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**STUDY ON COMPETITION RULES, DISPUTE
SETTLEMENT MECHANISM AND CONSUMER
PROTECTION**

LIST OF ABBREVIATIONS

AFCAC	African Civil Aviation Commission
AFRAA	African Airlines Association
ANSP	Air Navigation Service Providers
AU	African Union
AUC	African Union Commission
BASAs	Bilateral Air Service Agreements
BSc	Bachelor of Science
CA	Contracting Authority
CAA	Civil Aviation Authority
CIS	AFI Cooperative Inspection Scheme
CEN-SAD	Community of Sahel-Saharan States
COMESA	Common Market for Eastern and Southern Africa
DG	Directorate General
EA	Executing Agency
EAC	East-African Community
EC	European Commission
ECA	The United Nations Economic Commission for Africa
ECCAS	Economic Community of Central African States
EUD	European Union Delegation
ECOWAS	Economic Community of West African States
EU	European Union
FR	Final Report
GACA	General Authority of Civil Aviation
GDP	Gross Domestic Product
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICT	Information and Communications Technology
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
IR	Inception Report
MoT	Ministry of Transport
NEPAD	New Partnership for Africa's Development
PR	Progress Report
RECs	Regional Economic Communities
RSOO	Regional Safety Oversight Organization
RYA	Regional YD Authority
SAA	South African Airways
SADC	Southern Africa Development Community
SC	Steering Committee
TA	Technical Assistance
TL	Team Leader
ToR	Terms of Reference
UEMOA	Union Monétaire et Economique Ouest Africaine (West African Economic and Monetary Union)
UMA	Arab Maghreb Union
YD	Yamoussoukro Decision

1 Executive Summary

1. This document is the report of a four part study commissioned as part of a continental study on Support to the Operationalisation of the Executing Agency of the Yamoussoukro Decision.
2. The expected output is the draft of various pieces of legislation all aimed at empowering the Executing Agency to undertake its duties assigned in Article 9 of the Yamoussoukro Decision, 1999.
3. The main findings of this analysis are that there is need to define a detailed framework establishing the powers and functions of the Executing Agency. The need arises from the fact that though AFCAC has assumed the responsibility and has global powers in its revised Constitution, there is need for a more enhanced regulatory framework.
4. An instrument is provided in Appendix 2 to this Report, namely Draft Regulation on the Powers, Functions and Operations of the Executing Agency of the Yamoussoukro Decision.
5. The definition of the later raised an issue that needs to be dealt with. The issue was how the Executing Agency was going to issue decisions. This was dealt with in the form of a draft legal instrument outlining consultation and rule-making procedures. The draft Regulation on Procedure to be Applied by the Executing Agency for the Issuing of Opinions, Recommendations, Decisions and Guidance Material ("Rulemaking Procedure") is attached to this instrument as Appendix 3.
6. Key tasks in this study were to outline a dispute settlement mechanism and review an already existing draft. Based on our analysis of the powers of the Executing Agency, this study concluded that arbitration is not the only means and indeed may at times not even be effective to settle disputes arising from the implementation of the YD.
7. Consequently an additional set of dispute settlement mechanism was introduced, namely recourse to a Board of Appeals, national courts and regional and continental courts and tribunals. This structure is combined with the AU instrument on dispute mechanism in the Draft Regulation on Dispute Settlement Mechanisms Relating To the Implementation of the Yamoussoukro Decision. This draft instrument is attached to this study as Appendix 3. Various provisions in the different sets of legislation drafted point to appropriate sections of this dispute settlement regulation as a measure of resolving issues.
8. Another part of the study was to harmonise existing drafts on competition law and propose practical implementation guidelines. This is achieved in two sets of instruments - Draft Regulations on Competition in Air Transport within Africa and Guidelines and Procedures for The Implementation of The Regulations on Competition in Air Transport Services within Africa. The two instruments are attached to this report as Appendixes 4 and 5.
9. Finally, the matter of consumer protection analysed in the report is also dealt with as a draft instrument attached as Appendix 6 - Regulation on Protection of Consumers and liability of service providers in passenger air transport services.
10. A component of this study that was added in the course of the study, namely the relationship between the Executing Agency and African organisations such as NPCA and the African Development Bank, is studied in the report. This also translates in alternative provisions proposed in the draft Regulation on the Powers and Functions of the Executing Agency.
11. While issues of coordination of the contract made it impossible to organise, it is important that the AFCAC Legal Committee be constituted to review the proposed draft instruments in some detail.
12. Naturally, the set of instruments proposed are going to dictate how the Executing Agency functions. The functions identified require dedicated staff with legal and air transport expertise to implement them. Unfortunately, AFCAC as it now is constituted does not have the manpower required. It is imperative that the human resource be created to enable the organisation function as an Executing Agency.

2 Introduction

1. The Third African Union Conference of Ministers Responsible for Air Transport (CAMT) in 2007 in Addis Ababa adopted a Resolution entrusting the African Civil Aviation Commission (AFCAC) with the responsibility of the Executing Agency. That Resolution was endorsed by the Assembly of Heads of State and Government in Accra, Ghana on 29 June 2007 by Decision number OAU/AHG/AEC/Dec 1 (IV). Subsequently, on 16th December 2009, the AFCAC revised Constitution was submitted to Plenipotentiaries for signature and ratification.
2. Prior to that the regional economic communities (RECs) have actively been involved in securing the implementation of the Yamoussoukro Decision within their geographical area. Thus prior to the adoption of the new AFCAC Constitution, competition rules had been drafted by COMESA, SADC and EAC and this template was utilised by ECOWAS and CEMAC.
3. This study is part of the global project on the Support to the Operationalisation of the Executing Agency of the Yamoussoukro Decision.

3 Management of the YD – A Gap Analysis

3.1 Introduction

4. A Gap Analysis if needed to come up with where are we today in terms of the powers and functions of the Executing Agency as it related to the implementation of the Yamoussoukro Decision and propose the way forward.

5. There is a vast discrepancy between the responsibilities assigned to the Executing Agency and the realities of today.

6. Article 9 of the YD established an institutional arrangement reserving the management of rulemaking and enforcement of rules to the Committee on Transport, Communications and Tourism, the Monitoring Body and African Air Transport Executing Agency.

7. The functions of the Committee of Ministers are clearly outlined in Article 26 of the Abuja Treaty. The structure and functions of the Monitoring Body were also defined in Appendix 3 of the Yamoussoukro Decision.

8. The Executing Agency was conceived with the supervision and management of Africa's liberalized air transport industry, no concrete institutional structure was set up; nor were its functions outlined in any detail.

9. Furthermore, by dint of their role ascribed under Stage 1 of the implementation of the Abuja Treaty, the RECs have taken the lead in developing structures and institutions aimed at implementing the YD. While conceiving of the implementation of the YD as part of their key constitutional objectives of regional integration, thus lending their legitimacy directly from their constitutive Acts (see Chapter 4 below) and the Abuja Treaty, considerable effort has been made by RECs at undertaking special activities such as drafting competition rules and consumer protection rules. However, the absence of a visible and credible continental manager of the YD has hampered their efforts.

10. Whether right or not the absence of the Executing Agency is said to have thus contributed to the inconsistent pattern of implementation of the YD. The Monitoring Body is an ad-hoc group of institutions established to provide oversight and coordinating role and serve as a link to the Ministers. It was not conceived as a Secretariat, and has no day to day management role.

11. That the African Air Transport Executing Agency of the Yamoussoukro Decision was perceived as the institution to manage the day to day issues regarding implementation of the YD and to ensure its success can be seen from the wording of Article 9 (4) of the YD.

12. A good start was made in 2007 when the Third African Union Conference of Ministers responsible for air transport, in underscoring the challenge of non-implementation, entrusted AFCAC with the functions of the Executing Agency. The new AFCAC Constitution which acknowledged the responsibility entered provisionally into force for lack of attaining the required ratifications. Only one Member State has ratified it up to date.

13. Two approaches should be adequately analysed. The first is to come up with necessary tools which supplement the AFCAC constitution in order to enable it to supervise and manage Africa's liberalized air transport industry as required by the YD. Secondly is to provide AFCAC with the needed human and financial resources to deliver up to expectation of African States in terms of rules and regulations enforcement. This second approach is logically dealt with in Task 1 of this project when a diagnostic is made of the present human and financial resources.

3.2 AFCAC Constitution and the Executing Agency

14. This study looks purely at the question whether the revised Constitution contains the

needed provisions to enable AFCAC take up the gauntlet and without any challenge from any quarters serve in the function designed for it.

15. The conclusion from an analysis of the AFCAC constitution is that it does provide the organization with the general regulatory mandate and also enables it to attempt to enforce rules in its role envisaged in the management and supervision of the implementation of the Yamoussoukro Decision. It is our view though that specific tools will be needed to complement the AFCAC Constitution.

16. This conclusion is from an examination of what the Executing Agency stands and vis-à-vis the functions outlined in the AFCAC Constitution. Based on that conclusion we provide a draft legal instrument which covers that existing management gap.

Functions of the Executing Agency

17. In our view the Executing Agency must be able to:

- a) Receive complaints from states and airlines, investigate those complaints and make decisions, including recommending options for alternative solutions.
- b) Conduct detailed study of the market and report on implementation of the YD and where necessary undertake intervening action or recommend intervening action to eliminate any compliance issues identified.
- c) propose major rules for (further) liberalisation in accordance with new developments in Africa and worldwide
- d) make subsidiary rules as well as regulations for implementation
- e) enforce rules and regulations without challenge to its legitimacy
- f) apply sanctions
- g) be capable of defending its actions.

3.2.1 AFCAC Constitution

18. Our analysis of the AFCAC Constitution will be against a reflection of the issues listed above. Where a shortfall is identified, alternative solutions will be provided in other parts of this study.

19. Article 3 of the AFCAC Constitution identifies objectives of AFCAC inter alia as

- a) coordinating civil aviation matter in Africa and cooperating with all institutions in that regard;
- b) facilitating, coordinating and ensuring the successful implementation of the Yamoussoukro Decision by supervising and managing Africa's liberalized air transport industry
- c) formulating and enforcing appropriate rules and regulations that give fair and equal opportunity to all stakeholders and promote fair competition, and
- d) ensuring adherence to and implementation of Decisions of the Executive Council and Assembly

20. These objectives clearly show that AFCAC identifies with the responsibility of managing the implementation of the YD.

21. Article 4 of the AFCAC Constitution provides that the organization will:

- a) Undertake studies in technical, regulatory and economic developments
- b) foster and coordinate programmes for the development of training facilities

- c) Act under Article 9 of the YD to discharge its duties of Executing Agency
- d) ensure seamless and close co-operation with the various RECs Authority
- e) develop and harmonize rules and regulations for among others fair competition, dispute settlement and consumer protection etc, and
- f) perform such other functions as may be conferred upon it by the Executive Council or the Assembly of the African Union to fulfil its objectives.

22. According to Article 11 of the Constitution, the Plenary will among others:

- a) issue policy guidelines through resolutions and recommendations
- b) approve the work programme, business plan, budget, rules and regulations of AFCAC
- c) ensure the effective implementation of the Yamoussoukro Decision, principally the liberalization of air transport services;
- d) establish committees and working groups, as necessary, to undertake special assignments or tasks on civil aviation in Africa, with such functions as may be specified, and appoint their members,
- e) approve such other activities, rules and procedures as deemed appropriate, to meet the objectives of AFCAC
- f) submit its tri-annual report on the state of implementation of the Yamoussoukro Decision to the Assembly of Heads of State and Government through the Executive Council
- g) undertake such other functions as may be requested or conferred upon it by the relevant Organs of the AU, the Monitoring Body and the Sub-Committee of Air Transport.

23. The Plenary is the supreme organ of AFCAC. It assumes a specific function in relation to the YD, namely a general statement that it will ensure the successful implementation. In addition to this general statement, it also assumes certain general and specific functions that put together will enable it achieve a substantial set of the activities identified as what the Executing Agency stands for. The very obvious gap in the functions listed above is a specific function on enforcing rules. This can however be read into the obligations to undertake functions assigned to it. Thus while the Plenary assumes the responsibility and takes on certain functions, it still awaits specific functions from the Ministers or the Monitoring Body, as the case may be.

24. The Bureau, composed of the President and five Vice-Presidents elected by the Plenary in accordance with the AU geographical representation formula, among others:

- a) ensures the implementation of the AFCAC work programmes and other resolutions of the AFCAC Plenary;
- b) supervises and coordinates the activities of the Secretariat and any committee or working group;
- c) implements the resolutions, directives and decisions of the Plenary and discharge the duties and obligations which are conferred upon it in the Constitution;
- d) supervise the administrative and financial management of the Secretariat;
- e) Carries out any other functions that may be assigned to it by the Plenary.

25. The Bureau of AFCAC therefore oversees the functioning of AFCAC on behalf of the Plenary. It is important to note that if any assignment needs to be further prescribed for the Bureau by the Plenary, the Constitution enables such assignment to be made within the terms of the Constitution.

26. The Secretary General, according to Article 14 shall:
- a) submit to the Bureau and the Monitoring Body annual reports on the operations of AFCAC follow up and ensure the implementation of the resolutions, directives and decisions of the Plenary, Bureau and Monitoring Body, in accordance with the rules and regulations of AFCAC
 - b) promote the development of the programmes, projects and initiatives of AFCAC
 - c) prepare and submit proposals concerning the work programmes, business plans, strategic objectives, projects, activities and budgets of AFCAC and ensure their implementation
 - d) oversee the administrative and financial management of AFCAC
 - e) submit reports on the activities of AFCAC to the Plenary, Bureau and Monitoring Body, and perhaps most importantly
 - f) make recommendations to improve AFCAC's operational efficiency.
27. It is unfortunate that while the general responsibility has been assumed by AFCAC, while the Plenary is assigned rather detailed general and specific roles making it possible to enable it ensure the implementation of the YD and while the Bureau operating on its behalf is also granted the same general roles, the Secretary the day to day manager of AFCAC is not handed executor rules in relation to the YD.
28. It may be argued that by implementing directions of the Plenary and the Monitoring Body which may be executory in nature, the Secretary General has the executory power. While that argument may hold water, the overall impression obtained from examining the functions of the Secretary General are that that Secretary General has mostly administrative functions and lacks the specific powers to enforce any rules. Given the fact that the Secretary General is the one that will be handling the day to day management of the EA, it would be necessary to assign it specific executory powers.

3.3 Conclusion

29. The following table summarises our view of the current situation as regards AFCAC's status as Executing Agency. Where the function is created we identify it as E for existing. Where it is existing but weak we identify it as 'W' for Weak and provide a recommendation. Where the function is non-existent we identify it as 'N' for non-existent.
30. In the Recommendations column, our recommendations are listed as 'E' for enhanced functions or 'D' for defined functions.

	Status of Constitution	Recommendation
Receive complaints, investigate and make decisions	N	D
Study the market and report on implementation	E	E
Propose major rules for (further) liberalisation	W	E
Make subsidiary rules	N	D

Enforce rules without challenge for its legitimacy	W	D
Apply sanctions	N	D
Defend its actions before Courts	N	D
Deal with appeals against its decisions	N	D

31. Given the fact that AFCAC has acknowledged the responsibility but does not provide the detailed functions and powers for itself to operate as the Executing Agency, it is our proposal to draft a legal instrument to be utilized as the basic instrument for the Executing Agency. That instrument should cover issues identified in the above analysis.

4 The Executing Agency and African Regulatory Structures

4.1 Introduction

32. What is the regulatory structure the Executing Agency is expected to operate under? Chapter 3 above revised the African Civil Aviation Commission, particularly from the perspective of its strengths or otherwise in undertaking the responsibility it has assumed. We do not propose to re-examine that organisation here

33. Legal structures likely to impinge on the work of the Executive Agency are predominantly systems regulating the following sectors:

- Air transport – global and African and national
- Continental integration, in particular infrastructure
- Regional, sub-regional and national dispute settlement structures

34. The Executing Agency is the creation of a legislative framework in the Abuja Treaty. That Treaty and the Constitutive Act of the African Union recognise and operates on the basis of the regional economic communities. The African Union recognises 8 RECs. This overview concentrates on the key RECs that are presently active in some form of implementation of the YD.

35. In addition to the RECs, organisations such as the African Union and NEPAD as well as the African Development Bank have major influence in how the Executing Agency is to be constituted, how it operates and possibly even as to its funding.

Continental Framework

4.2 The African Union

36. The Abuja Treaty of 1999 and the Constitutive Act of the African Union establish a chain of legislative and enforcement structures, in relation to the Organs of the Union and the Member States.

4.2.1 Relevant Organs

37. The key organs are the Assembly of Heads of State and Government, the Executive Council, the Pan African Parliament, the Court of Justice, the Commission and the Specialized Technical Committees¹.

4.2.2 Regulatory and Enforcement Powers

38. Of immediate relevance are the regulatory functions and enforcement powers of the Assembly, the Executive Council, the Specialised Technical Committees and the Commission.

39. The Assembly acts by decisions², directives to the Executive Council³. The Executive

¹ The Assembly of the Union adopted Decision Assembly/AU/Dec.227 (XII) reconfiguring the existing STCs as a result of which the original Committee on Transport, Communications and Tourism was reconfigured as the *Committee on Transport, Transcontinental and Interregional Infrastructures, Energy and Tourism (CTTIET)*

² Article 10 (1) Treaty Establishing the African Economic Community (Abuja Treaty)

³ Article 9 (g), Constitutive Act of the African Union

Council acts by decisions, regulations and directives. The STC's may make recommendations to the Executive Council.

40. The Assembly is the highest organ of the Union and its Decisions adopted under Article 7 of the Constitutive Act are binding on all states and are automatically enforceable 30 days after the date of signature of the Chairperson of the Assembly⁴.

41. The Executive Council of the Union established under the Abuja Treaty and composed of Ministers of Foreign Affairs is the next organ of the Union. Its decisions (or regulations, as provided for under Article 13 of the Abuja Treaty) shall be binding on states, subordinate organs and regional economic communities after approval of the Assembly. Its decisions taken under the delegation authority of the Assembly have binding effect. Decisions of the Executive Council are enforceable 30 days after their signature by the Chairman of the Council.

4.2.3 Specialised Technical Committee No.4

42. The other relevant organ is body is the Committee on Transport, Transcontinental and Interregional Infrastructures, Energy and Tourism (CTTIET) which is to be established as a Specialised Technical Committee of the Union. The CTTIET, once established, will be composed of Ministers or senior officials. As a STC it prepares projects and programmes and submits the same to the Executive Council. It also ensures the supervision, follow-up and evaluation of the decisions taken by the Assembly and the Executive Council as well as other organs. Furthermore, it ensures the harmonization of projects and programmes. It reports directly to the PRC and the Executive Council. It has rulemaking powers in the form of recommendations.

4.2.3.1 Sub Committee on Transport of the Specialised Committee of Transport, Intercontinental and Interregional Infrastructure, Energy and Tourism

43. Currently the technical Ministerial body is the Sub Committee on Transport of the Specialised Committee No.4. According to its Rules of Procedures of the dissolved Conference of African Ministers of Transport, has the following functions:

- a) Ensure the respect of Union principles;
- b) Ensure the promotion and progressive realization of the goals of the Union;
- c) Define the priorities of the sector in matters of policies, strategies and programmes at continental level;
- d) Follow-up and promote cooperation between the Union and Regional Economic Communities;
- e) Deliberate and rule on proposals submitted for its consideration;
- f) Consider, adopt and monitor the implementation of the plans of action of the Sub-Sectorial Committees;
- g) Prepare sectorial integrating transport projects and programmes in Africa and submit them to the decision-making organs of the African Union such as the Executive Council and the Assembly of Heads of State and Government for consideration and decision;

⁴ Article 10 of the Abuja Treaty

- h) Cooperate closely with the Commission with regard to the organization and management of meetings and ensure the implementation, follow-up and evaluation of decisions taken in the transport sector by decision-making organs of the Union;
- i) Ensure the coordination and harmonization of transport projects and programmes of the Union;
- j) Present reports and briefings to the Executive Council, either on its own initiative or on the request of the Executive Council, with regard to the execution of projects and programmes in the transport sector;
- k) Carry out any other tasks in the transport sector that may be assigned to it by the decision-making organs of the Union in application of the provisions of the Constitutive Act and/or other relevant legal instruments of the African Union.

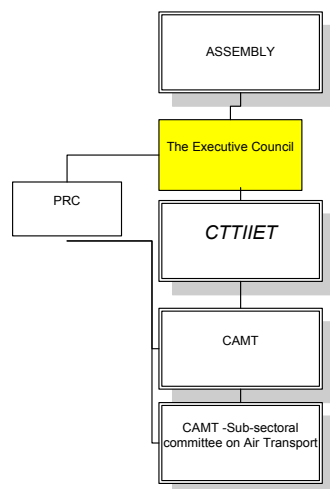
44. The Conference of Ministers may adopt rules by making (a) recommendations or (b) declarations, resolutions and or opinions. Recommendations are sent to and considered by the Executive Council and to be submitted to the Assembly. They may be binding if CAMT opts to make them binding. At any rate, once the superior organs take action, they become binding on CAMT and its subsidiaries. Declarations, resolutions, opinions, are not binding and are intended for policy purposes and for harmonizing the opinions of the Member States.

45. Article 3 of the CAMT Rules of Procedure provide for a sub-sectorial committee on Air Transport. In terms of the Yamoussoukro Decision, this sub-sectorial committee is the highest organ and connects the lower organs such as the Monitoring Body and the Executing Agency with the superior organs of the African Union.

46. Indeed the Yamoussoukro Decision's Sub-Committee on Air Transport is charged with the general responsibility of the overall supervision, follow-up and implementation of this Decision. Pursuant to Article 15 of the Rules of Procedure of CAMT, the sub-sectorial committee on air transport may take a decision and submit it to the Executive Council for forward adoption to the Assembly.

47. Article 12 of the Rules of Procedure emphasises that the meeting is a purely Ministerial meeting. The Ministers may however invite RECs, specialized institutions and professional associations, upon authorization of the Chairperson, (b) to take part in discussions but have no voting rights, (c) make a presentation on issues concerning them provided that the documents are communicated in advance, (c) even attend closed sessions, (d) give the floor to enable them answer questions addressed to them.

48. The Executing Agency is in a position where it can be classified as a specialized institution and will need the assistance of CAMT to enable it function. It is recommended that the Agency develop closer relationship with the Conference and apply to be accorded a formal status and to enable the Secretary General, the Chairperson of the Plenary, and the Chairperson of the Monitoring Body to have regular audience at the Conference and to enable it function efficiently and swiftly. This is important because that Conference is in a position to take decisive actions which AFCAC on its own cannot and it moreover has direct access to the Executive Council. The following figure depicts the channel of communication available to the Executing Agency through the organs of the Union.



Reporting Structure: AU

4.3 The NEPAD Coordinating Agency

49. The NEPAD Coordinating Agency (NPCA) is strictly speaking, not a policy making organization but is reviewed here for two key aspects of its work which demands attention from the Executing Agency.

50. Firstly, it is important to recall that in Sun City the Ministers instructed on two major issues that invariably involve NPCA and the African Development Bank.

51. Instructions of the Ministers were to exploit and utilize avenues for resource mobilization towards the implementation of the Yamoussoukro Decision. Secondly they charged that the implementation of the Yamoussoukro Decision should be included in the African Peer Review Mechanism (APRM) of NEPAD.

52. NPCA is resourceful, modern, has progressively developed the APRM from concept to successful implementation and engaged themselves in resource mobilisation in the field of transport under the thematic subject of regional integration

53. The Business Plan of NPCA for 2012 summarises the organization and its activities as follows:

54. "The New Partnership for Africa's Development (NEPAD) is Africa's most recent and coherent strategy for sustainable long-term growth and development. It is the Continent's most credible agenda for socio-political and economic transformation. A programme of the African Union (AU) that was spearheaded by African leaders and adopted in Lusaka, Zambia in 2001, NEPAD is an intervention geared towards the pursuit of new priorities and approaches to the political and socio-economic transformation of Africa. Its main objective is to enhance Africa's growth, development and participation in the global economy. The programme was implemented by NEPAD Secretariat until February 2010, when the 14th AU Assembly established the NEPAD Planning and Coordinating Agency (NEPAD Agency or NPCA) as a technical body of the AU to replace the NEPAD Secretariat. The Agency is a key outcome of the ongoing integration of NEPAD into the structures and processes of the AU. As the technical body of the AU, NPCA works closely with the AU Commission, regional economic communities, national governments, civil society and the private sector to push for programmes and projects that focus on improving

the lives of the African people. The Agency is thus a continental force for positive change and regional integration.”⁵

55. Of the Agency’s six thematic areas, namely: (1) agriculture and food security; (2) climate change and natural resource management; (3) regional integration and infrastructure; (4) human development; (5) economic and corporate governance; and (6) cross-cutting issues, the subject matter of the Yamoussoukro Decision logically fits into the third area. In addition however, given the institution building that is required in managing the Yamoussoukro Decision by the Executing Agency and the regional YD authorities of the RECs, it is also very important to consider the role of NPCA in areas 4 (human development) and 5 (economic and corporate governance). Indeed area 5 might be where Africa will need NPCA more than anything since it has the modern outlook and has successfully implemented governance issues at the highest level of government in Africa.

4.3.1 PIDA, NPCA AfDB Interaction

56. Theme three, according to the NPCA 2012 Business Plan is the Agency’s most extensive programme operations consisting of interventions to spur regional integration and facilitate the development of the continent’s infrastructure. The Agency is currently developing the PIDA project which also includes the implementation of the Yamoussoukro Decision and Single Sky concept.⁶

57. PIDA is institutionally managed by a Steering Committee comprising of AU, AfDB, NPCA, ECA and the RECs; a Technical Committee and an Executing Agency. Specialised Institutions are invited as observers in the Steering Committee and have technical input in the Technical Committee.⁷

58. The African Development Bank is identified as a key lender of PIDA Projects and serves on the Steering Committee alongside the AUC, NPCA, ECA and the RECs⁸.

4.3.2 APRM

59. Another area of relevant intervention is the African Peer Review Mechanism (APRM). It will be recalled that since 2006 NEPAD has managed and implemented the peer review mechanism involving periodic reviews of the participating countries to assess progress being made towards achieving mutually agreed in four areas of intervention: Democracy and good political governance, Economic governance and management, Corporate governance, and Socio-economic Development⁹.

60. Democracy and good political governance looks at ensuring that member state constitutions reflect the democratic ethos, provide accountable governance and that political representation is promoted, allowing all citizens to participate in the political process in a free and fair political environment.

⁵ 2012 NEPAD Planning and Coordinating Agency Annual Business Plan, p. III

⁶ Study on Programme for Infrastructure Development in Africa (PIDA), March 2011 Ref: ONRI.1/PIDA/2010/04,

⁷ PIDA, a presentation by Mr. Adama Deen, Head of Infrastructure Programs and Projects (NPCA), at the the NEPAD Transport & Infrastructure Summit Midrand, South Africa, 14th October 2010, (NEPAD.ORG)

⁸ Study on Programme for Infrastructure Development in Africa (Phase I) Overview p. 30.

⁹ <http://nepad.org/economicandcorporategovernance/african-peer-review-mechanism/about> (viewed in 31/5/2012).

61. Economic governance and management focuses on transparency in financial management which is considered as an essential pre-requisite for promoting economic growth and reducing poverty.

62. Corporate governance assesses promotion of ethical principles, values and practices that are in line with broader social and economic goals to benefit all citizens. It works to promote a sound framework for good corporate governance. Socio-economic Development looks to poverty.

63. There is no conditionality attached to the peer review mechanism.

64. How can the peer review mechanism be applied to the air transport sector and in particular to the implementation of the Yamoussoukro Decision? APRM involves the will to expose a state's apparatus to be reviewed by other states, a willingness to cooperate in identifying challenges and working on eliminating those challenges. Indeed it is an unenforced audit of the apparatus, institutions, policies, laws and procedures of the state against the objectives. It is a concept that can be easily applied to a unit of state such as the air transport sector or even a limited section as economic regulations.

65. Civil Aviation is not unfamiliar with audits. Indeed FAA, USOAP and other audits are gradually becoming the order of the day in civil aviation administrations. The difference with the peer review mechanism is that no state is forced to accept to participate. It epitomises the willingness of a state to participate in a mature regime by agreeing to expose itself to an assessment of its legislation, policies, procedures, institutions and structure. The APRM is akin to ISO Standardisation.

66. The implementation of the peer review mechanism to the Yamoussoukro sector could take many forms including:

- a) The Executing Agency, RECS, States and Airlines agreeing to join a peer review mechanism;
- b) Establishment of a review panel consisting of independent experts drawn from across the African region, properly resourced and with a secretarial assistance; and
- c) Agreement at the continental level of goals to be attained in the reviews and how reports will be handled.

67. It needs to be emphasised that the responsibility of successful implementation of the YD is not only borne by states and airlines but also by the regional and continental institutions set up to coordinate, manage and enforce. States are likely to be more willing to expose themselves if the regional and continental institutions are equally willing to utilise the same mechanism to identify any institutional and corporate governance issues that may hamper their effective participation in the process.

4.3.3 NPCA, AfDB and AFCAC Mutual Interventions

68. AFCAC and the Executing Agency should be actively involved in the interventions required in the transport infrastructure projects of their area of competence. Indeed the Executing Agency should be recognised as an active specialised institution and be co-opted on the Steering Committee, if not as a member, at least as a regular observer. AFCAC Technical Staff and in particular of the Executing Agency should be actively involved at the Technical level on the Technical Committee.

69. On the other hand in view of the NPCA's (and the AfDB's) competence in PIDA and the APRM, it is essential that the two institutions be co-opted on the management structure of the Executing Agency. Indeed where possible NPCA should be represented from two angles, regional integration and infrastructure angle and the APRM angle.

70. The African Development, due to its role as the preferred lender of PIDA projects of which includes projects on the implementation of the YD, should be accorded a logical place in the management of the Decision.

71. It is also hoped that the APRM team will be able to train the Executing Agency and the regional YD Authorities of the RECs to understand the basics of the APRM concept and team up to devise a suitable peer review or peer monitoring system.

72. Another alternative to active membership on the management body of the Executing Agency will be to co-opt the NPCA's two relevant departments alongside the African Development Bank and other relevant agencies into a standing working group on funding and peer review/ monitoring. Such a working is recognised under the AFCAC Constitution and will be utilised to enhance the capacity of AFCAC where needed. As a working group, the exchanges can be at the technical level. Output of the working group could be forwarded through the Secretary General to the Bureau.

Regional Economic Communities

73. The African continent is replete with multi-state organisations tasked with a number of activities. Given the duplicitous nature this section focuses on the organisations that currently have some programmes relating to the liberalisation of air transport.

74. Organisations to be reviewed are the more global RECs that have active programmes in the air transport sector:

- a) Common Market for Eastern and Southern African (COMESA)
- b) Economic Community of Central African States (ECCAS)
- c) Economic Community of West African States (ECOWAS)
- d) Southern African Development Community (SADC)

75. The following overview of these organisations is to determine:

- a) Key organs;
- b) Regulatory and enforcement powers vested in the organs;
- c) whether the organisation has any role to play in the YD in terms of stated objectives;
- d) whether it has adopted any instruments or undertaken any activity in the liberalisation of air transport;
- e) Whether the organisation has adopted a Court or Tribunal process and who has jurisdiction

76. It is important to note that all these organisations have been recognised by the African Union. With the exception of the UMA, it appears the organisations have all signed a Protocol on the Relations with the African Economic Community. They are all recognised by the AU as key pillars for the establishment of the African Community.

4.4 COMESA

77. The Common Market for Eastern and Southern African States began in December 1994. It replaced the Preferential Trade Area (PTA) established in 1981. Its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states.

78. In 1999 COMESA adopted the Legal Notice No. 2 on the COMESA Regulations for the Implementation of the Liberalised Air Transport Industry

79. The Members spanning almost the whole length of the continent of Africa are: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia; and Zimbabwe.

4.4.1 Key Organs

80. Relevant organs of COMESA are the Authority, the Council, the Court of Justice, the Intergovernmental Committee, the Committee on Transport and Communications, the Secretariat and the Consultative Committee.

81. In terms of liberalisation of air transport under its Legal Notice, COMESA set up the Air Transport Regulatory Board.

82. Another organ established was the Joint Competition Authority, established under the terms of the Joint Competition rules with SADC and EAC. It is not certain whether the ATRB is meant to play both roles as the regional YD authority.

4.4.2 Regulatory powers

83. The Authority acts by decisions and directives (Article 8 (3)) while the Council acts by regulations, directives, decisions and recommendations. All other bodies, with the exception of the Court of Justice report through others to the Council.

4.4.3 Enforcement powers

84. Regulations are binding on all member states. Directives are binding on the states to which they are addressed. Decisions are binding on those to which it is addressed. Recommendations and opinions have no binding effect. It is important that the Secretary General has mandate to investigate a presumed breach of the provisions of the treaty and report to the Council.

85. This enables the Secretariat to operate more than just an administrative office. Indeed the Secretary General may conduct examinations and has the mandate to request member states to submit responses to its investigation and it has the mandate to refer complaints to the Court of Justice of COMESA.

4.4.4 Key Role in YD Implementation

86. Articles 84 and 88 grant COMESA a comprehensive mandate in transport in general and air transport in particular.

4.4.4.1 Instruments adopted on liberalisation

87. COMESA adopted Legal Notice No. 2 in 1999 with the aim of liberalising air transport within the sub-region. Subsequent to that, the organisation has adopted Competition Rules to govern the implementation of the Yamoussoukro Decision.

88. In the 'Study on the Evaluation of Legal Notice No. 2 of 1999 on the COMESA Regulations for the Implementation of the Liberalised Air Transport Industry', conducted an audit to determine

the extent to which implementation had progressed and identify constraints that member States and service providers may be facing in the process of implementation.

89. The study, based on eight sample States namely; Egypt, Ethiopia, Kenya, Malawi, Sudan, Uganda, Zambia and Zimbabwe, determined the level of compliance of with Legal Notice No. 2, the impact of air transport liberalisation and difficulties being encountered.

90. The study indicated some progress in the implementation of the regional air transport liberalisation programme although States reported facing difficulties in a number of areas. Significant changes had also occurred in the quality and quantity of air transport services that could be attributed to the liberalisation process. Key findings included the following:

- There is greater flexibility in the granting of traffic rights. Virtually all States freely grant the 3rd and 4th freedom traffic rights with the exception of two countries.
- Fifth freedom traffic rights are still a major problem. The majority of States do not grant Fifth Freedom Traffic Rights as provided in phase 1 of Legal Notice No.2. Burundi, Egypt, Ethiopia, Rwanda, Sudan and Uganda are among the States that had granted 5th freedom traffic rights.
- Fifth freedom traffic rights are exercised only on three intra-COMESA sectors; Addis Ababa-Djibouti, Bujumbura-Kigali, and Khartoum-Cairo.
- Bilateral Air Services Agreements continue to be used to implement the liberalisation programme with reciprocity as the basis for exchanging market access rights;
- Most bilateral air service agreements are not fully consistent with Legal Notice No. 2 or the YD although a number of States reported that revision was in progress;
- The perception that Legal Notice No. 2 was not enforceable as it had not been domesticated is regarded as a major impediment to implementation.
- Lack of harmonised region-wide aviation regulations was commonly cited as a factor in slowing down implementation.
- There are mixed positions among states and service providers on the granting of 5th freedom traffic rights. States that claim to have weak airlines are reluctant to grant fifth freedom traffic rights as provided in legal Notice No.2 of 1999 for fear that their carriers could be driven out of business while those with strong airlines generally support implementation of the provision on the granting of 5th freedom traffic rights.
- Ethiopian Airlines and Kenya Airways are the only operators that exercise intra-COMESA fifth freedom traffic rights.
- Most COMESA carriers are yet to develop the capacity and markets to demand and exercise intra-COMESA 5th freedom traffic rights. However, a few requests had been made in respect of extra-COMESA sectors. For example, by Air Zimbabwe on the sector Lusaka-London and EgyptAir on the Harare-Johannesburg sector.
- There are few alliances and other fundamental cooperative ventures between and among COMESA airlines particularly between and among 'strong' and 'weak' airlines. Only Air Zimbabwe, Air Malawi, Air Zimbabwe, Kenya Airways, Rwanda Air Express and Zambia Skyways had a code share agreements with another COMESA carrier.
- Most States had removed restrictions on capacity and frequencies and had amended or plan to harmonise their bilaterals in accordance with the provisions of Legal Notice No. 2;
- The Multiple Airline Designation provision is being adhered to by all States
- All States comply with the COMESA Eligibility criteria provision and a number would prefer that it is aligned with that of the Yamoussoukro Decision

- There has been an increase in city pair frequencies by 207 from 342 in 2001 to 553 in March 2008
- Tariffs have been liberalised. Airlines are free to use market fares. However, there is no evidence of tariff reduction in real terms due to lack of competitive pricing as result of the monopoly enjoyed by airlines on most routes.
- Private airlines had been established and designated to operate scheduled international services in countries where the private sector had previously been excluded from participation in air transport. A number of new routes have also been opened.
- Between 2002 and 2006, passenger traffic increased by 48.5% and cargo by 8.8%. Aircraft movements went up 31% over the same period.

91. Based on the above findings the study identified a number of recommendations including the following:

- Replace existing bilateral air services with a COMESA Air Service Agreement based on Legal Notice No. 2 to be used in exchanging of market access rights between and among COMESA member States.
- States should take appropriate actions to domesticate Legal Notice No. 2 to create the necessary legal and administrative framework for effective implementation of the air transport liberalisation programme.
- Old bilateral agreements between and among COMESA member States be revised and made consistent with the liberalisation programme.
- Harmonise aviation regulations, legislation and policies to facilitate effective implementation of Legal Notice No. 2.
- In line with the above recommendations a draft COMESA Multilateral Air Service Agreement has been developed and proposed for adoption to be used for exchanging market access rights between and among COMESA Member States. The draft is based on Legal Notice No. 2 and captures all above recommendations.
- Open up the airline industry to increased private sector investment to produce strong airlines by relaxing the ownership and control requirements and adopting the broader YD eligibility criteria based on the "Place of Business" principle.
- Recapitalise and restructure airlines to be more competitive and to be able to effectively participate in the liberalisation process.
- Strengthen the airline industry through consolidation by encouraging strong COMESA airlines to invest in and forge alliances with their weaker counterparts.
- Encourage COMESA airlines to upgrade level of service standards and be IOSA compliant to attract alliance partners and equity partnerships.
- Establish a dedicated Air Transport office at the Secretariat to oversee and follow up implementation of the liberalisation programme.

4.4.5 COMESA Court of Justice

92. The Court of Justice of the Common Market for Eastern and Southern Africa (COMESA) was established in 1994 under Article 7 of the COMESA Treaty as one of the organs of COMESA. The Court is an independent organ of COMESA answerable only to the Authority. Indeed according to Article 9 (2) (c) of the Council shall give directions to all other subordinate organs of COMESA other than the Court in the exercise of its jurisdiction.

93. The COMESA Court of Justice has general jurisdiction of the Treaty and can be seized of a matter by one of several ways. First, a member State may bring another member State or the Council before the Court for breach of the Treaty or failure to fulfil an obligation thereunder.

94. Providing the Common Market with independent monitoring and enforcement power, the Treaty permits the Secretary General (with the agreement of the Council) also to bring a member State before the Court for failure to fulfil its Treaty obligations.

95. Decisions of the Court take precedence over any decisions of national courts.

96. It is important to note that the Court may receive cases not only from member States, but also from natural and legal persons, against the Council to determine the legality of any act, directive, regulation or decision made. Persons also are permitted standing under the Treaty to sue a member State in the COMESA Court regarding the legality under the Treaty of any act, directive, regulation or decision of such Member State.

4.5 ECCAS/CEMAC



97. The Economic Community of Central African States established in 1983, is composed of the following countries: Angola, Burundi, Cameroon, Central African Republic, Chad Democratic Republic of Congo, People's Republic of the Congo, Gabon, Equatorial Guinea, Rwanda, Sao Tome and Principe. This section combines the two institutions of CEMAC and ECCAS due to their history. In terms of the status of implementation of the YD, we rely on a study undertaken by the ECA relating to CEMAC.

98. The Union Douanière et Économique de l'Afrique Centrale (Customs and Economic Union of Central Africa) (UDEAC), established by the Brazzaville Treaty in 1966, formed a customs union with free trade area between members and a common external tariff for imports from other countries. UDEAC signed a treaty for the establishment of an Economic and Monetary Community of Central Africa (CEMAC) to promote the entire process of sub-regional integration through the forming of monetary union

4.5.1 Key Organs

99. Key organs of ECCAS as specified in Article 7 of the Treaty are the Conference of Heads of State and Government (hereafter, the Conference), the Council of Ministers, the Court of Justice, the Secretariat, the Consultative Commission and Specialised Technical Committees.

4.5.2 Regulatory powers

100. The Conference, the supreme authority of the ECCAS, acts by decisions and directives (Article 11). The Council of Ministers adopts Regulations (Article 15 (1)).

101. The other organs of ECCAS have no legislative powers. Indeed the Consultative Commissions in its role of assisting the Council and the Specialised Committees submit their reports and recommendations to the Council.

4.5.3 Enforcement powers

102. Conference Decisions are binding on the Member States and institutions of the Community, except for the Court of Justice, and are automatically enforceable in the territory of Member States thirty (30) days after the date of their publication in the official journal of the Community (Art. 11.2).

103. Conference Directives, on the other hand, are binding only on the institutions concerned and come into force upon notification (Art. 11.3).

104. Council Regulations are automatically enforceable in the territory of Member States thirty (30) days after the date of their publication in the official journal of the Community (Article 15 (2)).

4.5.4 Key Role in YD Implementation

105. ECCAS accorded itself the mandate, under Article 47, of cooperating in the development and harmonisation of air transport policies, as well as promote the integration of transport infrastructure. Accordingly, Appendix XI to the ECCAS Treaty, the Protocol on cooperation in the framework of Transport and Communication adopted enhanced objectives for the air transport sector (Article 5 to the Appendix XI). Accordingly, the Appendix established the Committee on Transport and Communications on the basis of a Specialised Technical Committee provided for under Article 26 of the Treaty.

4.5.4.1 Instruments adopted on liberalisation

106. A study by the UNECA in the four member states of CEMAC assessed the level of implementation of the impact of the decision on the development of air transport in the sub region, identify challenges and restrictions, propose measures to address the constraints and inform policy change.

107. According to the study the 23 states in West and Central Africa signed an agreement in November 1999 reaffirming their commitment to fully implement the YD. This includes the membership of ECCAS.

108. CEMAC member states have also adopted three instruments on:

- a) a Community Code of Civil Aviation¹⁰

¹⁰ Règlement n° 10/100-CEMAC-0066-CM-04 portant adoption du Code de l'aviation civile de la CEMAC.

b) Air Transport Agreement between CEMAC Member States¹¹ and

c) Common Rules on competition¹²

109. The ECA evaluation examined the implementation of the YD from the following perspectives:

- Precedence and enforceability of the Decision
- Market access and the grant of traffic right, freedoms regarding frequency and capacity (market access liberalisation)
- Right of establishment including the designation of eligibility, and tariff liberalisation

110. On the matter of **precedence of the Decision**, the study indicates that CEMAC states individually and collectively recognize the primacy of the Decision on national laws BASAs and MASAs and have taken concrete steps to translate the text and principles of the Decision in the laws, administrative practices or policies. It cites the case of Gabon that has issued a Presidential Decree on implementation and Cameroon that has taken legislative steps transposing the Decision into national law.

111. According to the study it is absolutely clear that national governments considered their BASA's as obsolete as they were amended by the provisions of the Decision.

112. In relation **market access liberalisation**, the study indicated that the CEMAC Agreement and the Code of civil aviation have liberalised market access within the community, thus expanding the airspace and the air transport market.

113. In terms of aviation relations with African countries, the four countries show greater flexibility in granting traffic rights and an easing of the fifth freedom in accordance with the Decision. Virtually all African states who requested have benefited from the grant of fifth freedom rights including but not limited to Kenya, Ethiopia, Angola, Guinea, Mali, South Africa, Togo, Benin, Cote d'Ivoire, Sudan, Sao Tome and Principe, and Nigeria.

114. CEMAC states did not refuse the increase in frequency and capacity required by an African airline. The only reasons that justify the refusal to offer additional capacity and frequency to an African airline are technical reasons (e.g. the capacity of the airport facilities and equipment or compliance with national and international safety). However, the four countries do not receive the same treatment from some countries in West Africa and Southern Africa and this is an issue they wanted the ECA to take note of and bring to the attention of the Monitoring Body.

115. As regards right **of establishment**, the states recognise multiple designation and several African states have benefitted from that including but not limited to South Africa, Togo, Benin and Mali.

116. In terms of **tariffs** the states recognise the freedom of Article 4 of the YD and abide by that.

117. Based on the findings, the study recommends that a priority must be given by governments to take measures to alleviate the constraints and challenges which include:

- a) Implement the Community institutions and address constraints related financial and human resource constraints to provide to enable them to discharge their responsibilities;
- b) Modernize and harmonize national regulations and adapt the community rules implementing

¹¹ Règlement n°6/99 /UEAC/-003-CM-02 portant adoption de l'Accord relatif au transport aérien entre les États membres de la CEMAC.

¹² Règlement n°1/99/UEDAC/AC-CM-639 portant sur la réglementation des pratiques commerciales anti-concurrentielles

- the liberalized market, particularly in regard to safety oversight and authorization of airlines.
- c) Encourage countries that have not domesticated the Decision to take incorporate the text of the Decision at the national level, and do so as soon as possible.

4.5.5 Court of Justice

118. The ECCAS Court of Justice is established as an organ of ECCAS. The Court is not operational.

119. The Court is given jurisdiction to rule on the legality of decisions, directives and regulations of the Community¹³. The Treaty provides that a Member State or the Conference of Heads of State and Government can bring to the Court cases on the misuse of powers, lack of competence or infringement of an essential procedural process of the Treaty¹⁴. Preliminary rulings may be issued by the Court on the interpretation of the Treaty or the validity of other Community laws. The Court is also given the power to provide advisory opinions¹⁵ to the Conference or the Council of Ministers.

120. While the Court's powers to deal with other issues may be provided for by Conference, it is argued that in matter relating to the implementation of the Yamoussoukro Decision the Court technically has jurisdiction in matter involving the Member States and the Organs of ECCAS.

4.6 ECOWAS



4.6.1 Key Organs

121. Relevant organs of ECOWAS are the Authority of Heads of State and Government (hereafter, Authority), the Council of Ministers, the Parliament, Court of Justice, the Executive Secretariat and the Specialised Technical Commissions.

¹³ Article 16 (3), Article 9 (2) k

¹⁴ Article 16 (3) b.

¹⁵ Article 16 (3) d Article 9(2) l.

4.6.2 Regulatory powers

122. The Authority acts by decisions and the Council acts by regulations. Decisions of the authority are binding on all community institutions and member states of ECOWAS. The Executive Secretary is required to publish a decision 30 days after its signature by the Chairman of the Authority and enter into force 60 days after publication.

123. Decisions of the Authority are to be published in the National Gazette of member state within 60 days of its publication in the Official Journal of the Community.

124. The Council acts by directives on matters concerning coordination and integration of economies and makes recommendations to the Authority. It may also act by regulations which shall be binding on lower organs of the institution and on member states after approval of the Authority.

125. Both Authority and the Council may request for advisory opinions from the ECOWAS Court of Justice.

4.6.3 Enforcement powers

126. Decisions of the authority are binding on Member States and institutions of ECOWAS and automatically enter into force in the member states 60 days after its publication in the official journal.

127. Regulations of the Council are binding on institutions under its authority but not on Member States until the Authority has approved them unless such regulations are made pursuant to a delegation of powers by the Authority in accordance with paragraph 3(f) of Article 7 of this Treaty and in which case they shall be binding forthwith.

4.6.4 Key Role in YD Implementation

128. Under the terms of Article 32 of the Treaty, the organisation has a mandate in air transport including developing common air transport policies, and regulations.

4.6.4.1 Instruments adopted on liberalisation

129. ECOWAS has adopted a host of Ministerial initiatives on the Yamoussoukro Decision.

130. ECOWAS conducted a study on the implementation of the the YD within the subregion. The study, "Evaluation Report on The Implementation Of The Yamoussoukro Decision In West Africa", conducted in April 2011 had the main purpose to help facilitate the full implementation of the Yamoussoukro Decision of 1999 and evaluated civil aviation authorities, the airlines, the airports and ground handling companies.

131. According to the study, a collective approach was initiated by the member states of UEMOA through their Joint Air Transport Programme, to adopt measures in economic regulation of air transport including air carrier status, conditions of market access, air fares, accident-incident investigation, air carrier liability, slots, compensation of passengers, the liberalization of ground handling, a common code of civil aviation, and competition rules.

132. The other states that are not affiliated to France have under the umbrella of the Banjul Accord Group adopted a multilateral air service agreement.

133. Though the most recent study, it lacks specific evaluation criteria and response and thus provides a global overview.

4.6.5 Court of Justice and Arbitral Tribunal

134. Articles 6 and 15 of the Revised Treaty establishes the Court of Justice of the Community. Its organisational framework, functioning mechanism, powers, and procedure applicable before it are set out in Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

135. The Court has competence to adjudicate on any dispute relating to (a) the interpretation and application of the Treaty, Conventions and Protocols of the Community; (b) the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; (c) the legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS (d) the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS; (e) the provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS Member States; (f) the Community and its officials; and (g) the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.

136. It has the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions.

137. Access to the Court is open to (a) Member States and the Commission, for actions brought for failure by Member States to fulfil their obligations; (b) Member States, the Council of Ministers and the Commission, for determination of the legality of an action in relation to any Community text; (c) Individuals and corporate bodies, for any act of the Community which violates the rights of such individuals or corporate bodies; (d) Staff of any of the ECOWAS Institutions; (e) Persons who are victims of human rights violation occurring in any Member State; (f) National courts or parties to a case, when such national courts or parties request that the ECOWAS Court interprets, on preliminary grounds, the meaning of any legal instrument of the Community; and (g) the Authority of Heads of State and Government, when bringing cases before the Court on issues other than those cited above.

138. The Court is not noted to have adjudicated any matter involving the Abuja Treaty or air transport as yet.

4.7 SADC

139. The Southern African Development Cooperation has the following member states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe

4.7.1 Key organs

140. Relevant organs of SADC are the Summit of Heads of State or Government (hereafter, Summit), the Council of Ministers; the Integrated Committee of Ministers, the Standing Committee of Officials, the Secretariat, the Tribunal, and SADC National Committees.

141. With specific reference to the implementation of the YD, SADC has established the SADC

YD Steering Group and the Regional Competition Authority¹⁶.

4.7.2 Regulatory powers

142. The Summit adopts legal instruments for the implementation of the provisions of this Treaty and it may delegate this authority to the Council or any other institution of SADC as the Summit may deem appropriate (Article 10.2). It is important to note that SADC was not devised with the objective of creating an economic community. It is therefore a typical international organisation whose decisions have to be ratified at the national level before they become binding. It is also important to emphasise that Article 10.2 is subject to the Article 22, which regulates the content and structure of the Protocols.

143. The Council of Ministers are finally responsible for the implementation of the Protocol. Subsidiary bodies have no real legislative authority.

4.7.3 Enforcement powers

144. As a legal instrument the enforcement of the Protocol and its future amendments lays primarily with states. Accordingly, a comprehensive mechanism has been built into the Protocol on non compliance. The philosophy underling compliance means that member states have an obligation to opt in or out and to obtain any necessary derogation from implementation.

145. Article 14.6 of the SADC Protocol on Transport, Communications and Meteorology regulates the regime of derogations. The primary rule is that a state which anticipates non-compliance must obtain a derogation. Derogation, once obtained is of a temporary nature and cannot be repeated.

146. States and citizens alike may allege non-compliance on behalf of a state whereon SADC may deliver a reasoned opinion upon identifying the alleged failure. The member state in question has 90 days to submit its observations whereupon a comprehensive investigatory process is provided. The provision reproduced here is a complex mix of, enforcement powers, a complaints handling procedure, a detailed investigatory process, far reaching decision-making powers of the Council of Ministers and an appeal process to the Tribunal.

147. Naturally as a non-automatic enforcing regime (contrary to COMESA, ECOWAS and ECCAS, enforcement of decisions has its challenges. but remains an intelligent recognition of the sovereign rights of states and its challenges in a community of nations.

148. Article 14.6 of the SADC Protocol is extracted in the following box.

Article 14.6 of the SADC Protocol on Transport, Communications and Meteorology

A Member State which anticipates a failure to comply with an implementation obligation, must timeously obtain a derogation from the appropriate sub-sectoral committee. Such derogation shall be of a temporary nature and may not be repeated.

2. A Member State, the SATCC-TU or any other person or body may allege that a Member State is failing to comply with an implementation obligation.

3. In the event that the SATCC-TU identifies an alleged failure, it shall deliver a reasoned opinion to the Member State in question.

4. In the event of a Member State or any other person or body raising the complaint, such State, person or body shall submit a written motivation to the SATCC-TU which shall

¹⁶ Report on the Evaluation of Southern African Development Community (SADC) Member States' Compliance in Implementing the Yamoussoukro Decision (YD), Request No. 2009/202993

transmit it to the Member State concerned.

5. The Member State in question shall, within ninety days after the date of receipt of such opinion or motivation, submit its observations upon the reasoned opinion or written motivation to the SATCC-TU.

6. The SATCC-TU shall investigate the complaint and forward its own observations, together with the observations of the Member State, to the responsible sub-sectoral committee within ninety days after the date of receipt of the complaint.

7. A sub-sectoral committee receiving a communication from the SATCC-TU contemplated in paragraph 6 shall, at its first meeting following receipt of the complaint, discuss the matter and attempt to reach an amicable settlement. An amicable settlement shall entail an affirmation by the Member State of its intention to comply with its implementation obligation within a time frame and upon the conditions approved by the sub-sectoral committee.

8. In the event that an amicable settlement is not reached within sixty days after the date on which the communication was received from the SATCC-TU, the committee shall refer the matter to the Committee of Senior Officials.

9. The Committee of Senior Officials shall conduct further investigations to consider whether a Member State's failure to comply with an implementation obligation is -

a) due to a lack of commitment; or

b) due to temporary or permanent factors beyond the control of a Member State which were recorded in the relevant implementation strategy.

For the purposes of its finding in terms of this paragraph, a decision by the Committee of Senior Officials may be taken by two-thirds of its members with each Member State having one vote. In the event of the Committee of Senior Officials failing to take a decision within sixty days after the date on which the matter was referred to it, the matter shall be referred to the Committee of Ministers.

10. The Committee of Senior Officials shall refer its finding in terms of paragraph 9 to the Committee of Ministers which shall confirm or reject the finding on the basis of a decision taken by two-thirds of its members with each Member State having one vote.

11. In the event that the Committee of Ministers approves a finding as foreseen in paragraph 9(b), the relevant committee shall be tasked to investigate appropriate support measures to the Member State in question and the amendment of the implementation strategy.

12. In the event that the Committee of Ministers approves a finding as foreseen in paragraph 9(a) and establishes that the non-compliance is detrimental to the interests of other Member States, such Member States shall be entitled to apply reciprocal measures to remove such detriment.

13. The Committee of Ministers shall specify the nature and extent of reciprocal measures which may be applied in order to remove such detriment and prevent any detriment to other Member States resulting from the non-compliance.

14. In the event that the Committee of Ministers does not approve the finding of the Committee of Senior Officials, the matter shall be referred back to the Committee of Senior Officials for reconsideration. The Committee of Senior Officials shall report to the Committee of Ministers within a period of sixty days.

15. An appeal may be lodged against the decision of the Committee of Ministers or the lack of such decision, to the Tribunal which shall deal therewith in the manner prescribed in the Protocol governing its operations.

149. It is anticipated that this mechanism is what will guide the active implementation of the YD within SADC. The details of the SADC implementation will be dealt with in a subsequent

paragraph of this study.

150. A study undertaken in 2004 considered inter alia whether SADC states considered themselves bound by the Yamoussoukro Decision and whether further legislative measures were required in the member states in order to give effect to the Decision. The study concludes that the YD has binding effect and whether or not domestic legislative acts are required will be dependent on the national law. Unlike the case of the ERCA Study of the CEMAC states this study does not provide any insight into national practices.

151. The study refers to the establishment of SADC YD Implementation Steering Committee.

4.7.4 Key Role in YD Implementation

152. As indicated it has established YD Implementation Steering Group as its implementing mechanism for the YD. Indeed SADC was also the first organisation to develop competition rules to assist implementation of the YD.

4.7.4.1 Instruments adopted on liberalisation

153. Jointly with COMESA and EAC, SADC adopted the Joint Competition Authority.

4.7.5 SADC Tribunal

154. The SADC Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State or Government appointed the Members of the Tribunal on 18th August 2005.

155. The Tribunal has jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; (c) all matters specifically provided for in any other agreements that Member States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.

156. The Tribunal has jurisdiction over disputes between Member States, and between natural or legal persons and Member States and no natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.

4.8 ICAO Air Transport Regulation

157. In this section we provide a brief overview of the global regulatory structure prevailing under the regime of the International Civil Aviation Organisation (ICAO). ICAO legislation will continue to set the standard for aviation regulation.

158. Global air transport regulation has been the imperative of the International Civil Aviation Organization which is regulated by the Convention on the International Civil Aviation, hereafter the Chicago Convention. ICAO's regulatory regime consists in:

- Treaties
- Standards and Recommended Practices
- Procedures and Associated Practices

4.8.1 Treaties

159. ICAO has adopted a comprehensive list of treaties. Presently ICAO treaties can be grouped generally into those regulating passenger safety and airline liability, criminal activity involving safety of passengers. These treaties are of most relevance to the regulation of air transport under the YD and will involve the Executing Agency playing a role in coordinating its acceptance and implementation by member states.

4.8.2 SARPs

160. Article 37 of the Chicago Convention states that “Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.”

161. A Standard is “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention”

162. A Recommended Practice is “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention”

163. SARPs have been adopted by ICAO covering almost all areas of air transport operation.

4.8.3 Global, Regional and National Implementation of ICAO Regulations

164. ICAO’s powers to enforce its regulations including treaties, SARPs, PANS and APs are prescribed by the Chicago Convention and the individual treaties adopted. Article 38 of the Chicago Convention requires state implementation of SARPs.

165. It is important to note that ICAO SARPs are adopted to be implemented at the national level by States Parties. Thus regional organisations of whatever calibre are not compelled to implement. Regional organisations, particularly air transport related organisations are however encouraged to coordinate the national implementation of SARPs.

166. The situation is however different at the national level. While states have the privilege to accept or not to accept to be parties to any of the ICAO treaties, they become bound to implement the treaties in accordance with the terms of the Treaties themselves. The nature of a State’s treaty commitment, it need to be emphasised, is as always, determined by the terms of the agreement in question.

167. National implementation of SARPs goes over and beyond the statutory stipulation of compliance. SARPs are adopted with practical measures of implementation, reporting structures, assessment criteria and many more measures.

168. Through state reporting and other measures, ICAO is also able to identify the extent of implementation of the SARPs.

169. It’s also most important that effective implementation is achieved through focussed point of contact in member states, namely the CAAs. Standards are legislative while Recommended Practices are non-legislative.

4.9 Conclusion

170. The review of the regional and continental regulatory agencies as well as NPCA and the African Development Bank reveals a pattern of regulatory activities and a general trend in relation to a large number of regulatory and enforcement issues.

- Akin to the Abuja Treaty and thus the African Union, three RECs (COMESA, ECCAS, and ECOWAS) have the policy that decisions of the highest organs are automatically binding on member states. SADC is the only REC that has another philosophy. SADC philosophy is based on the right to derogate.
- In relation to the Abuja Treaty and statutes of COMESA, ECCAS and ECOWAS, no specific requirement is outlined in the statutes in terms of how States will proceed beyond the so-called automatic binding state of decisions of the higher organs.
- This lack of specificity has resulted in a situation where decisions and regulations are considered binding and yet many states fail to implement, possibly because they require statutory, administrative or policy actions.
- The CEMAC study reveals how Gabon has utilised Presidential action to ensure implementation of the Decision.
- The review shows that generally all states understand that they are bound by the Decision.
- The review also shows that RECs recognise the independence and powers of the Courts and or Tribunals in considering such issues as the YD. Courts of ECCAS, COMESA, ECCAS and the SADC Tribunal are automatically seceded of matters initiated by or against their member states, organs of the RECs and legal and natural persons within the geographical territory of the REC.
- The Courts and Tribunals are not likely to assume jurisdiction over matters initiated by states that are not members of the REC, nor legal and natural persons originated from outside the REC. Whether or not action initiated by a natural and legal person not logically within the jurisdiction of the Courts or Tribunals in actions brought against Member States of the REC in question will depend on the interpretation of the Court or Tribunal's jurisdiction. To prevent the court or tribunal denying jurisdiction in matters involving the Decision which may be initiated by the Executing Agency of its own accord against the regional YD Authority, a member state or a natural or legal person falling within the jurisdiction of the court, it is recommended that a separate memorandum of understanding or agreement be concluded between the Agency and the courts and tribunal.
- To date though no action has been initiated before any Court or Tribunal in relation to the Abuja or the Yamoussoukro Decision.
- The AFCAC Constitution recognises its role as trustee of the supervision and management of the YD and provides for the Plenary to supervise. It however fails to make provision for day to day management and enforcement by the Secretary General of AFCAC. It is therefore recommended that detailed functions, powers and procedures be

defined for the Agency in order to enable effective implementation.

- NPCA and the African Development Bank continue to play a major role in infrastructure development under PIDA. The former, in addition, has successfully established and manages the peer review mechanism. It is recommended that lessons be learnt from the application of the African Peer Review Mechanism and that an active role be given to NPCA and AfDB in the supervision and management of the YD under the tutelage and in cooperation with the Executing Agency.

5 Dispute Settlement Measures

5.1 Introduction

171. Article 8 of the Yamoussoukro Decision provides the framework for dispute settlement measures. According to that Article:

8.1 If any dispute arises between States Parties relating to the interpretation or application of this Decision, the States Parties concerned shall in the first place endeavour to settle the dispute by negotiation.

8.2 If the State Parties concerned fail to reach a settlement of the dispute by negotiation within 21 days, either party may submit the dispute for arbitration in accordance with the arbitration procedures set forth in draft Regulation on Dispute Settlement Mechanism..

172. The Decision clearly settles on negotiation and arbitration as the primary modes of dispute settlement. It is worth noting that this is unfortunate as it limits the other avenues available for dispute settlement.

173. It is worth noting though that the Decision was adopted in an environment in Africa where the two best solutions were negotiation and arbitration.

174. From onset the question has to be asked whether the Decision precludes any other form of dispute settlement. It is our view that the Yamoussoukro Decision does not prevent the utilisation of other modes of dispute settlement. It is an inalienable right of disputants to choose their mode of settling. Moreover the matter regulated by the Treaty is a commercial activity par excellence that requires speedy but elaborate modes of settlement of disputes. Indeed air transport operators are extremely sophisticated and the amounts involved that need to be resolved often determine the best course of settlement.

175. It is our view that alternatives such as the use of courts, mediation, and other appeals procedures are not precluded.

176. It could be asserted though that negotiation remains the preferred mode of dispute settlement. It is quite clear that the drafters of the Decision were of the view that disputes should not be protracted. This negotiation should be concluded within 21 days from the time of the dispute arising failing which arbitral rules in Appendix 2 of the Decision kick in. While being the preferred mode, due to the nature of commercial transactions in the air transport industry, parties may prefer to use national courts or other forms of settlement proposed here.

177. The draft Regulation on Powers and Functions of the Executing Agency provides three modes of dispute settlement based on the nature of the work to be undertaken by the Executing Agency as well as the realities of the transport sector.

178. The options provided are:

- a. Recourse to national courts
- b. Recourse to courts and tribunals of the regional economic communities
- c. Recourse to the African Court of Justice and Human Rights
- d. Appeals against the decisions of the Executing Agency by recourse to Board of Appeals
- e. Recourse to the arbitral tribunal provided

179. The following sections will describe the proposed dispute resolution measures

5.2 Complaints and Appeals to the Board of Appeal

180. This section deals with complaints procedures, decision making, appeals procedures, and recourse to courts and arbitral tribunals.

5.2.1 Complaints Handling

181. Effective dispute settlement measures start from effective use of complaints handling measures. It is expected that disputes relating to the implementation of the YD will mostly be handled at the REC level. It is therefore essential that the Executing Agency coordinates with the RECs to develop an effective process of (a) taking complaints (b) acknowledging complaints (c) undertaking investigations, (d) organising hearings where necessary, and (e) making reasoned decisions. Figure 1 below depicts the process

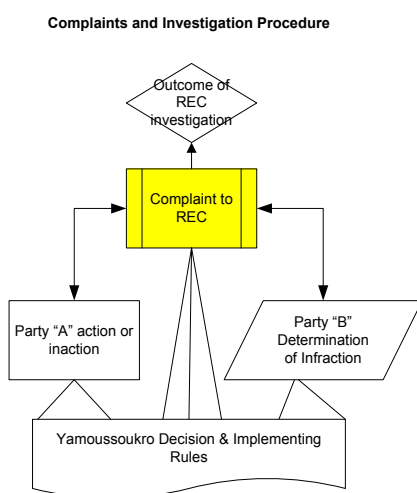


Figure 1: Complaints handling process

5.2.2 Decision-Making

182. The RECs and the Executing Agency as operational organisations making decisions that relate to the implementation of the Decision is likely to make decisions on whether or not states and service providers are undertaking their obligations or in other words acting in breach of the Decision and its implementing regulations including the consumer protection rules and competition rules.

183. Such decisions may have effect on either how a state is perceived and provide services under the Decision or how a service provider acts under the Decision. A typical example could be where a complaint has been raised and the REC upon due investigation concludes that the complaint is unfounded. Such a decision is challengeable. We propose two alternative modes of challenging the decision. The alternatives are (a) appeal to the Executing Agency or (b) appeal to the court or tribunal of the REC.

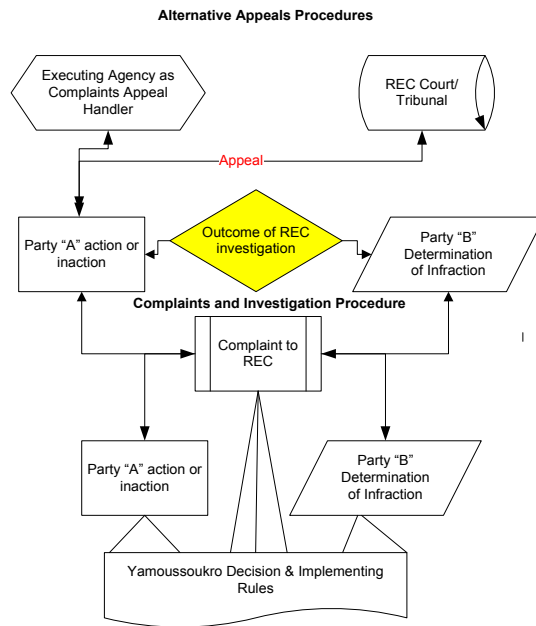


Figure 2: EA Complaints (Appeal) Handling or Appeal to RECs Tribunal

184. Where the decision is taken by the Executing Agency, the aggrieved party may opt to apply to the courts to challenge the decision of the Executing Agency or utilise an appeals procedure provided in the draft Regulation.

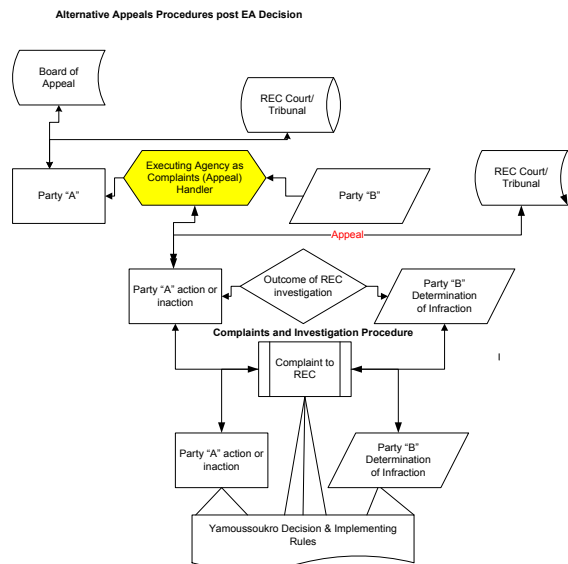


Figure 3: Alternative Appeals to Board of Appeals and REC Tribunals

185. It is proposed that the Executing Agency encourages aggrieved parties to use that mode of dispute settlement which if well-structured could be efficient and cost effective.

186. The use of the Board of Appeal, it need to be emphasised only arises where the complaint is first brought to the Executing Agency.

187. The draft instrument provides for a stepped approach to complaints. Complaints are raised before the regional YD implementation group of the regional economic community in whose territory the matter complained of first arose. Where the event spans more than one regional economic community, the parties may upon agreement submit the complaint to one of the regional economic communities or to the Executing Agency but not to both. It is proposed and provided for that where a complaint on the same facts involving the same parties is brought by the same initiation party to either two economic communities or an economic community and the Agency one of those agencies must decline to handle the complaint.

188. Where a complaint is unsuccessfully handled at the level of the regional economic community from the point of view of one of the parties, it may either be appealed to the court or tribunal of the regional economic community or to the Board of Appeal through the Executing Agency. It is recommended that the Executing Agency encourages the regional economic communities to reduce cost and not to set up their own Board of Appeal but to rather use the continental structure.

189. From this perspective the Board of Appeal serves as the appeals Board for all the RECs and the Executing Agency alike. Or this reason, it has been provided that the regional economic communities will notify the Executing Agency of any new complaint, how it is handled, the result and the likelihood of appeal. The Agency in its agreement with the RECs can provide reporting structures to enable them easily utilise these procedures.

190. It needs to be emphasised that nothing will prevent a complainant from taking the matter to a national court, or applying to a regional court or tribunal.

5.3 Board of Appeal and Appeals handling by the Executing Agency

191. Appeals procedure, as depicted in the figures above, will be channelled through the Executing Agency. If operated properly, the Board of Appeals can serve as an alternative appeals procedure to the RECs decision-making institutions as well as to the Executing Agency.

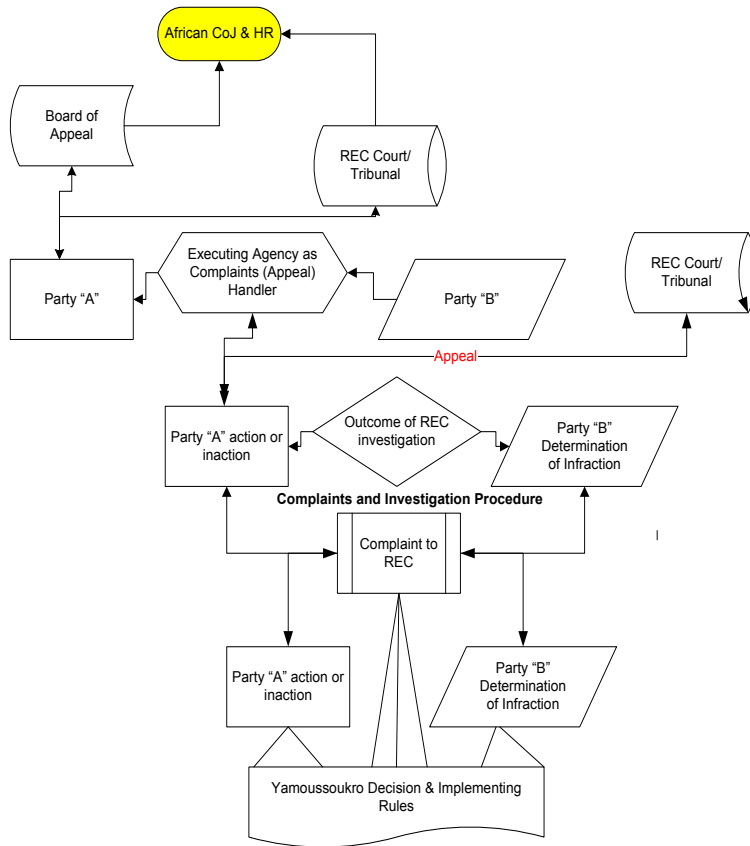
192. The Board of Appeal, it is proposed should be constituted as and when needed from a list of qualified personnel to be compiled by the Monitoring Body in consultation with the Office of Legal Counsel of the African Union.

193. The List may be maintained by the office and can also serve as the list of arbitrators in the arbitration procedure.

5.4 African Court of Justice

194. With the exception of State to State conflicts where States are automatically entitled to apply to the African Court of Justice by right, the Executing Agency should encourage all appeals to the African Court of Justice to be channelled through the Board of Appeal or where the RECs permit such, through as an appeal from the tribunals or Courts of the RECs. It is proposed that appeals to the African Court of Justice should only be allowed

Final Appeal to the African Court of Justice



6 Competition Rules

6.1 Introduction

195. Competition regulation has been seen as the bedrock for the successful liberalisation of the air transport sector.

196. Following the adoption of the Yamoussoukro Decision, many states clamoured for the adoption of competition rules. While this is seen by many as a tactic by some states that have no interest in liberalising to derail or delay the liberalisation process, the issue of competition rules and in particular provisions on the abuse of dominant position of a few big airlines on the continent has been a genuine concern of states with smaller airlines.

197. In 2002, 20 Ministers of Transport from COMESA, EAC and SADC met in Pretoria to agree the first ever competition regime governing the air transport sector. The rules which were subsequently adopted by the individual regional economic communities created the largest block of states on the continent to conclude competition rules.

198. Subsequently West and Central African states in Gabon in 2004 endorsed the COMESA EAC and SADC process.

199. The COMESA EAC SADC regulations therefore serve as the backbone for the proposed continental competition regime.

6.2 The Content of Competition regulation

200. According to Article 7 of the Yamoussoukro Decision, State Parties shall ensure fair opportunity on non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territory. Article 9.5 of the Decision further provides that the Executing Agency be provided with powers to enforce appropriate rules and regulations that give fair and equal opportunities to all players and promote healthy competition.

201. Competition regulation aims at promoting and guaranteeing a free and fair competition in air transport services within the geographical market being regulated. The draft harmonised rules applies to eligible airlines who are indeed by far the strongest set of airlines on the continent. The African competition regulation is not meant to regulate the activities of non-African carriers. However it needs to be stated that consumer protection measures are adopted to regulate the activities of non-African airlines. How far this can go will be determined by the ingenuity of the implementers of the drafted regulation.

202. It is important to note however that the ambit of the Articles 7 and 9.5 does not restrict competition regulations to only eligible airlines. Indeed Article 7 uses the term 'designated African airline'. Given that the addressor of article 7 are the states parties to the Decision, it is worth pointing out that the obligation extends beyond eligible airlines to include non-eligible airlines designated by the States Parties under any other regime such as through bilateral agreements. It may also be argued that 'all players' as employed in Article 9.5 further expands the ambit of any discussion on competition to any set of players the Executing Agency considers necessary to regulate to promote healthy competition in the airline industry.

203. The objective of free and fair competition means that practices of airlines that are not considered to be free and fair are automatically considered anti-competitive if they meet a certain set criteria including the fact that it does not limit the interests of consumers, is temporary, has no adverse economic effect and is not intended to and have no effect of crippling or driving out competitors from the market.

204. A host of practices that are considered to be illegal are provided for in the draft regulations.

205. Another major anti-competitive practice prohibited is the abuse of dominant position which includes introducing excessive capacity or low fare on a route merely to drive out among others start-ups or existing operators on the route.

206. It is important to recognise that national measures can be anti-competitive or somehow negatively impact free and fair trade. These include discriminatory legislation or practices as well as financial stimulation seen as subsidies.

207. An essential aspect of competition regulation is the effective monitoring and supervision of the regime by a competent institution. The Decision already identifies the Executing Agency. Additionally, the draft provisions recognise the need for cooperation between competent national and regional authorities and the Executing Agency. This is provided for in the regulation including guidelines on monitoring the regulations.

208. Dispute settlement and review measures are also catered for to enable the smooth implementation of the regime.

209. As with the instruments adopted by the RECS the draft regulations provide for detailed guidelines and implementing provisions.

7 Consumer Protection

7.1 Introduction

210. Consumer protection regulations are designed to ensure that the services rendered to consumers is fit for purpose. It ensures that the suppliers are regulated to ensure continuity of service delivery, quality of service delivery, complaints handling and, that in the eventual case of failure of continuity from one service deliverer, the consumer who has paid for service delivery is not left in the cold and has other suppliers to provide the specific service he paid for.

211. Article 9.6 of the Yamoussoukro Decision provides that the “Executing Agency will also ensure that consumer rights are protected”. Key questions to be dealt with in this section include:

- the content of consumer rights that need protection
- the spatial level of protection (national, sub-regional and continental), and
- the institution or institutions obliged to protect the rights of the consumer

7.2 Key principles of Consumer Protection

212. The basic consumer rights according to Consumers International are:

- **The right to satisfaction of basic needs** - To have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water and sanitation.
- **The right to safety** - To be protected against products, production processes and services that are hazardous to health or life.
- **The right to be informed** - To be given the facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labelling.
- **The right to choose** - To be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality.
- **The right to be heard** - To have consumer interests represented in the making and execution of government policy, and in the development of products and services.
- **The right to redress** - To receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services.
- **The right to consumer education** - To acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.
- **The right to a healthy environment** - To live and work in an environment that is non-threatening to the well-being of present and future generations.

213. Generally, these rights or various reformulations of them appear in consumer protection statutes. For instance the South African Consumer Protection Act, 2008¹⁷, identifies the following:

- Right to equality in the consumer market (non-discrimination)
- Right to privacy
- Right to choose, including right to cooling-off period, cancel advance reservation, and right to return
- Right to disclosure and information
- Right to fair and responsible marketing
- Right to fair and honest dealing
- Right to fair, just and reasonable terms and conditions

¹⁷ No 68 of 2008, Consumer Protection Act, 2008

- Right to fair value, good quality and safety
- Right to be heard and obtain redress

214. These general principles have been modified to suit specific service such as banking, micro-finance and information technology. For instance Association of Regulators of Information and Communication in Eastern and Southern Africa (ARICEA) adopted the following as prevailing rights of the consumer that needs to be protected by its service providers:

- Personal Privacy and security
- High quality reliable service
- Accurate and comprehensive billing
- Market abuse
- Responsive regulatory authority
- Non-discrimination
- Health and Safety
- Fair and responsible marketing
- Freedom of choice
- Transparency and disclosure
- Channels for redress
- Fair and reasonable treatment
- Representation
- Access to information.

215. It is most important to note that consumer protection rules are not adopted as non-binding commitments but have consistently been adopted as binding regulations enforced by identifiable institutions. The rationale has been that the consumer is often dealing with a more powerful partner in a contractual situation where the consumer is not as sophisticated as the service provider.

216. To enhance the position of the consumer, these rights identified are better enforced by a non-partisan regulator able to balance the interests of continuous and successful delivery of services by the service provider as well as ensure that the consumer obtains the service a transparent, safe and fair service.

7.3 Aviation and Consumer protection

217. Aviation has developed a series of packages to ensure that the consumer is protected. This including air carrier liability under the Warsaw/Montreal regime, competition law and sets of special consumer protection rules.

218. This section provides for a comparative analysis of consumer protection regimes. Jurisdictions examined are the United States, the European Union, the United Kingdom, EU, South Africa, Mauritius, and Nigeria.

219. The analysis is designed to provide a quick overview of the following issues:

- The regulator
- Issues considered to be in the interest of the consumer
- Solutions identified
- Enforcement powers
- Complaints procedures

220. Where options presented in ne jurisdiction have their source in another analysed jurisdiction a passing reference will be made unless there is a specific modification worth highlighting.

221. Based on the analysis, we shall identify issues of pertinent importance in the continental African setting and outline the powers of the Executing Agency in relation to the protection of the interests of the African consumer vis-à-vis African airlines, non-African Airlines providing services to the African continent, and other service providers whose services are directly received by the consumer.

7.4 Consumer Protection in the US

222. In the United States, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings has a division called Aviation Consumer Protection Division. The Office and its Division monitors compliance with and investigates violations of aviation economic, consumer protection, and civil rights requirements.

223. The United States has developed a comprehensive corpus of consumer related legislation inter alia Airline Service Quality Performance Reports (Title 14 CFR Part 234), Notice Of Terms Of Contract Of Carriage (14 CFR 253), Enhanced Protections For Airline Passengers (14 CFR 259), Statements Of General Policy (14 CFR 399), Unfair and deceptive practices and unfair methods of competition (49 USC § 41712), Economic regulatory powers.

224. The US Consumer protection compliance and enforcement activities relate to such areas as:

- unfair and deceptive practices
- unfair competition by air carriers and travel agents
- deceptive airline advertising (e.g., fare, on-time performance, schedule, the disclosure of code-share service, etc)
- violations of rules concerning:
 - I. denied boarding compensation,
 - II. ticket refunds, and
 - III. baggage liability requirements

225. In the US, the matter of consumer protection has been tackled as a major legal and complaints issue. It is important to note that the effectiveness of the consumer protection regime in the US is in the rigorous enforcement of consumer protection rules solutions identified are:

- violations of Montreal Convention (deceptive business practice and unfair competition 49 U.S.C § 41712);
- chronically delayed flights constitute “unfair and deceptive” practice (49 U.S.C § 41712)

226. Enforcement powers assigned to the consumer protection measures differ considerably depending on the statute in question but at all material moments are enforceable by the office.

227. A comprehensive system of complaints procedures and avenues for complaints have been implemented by the Division in matters involving safety and security.

228. The structure of US consumer protection legislation has informed a draft consumer protection regulation applicable to the African air transport setting.

7.5 Consumer Protection in the UK - Insolvency

229. The vast majority of the UK’s consumer protection regulation is based on the EU regulatory structure to be reviewed below. The UK is selected because of one important aspect of its consumer protection that stands to benefit consumers at the time when their service providers are insolvent.

230. The Consumer Protection Group of the UK Civil Aviation Authority is charged with the responsibility to

- Regulate the finances and fitness of travel organisers selling flights and package holidays in the UK.
- manage the Air Travel Organisers' Licensing scheme (ATOL).
- license UK airlines and enforce European Council requirements in relation to their finances, nationality, liability of passengers for death or injury and insurance.
- enforce certain other legal requirements and codes of practice for protection of airlines' customers.

We focus here on the protection of carriers against insolvency. Other aspects of UK consumer protection are dealt with under the EU structure.

7.5.1 Protection arrangements of customers against insolvency of airlines and agents

231. The UK CAA's Air Travel Organisers' Licensing scheme is designed to protect customers through the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995 (ATOL Regulations).

232. The ATOL Regulations apply to all air travel sales made in the UK, whether they are for flight-only or for tour packages and whether they are made by travel agents, tour operators, or airlines.

233. Under the powers of the UK Civil Aviation Act the Air Travel Trust Fund is set up as the primary source of funding when an ATOL holder fails. The Fund was set up by the Trust Deed and is administered on behalf of the Air Travel Trust by the Consumer Protection Group.

234. The UK has established the Air Travel Insolvency Protection Advisory Committee to advise on the financial protection arrangements for air travellers and customers of air travel organisers. The Committee among others advises on the structure of protection that it concludes are necessary or desirable, bonding arrangements and bond levels and payments from bonds and from the Trust.

235. The ATOL Scheme which is strictly implemented has had a considerable impact on consumer protection in the UK. Consumers are ATOL Protected when their ticket is purchased by an ATOL Holder and when stranded following the failure of the ATOL Holder, are accommodated and repatriated under the scheme back to their original airport of departure.

236. This consumer protection scheme is highly recommended for passengers on the African continent who suffer the most for the cancellation of their flights as a result of administrative procedures of suspending an airline's operating rights or the failing to operate by an operator. It is recommended that a scheme be developed to regulate the suffering of passengers and tourists who are often stranded due to insolvency and other administrative suspensions of operating licence by Civil Aviation Authorities.

237. The implementation of an ATOL-like scheme can be undertaken by the regional YD Authorities and/or at the continental level by the Executing Agency. Its implementation could be conditioned on the grant of a YD Certificate as outlined in section ... of this report.

7.6 European Union Consumer Protection Rules

238. EU legislation on consumer protection include:

- Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11

February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights

- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community
- Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents

239. EU consumer protection developed over a decade is currently predicated on a number of objectives outlined as rights:

- Right to non-discrimination in access to transport
- Right to mobility: accessibility and assistance at no additional cost for disabled passengers and passengers with reduced mobility (PRM)
- Right to information before purchase and at the various stages of travel, notably in case of disruption
- Right to renounce travelling (reimbursement of the full cost of the ticket) when the trip is not carried out as planned
- Right to the fulfilment of the transport contract in case of disruption (rerouting and rebooking)
- Right to get assistance in case of long delay at departure or at connecting points
- Right to compensation under certain circumstances
- Right to carrier liability towards passengers and their baggage
- Right to a quick and accessible system of complaint handling
- Right to full application and effective enforcement of EU law

240. **Non-discrimination:** The right to non-discrimination is implemented in the aviation sector in two separate ways. Passengers who are denied boarding may opt for re-routing or reimbursement. The other practical aspect of non-discrimination is a right of its own; namely the right for disabled passengers and passengers with reduced mobility not to be discriminated against and furthermore to be transported without any additional cost.

241. **Passenger rights** to information include general information on issues like rights and obligations while travelling, on accessibility of services for disabled passengers and passengers with reduced mobility and on carrier quality standards and performance; and specific information on the journey throughout the trip (before purchase, before and during the journey, and in case of disruption)

242. The **right to renounce travelling** include a choice between reimbursement and rerouting. This right is considered unconditional and it intervenes in all events, even in case of extraordinary circumstances. The EU has imposed time limits which triggers this right, namely: 5 hours. The right to reimbursement means the refund of the full price of the unused ticket within 7 days air and, where necessary, the return journey to the initial point of departure.

243. The European passenger is considered to have a right to insist that the contract of carriage is performed. Whenever the passenger chooses not to ask for the reimbursement of the full ticket price, he has the right to ask for the fulfilment of the transport contract and to be re-routed to the final destination. The re-routing to the final destination at the earliest opportunity can be provided under comparable transport conditions by the same or a different carrier or by another mode of collective transport.

244. In relation to the **right to assistance**, EU legislation establishes a minimum level of care to be provided on the spot whenever a delay reaches the time limit beyond the scheduled time of departure. Care is linked to the waiting time resulting for long delay or cancellation and subsequent re-routing. It must be proportionate, reasonable and adapted to the circumstances of the disruption, to those of passengers. Minimum delays triggering a right to assistance from 120

up to 240 minutes in the air transport sector. Care must be provided both at the terminal and/or on-board (e.g. refreshments and meals can be limited but must be provided on-board in case of tarmac delays or on the ship, especially for vulnerable passengers; access to the toilets and to adequate heating/cooling air conditioning must always be provided).

245. Under certain conditions, the **right to be compensated** in an objective and standardised manner in case of long delay at arrival is part of the hard core of minimum quality standards. This compensation aims at reducing the inconvenience suffered by all passengers by, inter alia, ensuring a minimum relief to passengers at arrival to allow them to cope with the immediate discomfort caused by the unexpectedly long delay, similar to the assistance they are entitled to while delayed at departure. EU legislation recognises that some inconvenience may not be due to the air carrier and allows for matters of force majeure or act of God.

246. In relation to **right to effective complaint mechanism**, when passengers are dissatisfied with a carrier's application of their rights, they have the right to complain first to the carrier and, if still dissatisfied, to a competent body.

247. Effective enforcement of these rights is in itself a right of the EU citizen which is foreseen in the obligations on national institutions to ensure that the legislation is implemented and obligations of all parties are enforced.

248. Not unlike the set of US principles governing consumer protection, the European legislation which have also reflected in a vast number of consumer protection rights elsewhere are reflected in the draft consumer protection legislation proposed.

7.7 African Consumer Protection legislation

249. A number of African countries have introduced consumer protection regimes to govern aspects of society. Notably, South Africa, Mauritius, Egypt, Tunisia, Botswana and Algeria have various type of general consumer protection legislation that provides in varying forms for a number of rights including complaints, enforcement, right to return goods purchased and to non-discrimination.

250. In 2009 SADC adopted a general Declaration on Regional Cooperation in Competition and Consumer Policies enjoining the member states to adopt competition and consumer protection rules. As part of the regime of the Declaration the SADC Secretariat was to set up a Competition and Consumer Policy and Law Committee (CCLPOLC) to implement a system of cooperation in the field.

251. It is our understanding the UEMOA has adopted consumer protection rules for the air transport sector. Our effort to obtain a copy, unfortunately, has not been successful.

252. Consequently the only African *lex specialis* we examine in some detail is the draft Nigerian Air Passengers' Bill of Rights found and accessed from the website of the NCAA.

253. It is worth noting a COMESA draft policy guidelines on consumer protection. Relying on EU regulations¹⁸, the draft policy guidelines dealt with air carrier liability, information to the

¹⁸ Regulation (EC) No [889/2002](#) of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No [2027/97](#) on air carrier liability in the event of accidents [Official Journal L 140 of 30.05.2002].

Regulation (EC) No [261/2004](#) of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No [295/91](#). [Official Journal L 46 of 17.02.2004]

passenger, care, delay and others dealt with in European legislation. It is not certain whether the draft policy guidelines have been adopted by any COMESA Institution.

254. The AFRAA Secretariat, it has come to the attention this consultant, has also published a paper on Airline Passenger Service Commitment and Consumer Protections calling for a voluntary commitment for the service providers. This matter will be reviewed in a discussion on the best approach, below.

7.8 Nigerian Air Passengers' Bill of Rights

255. The Nigerian draft legislation applies to:

- to passengers departing from an airport located within the Nigerian territory to another airport within Nigeria;
- to passengers departing from an airport located in another country to an airport situated within Nigeria, unless they received benefits or compensation and were given assistance in that other country, if the operating air carrier of the flight concerned is a Nigerian carrier; and
- to foreign air transportation with respect to non-stop flight segments originating at a point within Nigeria.

256. It covers denied boarding, makes provision for priority procedures and criteria for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight if an insufficient number of volunteers come forward; delay, cancellation of flights, triggered right to compensation, right to reimbursement and re-routing, right to care, non-discrimination against persons of reduced mobility and with special needs, right to redress, obligation of the carrier to inform the passengers, prohibition of misleading advertising, complaints procedure and the right of the Authority to enforce penalties.

257. The draft Nigerian legislation is a comprehensive instrument placed as it were under the office of the Consumer Protection Directorate of the Nigerian Civil Aviation Authority. Interestingly the draft legislation introduces mediation as a mode of dispute resolution which could be beneficial to the parties. Failing mediation, it is able to undertake administrative hearings and where necessary impose fines.

7.9 The Executing Agency and Consumer Protection

258. Based on the review of the existing legislation, confronted with the obligation to introduce consumer protection and most importantly taking note of the daily challenges faced by passengers travelling within to and from the African continent, it is highly recommended that an enforceable regime be introduced to regulate the rights of the passenger.

259. It is our considered view that while consumer protection is not designed to examine the financial sustainability of an airlines business it is important that the consumer be protected from shoddy airlines starting in the first place. This ab-initio protection could be implemented in the form of a UK ATOL-like operator insolvency protection. It could be implemented as a condition of member states of the AU before the licensing of their carriers. That regime can then be overseen by the regional YD Authorities and the Executing Agency. A uniform implementation of this

COM(2005) 48 final: Proposal for a Regulation of the European Parliament and of the Council on the information of air transport passengers on the identity of the operating carrier and on communication of safety information by Member States.

COM(2005) 47 final: Proposal for a Regulation of the European Parliament and of the Council concerning the rights of persons with reduced mobility when travelling by air

measure will ensure that all carriers undergo the same regime whether or not they operate YD routes.

260. An alternative will be the imposition of this obligation either by the RYA or the EA as a condition for certification as a YD operator. Naturally this could be an additional measure on top of national measures or even independent of national measures. If applied uniformly, it can ensure that the situation of YD passengers getting stranded in strange cities will soon be a thing of the past..

7.10 The Executing Agency, the African Civil Aviation Policy and the interest of the Consumer

Scope of Article 9.6 (Geographical and temporal)

261. What is the scope of the protection of the consumer rights provided in the YD?

262. Article 9.6 provides that 'the Executing Agency will also ensure that consumer rights are protected.' It is once again important to note that the formal name of the Executing Agency is the African Air Transport Executing Agency. Its primary responsibility as provided for in Article 9.4 is the supervision and management of Africa's liberalized air transport industry. The letter of the Decision is therefore silent on the scope of the consumer rights to be protected.

263. On the other hand the Executing Agency has two specifically outlined tasks: ensure competition and protect the rights of the consumer. In relation to the first the objects are the players of the air transport industry who may be seen as including the African airlines, airports etc. In relation to the consumers the same cannot be said that the target of consumer rights is the African consumer as this will be discriminatory. The geographical scope of the Decision can however be utilized to define the scope to include the consumer on the geographical territory covered by the Decision. Thus irrespective of race, nationality, creed country of origin, the Executing Agency is required to protect the consumer of air transport services provided on the African continent.

264. By use of the term consumer excludes commercial contracts. It limits to consumer enjoying services provided by airlines, and other service providers who are directly involved in service provision to the consumer. This obviously includes the airport service provider but will for instance not include a fuel servicing company or the air navigation service provider who is not directly involved in providing services to the direct consumer.

265. It should not matter for instance that the service provider concerned is operating as an agent of another direct service provider. Consequently air travel agencies, ground handling companies would fall within the scope of the consumer protection rules.

7.11 The Executing Agency and passengers on non African Airlines

266. Of particular importance is whether or not it will apply to only African carriers or only eligible carriers. The general wording of the provision, read against the global responsibility of the Executing Agency, namely bringing sanity into a liberalized air transport market will dictate that the players falling within this scope to be protected are 'all consumers of air traffic services provided on the African continent'. Destination or origin is of little importance with the slight exception that purely domestic consumers do not fall within the scope of this Decision. Against this view, the passenger on an eligible airline operating on an intra-Africa route is as much to be protected as the passenger on a non-eligible airline operating an intra-African route and much in the same way as the passenger on a non-African airline arriving in or destined for a point outside the geographical scope of the Decision.

267. One cardinal principle of consumer protection is the elimination of discrimination in service provision; it is highly untenable that the regulatory regime guaranteeing equal protection to consumers will start off by discriminating against passengers flying on board non-African airlines.

7.11.1 AFCAP

268. The view expressed herein coincides with the terminology of the African Civil Aviation Policy (AFCAP). Paragraph 5.4.3.1 (II) recognises that airlines, ground handling companies, travel agents, consolidate and other service providers are to be made to comply with consumer rights rules. One obvious party left unmentioned is the airport which will be classified as one of the services providers. While sub-paragraph (IV) of the same provision recommends the adoption of measures by AFCAC on 'third country companies' and links such measures to competition, we also recognise that such companies, predominantly airlines operating into the territory of the Decision, fall within the scope of the AFCAP.

7.12 Binding or Non-Binding commitments

269. It is worth recalling that AFRAA has proposed certain non-binding commitments, strangely enough exactly at the time when this study was designed to propose measures to implement Article 9.6 of the Yamoussoukro Decision.

270. This matter is mentioned purely for the purpose of providing a completing the matter under review. It makes no sense for AFRAA to propose such measures when African airlines have not been seen to undertake any measures of self-regulation for all these periods of passengers suffering and clamouring for some form of protection. The African aviation sector is replete with airlines that are collapsing and retaining the monies of their passengers; airlines that are cancelling flights without any regard to the passengers; airlines that are said to be imposing high fares without any form of regulatory overview; travel agents, ground handling and tour operators that are completely failing in their duty to provide decent services to passengers; and most importantly a considerable number of Civil Aviation Authorities that have no decent measures to assist the consumer.

271. Self-regulation of service providers is not new. It is unfortunately unwise to even contemplate it in the African aviation setting where AFRAA without any doubt has not had the clout, the willingness nor the urge to approach the matter of consumer protection for all of its years of existence and do certainly not have the mandate over non-members including non-African airlines.

7.13 Key principles of Aviation consumer protection

272. The consumer protection principles identified and provided for in the attached draft Consumer Protection Regulations are meant to answer some of the following questions:

7.13.1 Insolvency

273. How can one reduce harsh **effect of insolvency** on the passengers who are either stranded and or lose out on tickets paid for to insolvent travel agents, tour operators and airlines?

274. A number of airlines fail financially or are forced due possibly to administrative procedures to suspend flights. Air Nigeria is a typical case of the second instance where the airline apparently had their operating certificate suspended. The result of this is that a large number of

passengers who would have paid their monies to the airlines in various countries end up losing their monies either because the airlines offices closes down immediately or where open it fails to refund their monies. Additionally, passengers who would have started their flights are unable to do the return leg, are unable to obtain any information from the airline.

275. There appears to be no scheme where the Civil Aviation authorities of African countries have any transparent information management to alert passengers of impending challenges and to advise them of how to obtain refunds etc.

276. Provisions have been introduced in the draft Consumer Protection Regulations to enable the Executing Agency and the regional YD Authorities and national authorities raise questions at the time of licensing of the carrier and certificating the eligible airline and of other airlines and ensure financial stability; regulating how to secure passenger monies; establishing a fund to ensure that passenger monies are not taken by irresponsible service providers and where taken can either be refunded in times of need or that passengers can be repatriated to their intended destination.

7.13.2 Unfair and deceptive practices

277. What measures to impose on service providers to ensure fair pricing, fair communication, decent marketing practices?

278. One side of competition regime is to ensure that airlines compete in a decent fashion among themselves. Competition law operates to prevent abuse of dominance, collusion by airlines to introduce unfair pricing etc. The other side of those is the utilisation of consumer protection law to prevent an airline from implementing measures that may not be offensive to competition regulation but end up having a negative impact on consumers.

279. Measures introduced in various jurisdictions to curtail and proposed here include the elimination of misleading advertisement and the disclosure of the whole fact about the travel a passenger s paying for. Additionally, given the rampant nature of its implementation in Africa, the practice of free seating has been questioned in the draft regulations and raised as a practice that is not only unfair but may also lead to deception and needs to be punished. Other measures include persistent boarding denials; unfair application of Warsaw/Montreal regime; failure to maintain adequate insurance; and chronically delayed flights.

7.13.3 Additional Obligations

280. The draft regulation provide general obligations on insurance, non-discrimination, maintaining a contact point for passengers and tourists; information to the consumer; complaints procedure, filing of advanced flight and passenger information; compliance with Warsaw Liability regimes; denied boarding; delay; cancellation of flight; downgrading particularly in consequence to free seating policy; and specific obligations on air travel agents, tour operators and airports.

7.13.4 Rights of the consumer

281. The duties outlined in the previous paragraph also have complementary rights of the passengers including reimbursement, re-routing, and compensation.

7.13.5 Duty of care of third parties

282. Exceptional provisions have been included in the draft to ensure that service providers upon whose service others relies who are in direct relationship with the consumer provide and

though whose reckless or negligent action the airline fails to provide its services contracted for may be, subject to national legislation, be subjected to legal suit in tort for general breach of duty to the consumers. Attendant right of recourse of service providers against others have been introduced as well.

7.13.6 Administrative procedures

283. Administrative procedures, including right to investigate, conduct hearings and impose penalties have been proposed to ensure compliance with the proposed draft regulation.

8 Conclusions and Recommendations

284. This study scheduled as three separate studies but combined as one has been approached as a legislative drafting exercise that was justified by initial analysis.

285. Indeed this stance of the study flowed out of a realisation fairly early on in the study that what is required is not another voluminous study of hopes and aspirations but rather practical measures that will enable the Executive Agency as it were 'hit the ground running.

286. The exercise has therefore resulted in the drafting of regulations which could serve as a basis for discussion and hopefully result in their adoption to enable the Executing Agency have the tools to implement the project or monitoring and supervising the implementation of the YD.

287. The following draft regulatory texts are recommended to be adopted as Appendices to the YD:

-
- Draft Regulation on Dispute Settlement Mechanisms Relating To the Implementation of the Yamoussoukro Decision
- Draft Regulations on Competition in Air Transport within Africa
- Guidelines and Procedures for The Implementation Of The Regulations on Competition in Air Transport Services within Africa
- Regulation on Protection of Consumers.

288. The above set of drafts are based on conclusions from the analysis conducted in the study.

- NPCA and the African Development Bank continue to play a major role in infrastructure development under PIDA. The former, in addition, has successfully established and manages the peer review mechanism. It is recommended that lessons be learnt from the application of the African Peer Review Mechanism and that an active role be given to NPCA and AfDB in the supervision and management of the YD under the tutelage and in cooperation with the Executing Agency.

289. On the content of regulatory powers and outlining the functions and powers of the Executing Agency, its management structure, its role in handling complaints, what measures are required to adopt subsequent decisions and how to settle disputes, the establishment of the Agency means that the liberalisation of the YD has entered into a sphere of free market access to routes, intelligent management of competition dispute settlement and complaints, and a willingness on the part of a regulator to boldly study the market and adopt the necessary tools to liberalise the market.

290. The Executing Agency as the manager has the flexibility to propose a much quicker implementation cycle such as reducing the phases to 12 months of 18 months. Naturally, this will be based on the level of preparation, the human capacity as well as the financial and technical resources at the disposal of the Executing Agency. It is certainly the case that AFCAC as it now stands needs the human, financial and technical empowerment. Of all of these the most glaring is the lack of human resources.

291. Relevant instruments needed by the Executing Agency to enable it function are provided in the form of Draft Regulation on the Powers, Functions and Operations of the Executing Agency of the Yamoussoukro Decision and Draft Regulation on Procedure to be Applied by the Executing Agency for the Issuing of Opinions, Recommendations, Decisions and Guidance Material ("Rulemaking Procedure").

- In respect of dispute settlement, the following options are recommended as a mix :
- Recourse to national courts
- Recourse to courts and tribunals of the regional economic communities

- Recourse to the African Court of Justice and Human Rights
- Appeals against the decisions of the Executing Agency by recourse to Board of Appeals
- Recourse to the arbitral tribunal provided for inter-state disputes

292. These are outlined in a two part Draft Regulation on Dispute Settlement Mechanisms Relating to the Implementation of the Yamoussoukro Decision.

293. Competition rules, the bedrock to the implementation of the YD are foreseen in a Draft Regulations on Competition in Air Transport within Africa. Additional Guidelines and implementing provisions are provided in Draft Guidelines and Procedures for The Implementation Of The Regulations on Competition in Air Transport Services within Africa.

294. Finally, the Draft Regulation on Protection of Consumers is provided to enable passengers on the African continent be covered by a decent set of specialised protection.

9 APPENDIXES TO THE REPORT

This section contains Appendixes to this report.

Appendix 1: Draft Regulation on Procedure to be Applied by the Executing Agency for the Issuing of Opinions, Recommendations, Decisions and Guidance Material (“Rulemaking Procedure”)

Appendix 2: Draft Regulations on Competition in Air Transport within Africa

Appendix 3: Guidelines and Procedures for The Implementation Of The Regulations on Competition in Air Transport Services within Africa

Appendix 4 Regulation on Protection of Consumers

Appendix 5: Draft Regulation on Dispute Settlement Mechanisms Relating To the Implementation of the Yamoussoukro Decision

ANNEX 1: ANNEXES TO THE YAMOUSSOUKRO DECISION

(INTEGRATING ORIGINAL ANNEXES 1 (a), (b), (c) and 2)

ANNEX 1(a)

Form of Declaration of Commitment¹⁹ on the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of access to air transport markets in Africa

I, [name of the Minister in charge of civil aviation] representing the Government of [insert name of country] and in reference to the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of access to air transport market which was endorsed by the 36th ordinary Session of the Assembly of Heads of State and Government of the OAU as published in *the Official Journal No6 of the African Economic Community covering Decision of the fourth ordinary session of the Assembly of heads of State and government.*

By this Declaration of commitment, I declare that my country is bound by the Decision to liberalize the access to air transport market in Africa in its entirety and will fully implement the said Decision as party thereto.

I hereby inform that my government has taken all the necessary administrative measures to give full effect to this Declaration.

Our rights and obligations under the said Decision shall be effective 30 days after the receipt by you of this Declaration.

Done at.....on.....

For the Government of [Insert name]

By:[..... signature.....]

Its:[..... [insert title of signatory.....]

¹⁹ This form is to be used by State Parties that are not parties to the Abuja Treaty and wish to be parties to the Decision.

ANNEX 1(b)

Form of Declaration of Commitment²⁰ on the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of access to air transport markets in Africa

I, [name of the Minister in charge of civil aviation] representing the Government of [insert name of country] and in reference to the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of access to air transport market which was endorsed by the 36th ordinary Session of the Assembly of Heads of State and Government of the OAU as published in *the Official Journal No6 of the African Economic Community covering Decision of the fourth ordinary session of the Assembly of heads of State and government.*

By this Declaration of commitment, I declare that my country is bound by the Decision to liberalize the access to air transport market in Africa in its entirety and undertake to fully implement the said Decision as party thereto, except to the extent provided below for a maximum transitional period of [*insert period but not to exceed two years from date of declaration*]:

2. Grant of traffic Rights

1.1 In accordance with the provisions of paragraph 3.2 of Article 3 of the said Decision, I commit my country to grant during the transitional period fifth freedom traffic to the designated airlines of States Party on the following basis:

- (a) grant and receive unrestricted fifth freedom on sectors where, for economic reasons, there are no third and fourth freedom operators; and
- (b) grant and receive a minimum of 20 percent [*or such other higher percentage*] of the capacity offered on the route concerned during any given period of time in respect to any sector where third and fourth freedom operators exist.

²⁰ This form is to be filled by States that are not parties to the Abuja Treaty and wish to be parties to the Decision with limitation of their commitment.

3. Other provisions

All other provisions of the Decision shall remain valid and be binding on us.

4. This Declaration shall terminate at the latest on [*insert date*] and thereafter we shall be bound to the fullest extent by the terms of the Decision.

5. With respect to matters covered by the foregoing paragraphs, my country confirms the understanding that during the transitional period the obligations of other States Party to grant any rights to us will be strictly equivalent to our commitment hereunder.

Done aton

For the Government of [*Insert name*]

By:[..... *signature*.....]

Its:[..... [*insert title of signatory*.....]

ANNEX 1(c)

Form of Declaration of Commitment²¹ on the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of access to air transport markets in Africa

By this Declaration of commitment, I [insert name of the minister] representing the Government of the Republic of [insert name] declare that my country is bound by the Decision to liberalize the access to air transport market in Africa in its entirety and will fully implement the said Decision as party thereto, except to the extent provided below for a maximum transitional period of [*insert period but not to exceed two years from date of declaration*]:

1. Grant of traffic Rights

1.1 In accordance with the provisions of paragraph 3.2 of Article 3 of the said Decision, we commit ourselves to grant during the transitional period fifth freedom traffic to the designated airline of State Parties on the following basis:

- (a) grant and receive unrestricted fifth freedom on sectors where, for economic reasons, there are no third and fourth freedom operators; and
- (b) grant and receive a minimum of 20 percent [*or such other higher percentage*] of the capacity offered on the route concerned during any given period of time in respect to any sector where third and fourth freedom operators exist.

2. Other provisions

All other provisions of the Decision shall remain valid and be binding on us.

3. This Declaration shall terminate at the latest on [*insert date*] and thereafter my Government shall be bound to the fullest extent by the terms of this Decision.

4. With respect to matters covered by the foregoing paragraphs, my country [insert the name] confirm the understanding that during the transitional period the obligations of other States Party to grant any rights to us will be strictly equivalent to our commitment hereunder.

²¹ This form is to be filled by States that are parties to the Abuja Treaty who wish to limit the extent of their commitment.

5. I hereby inform that my Government has taken all the necessary administrative measures to give full effect to this Declaration.

6. Our rights and obligations under the said Decision shall be effective 30 days after the receipt by you of this Declaration.

Done at.....on.....

For the Government of [*Insert name*]

By:[..... *signature*.....]

Its:[..... *insert title of signatory*.....]

ANNEX 2

DUTIES AND RESPONSIBILITIES OF THE MONITORING BODY

1. Terms of Reference

The Monitoring Body, as established under Article 9 of this Decision, shall have the following duties and responsibilities:

- a) Prepare, for adoption by the sub committee on Transport, the relevant annexes to the Decision;
- b) Formulate proposals on studies, seminars, workshops and other measures aimed at enhancing and updating air transport services in Africa;
- c) Use, if necessary, experts to undertake studies related to the implementation of the Decision;
- d) Provide, on request, to interested organization and members State, technical advises for the implementation of the Decision.
- e) Receive declarations made in accordance with the Decision, notification of withdrawals of any declaration of complaints and requests and shall inform the Depository accordingly;
- f) State its views on any disputes resulting from the application and/or interpretation of the Decision and recommend solution to the dispute;
- g) State, on request of States party, its views on predatory and unfair competition practices;
- h) Request the competent national and international bodies for the support required to carry out studies, seminars, work programs and other measures aimed at enhancing and updating air transport services in Africa;
- i) Assist AUC to organize the meeting of the sub committee on Transport for matters specific to air transport.
- j) Analyse and plan for the periodic review of the Decision;

k) Develop and formulate a coordinated implementation programme of the Yamoussoukro Decision between and within sub-regions.

2. 2. Seat of the Committee

The seat of the Monitoring Body will be within AUC and ECA is designated to serve as secretary during the meetings.

3. Meeting

The Monitoring Body will meet at least once a year.

4. Funding

Participation in meetings of the Monitoring Body will be funded by each participating organization.

Other activities of the Monitoring Body could be financed from external sources.

9.1 Appendix 2: Draft Regulations on Competition in Air Transport Services within Africa

<p style="text-align: center;">DRAFT ANNEX 5 OF THE YAMO USSOUKRO DECISION: Draft Regulations on Competition in Air Transport Services within Africa</p>

Table Contents

CHAPTER ONE: CITATION, DEFINITION, OBJECT AND SCOPE OF APPLICATION

Article 1 Citation

Article 2 Definitions

Article 3 Object and Scope of Application

CHAPTER TWO: PROHIBITED PRACTICES, AGREEMENTS AND DECISIONS

Article 4 Anti- Competitive Practices, Agreements and Decisions

Article 5 Abuse of Dominant Position

Article 6 Non-discrimination in national legislation and administrative measures

Article 8 Exemptions and Safeguard Measures

CHAPTER THREE: ENFORCEMENT, INVESTIGATION NEGOTIATION, ARBITRATION AND JUDICIAL REVIEW

Article 9 The joint Competition Authority

Article 10 Complaints

Article 11 Investigation and Procedural Fairness

Article 12 Hearing of the Parties Concerned

Article 13 Outcome of Complaint

Article 14 Provisional Measures

Article 15 Cooperation with State Party Authorities and Access to Information

Article 16 Penalties

Article 17 Review by the Court of Justice and Tribunal

Article 18 Dispute Settlement

Article 19 Professional secrecy

Article 20 Publication of decisions

Article 21 Implementation provisions

Article 22 Amendments

Article 23 Entry into Force

PREAMBLE

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

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

WHEREAS the Decision relating to the implementation of the Yamoussoukro Declaration concerning the liberalization of air transport markets access in Africa of 14th November 1999, was approved by the Conference of Heads of State and Government of OAU and signed by the current Chairman in Lome on 12th July 2000;

WHEREAS the African Union Commission's Statutes were adopted by the African Union Conference in Durban (South Africa) on 10th July 2002;

WHEREAS The Decision of the Conference of Heads of States and Government of the African Union adopted on 11 May 2007 establish the Executing Agency of Yamoussoukro Decision;

WHEREAS the Convention on International Civil Aviation (ICAO), signed in Chicago (United States of America) on 7th December 1944 and its annexes as well as the legal instruments of the international air law are applicable to State Parties;

WHEREAS further the Resolution on the follow-up of the implementation of the Yamoussoukro Decision of 1999, was adopted by the Ministers responsible for air transport of Member States of the African Union, in Sun City (South Africa) on 19th May 2005;

WHEREAS further the resolution on air safety in Africa, was adopted by the Ministers responsible for air transport of Member States of the African Union, in Libreville (Gabon) on 19th May 2006;

MINDFUL OF the necessity to speed-up the full implementation of the Yamoussoukro Decision, for the purpose of giving a boost to the African airlines' operations and facing up to the challenges of the globalization of international air transport;

DESIROUS OF ensuring fair opportunity on a non-discriminatory basis for the designated African airlines, to effectively compete in providing air transport services within their respective territories.

HEREBY MAKE THE FOLLOWING REGULATIONS:

CHAPTER ONE
PURPOSE, DEFINITIONS, OBJECTIVES AND THE SCOPE OF APPLICATION

Article 1: Citation

These Regulations shall be cited as “Regulations on Competition in Air Transport Services within Africa.”

Article 2: 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 co-operation activities of its members.

Article 3: 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 4: 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 3(a) of this Article and Article 8 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 5: 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 6: 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 7: 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 8: 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 4 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 Chapters 1 and 2 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 8(3) 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 7 of the [Draft 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 8(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 9: 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 Chapter Two;
- d) granting, refusing or revoking exemptions in terms of Article 8;
- e) reviewing legislation or administrative measures of Member States in terms of Article 6;
- 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 10

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 11: 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 12

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 13

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 14

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 15

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 16

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 17

Review of the Decisions of the Executing Agency

1. 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 18

Dispute Settlement among State Parties

1. If any dispute arises between State Parties relating to the interpretation or application of these

Regulations, the State Parties concerned shall have recourse to Part Two of the Dispute Resolution Regulation

Article 19

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 20

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 21

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 7;
- b) rules of procedure on exemptions granted in terms of Article 8;
- c) the standard form, content and other details pertaining to:
 - (i) applications submitted in terms of Article 8; and
 - (ii) complaints submitted in terms of Article 10 and outcomes of complaints in terms of Article 13;
- d) the rules on hearings provided for in Article 12;
- e) penalties imposed in terms of Articles 16;
- f) guidelines and rules of procedure for the implementation of these Regulations; and
- g) guidelines dealing with frivolous complaints.

Article 22

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 23

Entry into Force

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

9.2 Appendix 3: Guidelines and Procedures for The Implementation Of The Regulations on Competition in Air Transport Services within Africa

<p style="text-align: center;">DRAFT ANNEX 6 TO THE YAMMOUSSOUKRO DECISION: GUIDELINES AND PROCEDURES FOR THE IMPLEMENTATION OF THE REGULATIONS ON COMPETITION IN AIR TRANSPORT SERVICES WITHIN AFRICA</p>

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:

Article 1

The following airline industry standards shall normally not be considered as a violation of Article 4 of the Competition Regulations and shall be presumed excepted under Article 4 (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 non-discriminatory 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 4 of the Regulations, save where an exemption is obtained from the relevant authority under Article 8 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 non-discriminatory 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).

Article 2

The following shall apply to the implementation of State subsidies under the terms of Articles 7 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.

Article 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 6 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.

Article 4

Applications by any undertaking, or association of undertakings to the EXECUTING AGENCY for exemptions under Article 8(1) of the Regulations shall be made using Form A provided for in the Schedule to these Guidelines, Provisions and Procedures.

Article 5

In addition to the information and procedures contained in Form A of the Schedule mentioned in Article 6, the relevant authority:

- a) shall render decisions on applications for exemptions under Article 8 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 5 of the Regulations.

Article 6

Where a State Party wishes to apply to the relevant authority to approve safeguard measures under Article 8(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

Article 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 8, 9, 10, 11, and 12 of these Guidelines, Provisions and Procedures.

Article 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 9 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 14 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 14 of the Competition Regulations and the right to have the decision of the Executing Agency under Article 11 and any penalties reviewed under Article 17 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 16 of the Competition Regulations, and the right to have the decision of the Executing Agency under Article 13 and any penalties reviewed under Article 17 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.

Article 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 defence; 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.

Article 10

The Executing Agency shall, in making decisions in accordance with Article 13 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 13(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 16 of the Regulations;
- d) in the event of a prohibited subsidy under Article 7 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 8 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 13(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 21(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 13(3) of the Regulations.

Article 11

Where the Executing Agency is of the opinion that provisional measures must be ordered in terms of Article 14 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.

Article 12

Where, in terms of Article 15 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.

Article 13

In imposing penalties under Article 16 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 4 and/or 5 of the Regulations, or do not comply with a cease and desist order under Article 13 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 8(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 19 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 8(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 19 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 12 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 10 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 13 (cease and desists orders) and/or Article 16 (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 19 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 10(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 19 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 16 of the Regulations;

(e) The undertaking (or association of undertakings) against whom a complaint has been made be entitled to a hearing under Article 12 of the Regulations;

(f) The Executing Agency shall endeavour to render a decision on the complaint under Article 13 of the Regulations (cease and desist orders) and/or Article 16 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):

9.3 Appendix 4: Regulation on Protection of Consumers

**DRAFT ANNEX 7 TO THE YAMMOUSSOUKRO DECISION:
Regulation on Protection of Consumers**

Contents

Formatted: English (U.S.)

Preamble

Article 1 – Citation

Article 2 – Definitions

Article 3 – Scope of application of the Regulations

Article 4 – Objectives and principles

PART ONE - CONSUMER LOSSES

Article 5 - Insolvency

PART TWO - PROHIBITIONS

Article 6 – Prohibitions: Unfair and deceptive practices

Article 7 - Obligations of Service Providers

PART THREE - OBLIGATIONS ON SERVICE PROVIDERS

Article 8 - Maintaining adequate third party insurance cover

Article 9 – Non-Discrimination

Article 10 - Telephone and Email contact

Article 11 - Information to the consumer

Article 12 - Complaints Procedures

Article 13 – Filing of advanced flight and Passenger Information

Article 14 - Compliance with Warsaw Liability Regimes

Article 15 - Denied Boarding

Article 16 - Delay

Article 17 - Cancellation of Flight

Article 18 - Downgrading

Article 19 – Travel Agents and Package Tour Operators

Article 20 - Airport Operators

PART FOUR - RIGHTS OF THE CONSUMER

Article 21 – Right to reimbursement

Article 22 - Right to be re-routed

Article 23 - Right to compensation

PART FIVE - ADMINISTRATION

Article 24 - Administrative Procedures

Article 25 - Investigation

Article 26 - Determination of Complaints

Article 27 - Penalty

PART SIX - MISCELLANEOUS

Article 28 - Duty of Care

Article 29 - Service providers right of redress

Article 30 - Review by the Executing Agency

Article 31 - Entry into Force

Draft
Regulation on Protection of Consumers

Preamble

WE, African Ministers of Transport, meeting in Malabo, Republic of Equatorial Guinea, from 7 to 11 April 2014, on the occasion of the First Meeting of the Sub Committee of the Specialised Technical Committee on Transport, Intercontinental and Interregional Infrastructure, Energy and on the theme: Speeding-up transport programme delivery for facilitating Africa's economic growth ;

Considering Article 9.6 of the Council Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa (the Yamoussoukro Decision) adopted by Council on (date) under CM/2178 (LXX11) as endorsed by the Assembly of Heads of State and Government of the under AHG/OAU/AEC/Dec.1(IV) and which entered into force on 12 August 2000;

Recalling that the African Ministers Responsible for Air Transport, meeting in Sun City, South Africa, from 18 to 19 May 2005 expressing serious concerns about the inordinate delay in the implementation of the Decision, and taking note of progress some states have made in that regard, called for measures that will ensure effective implementation including the establishment of the African Air Transport Executing Agency (Executing Agency) provided for in the Yamoussoukro Decision under the auspices of the African Union;

Observing that there is a need to strike a balance between, on the one hand, the right of airlines to operate efficiently in a liberalised and increasingly competitive market and the right of the consumer to be assured of sufficient protection and information of his rights;

Recognising the need to assist the travelling public through time saved by the legitimate (non-targeted) passenger while undergoing normal arrival formalities and thereby enhance quality of travel;

Noting that passengers suffer considerable delays, overbookings, flight cancellations and often live in uncertainties;

Concerned that the increasingly liberalised environment requires the protection of customers on the African continent;

HAVE ADOPTED THIS REGULATION:

Article 1 – Citation

These Regulations shall be cited as "*Regulation on Protection of Consumers, provision of an African Air Transport Fund and liability of service providers in passenger air transport services*".

Article 2 – Definitions

For the purposes of this Regulation, the following expressions shall mean

'airport' means any area of land especially adapted for the landing, taking-off and manoeuvres of

aircraft, including the ancillary installations which these operations may involve for the requirements of aircraft traffic and services including the installations needed to assist commercial air services

'Airlines', unless the context otherwise requires include eligible airlines, non-eligible African Airlines, and non African airlines as defined in these Regulation

'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee');

'Consumer Protection Agency' means the institution or organisation authorised by this Regulation to regulate consumer protection under the Yamoussoukro Decision, by the regional economic communities or by state parties

'Eligible airline' mean any airline licensed duly licensed by a State Party and Certificated as an eligible airline to operate under the terms of the Yamoussoukro Decision and actually operating the flight in question under these regulations.

'Ground handling' means the services provided to airlines at airports and comprise the following sub-categories:

Passenger handling comprises any kind of information and assistance including those provided to arriving, departing, transfer or transit passengers, including checking tickets and travel documents, registering baggage and carrying it to the sorting area.

Baggage handling comprises handling baggage in the sorting area, sorting it, preparing it for departure, loading it on to and unloading it from the devices designed to move it from the aircraft to the sorting area and vice versa, as well as transporting baggage from the sorting area to the reclaim area.

Freight handling comprises physical handling of export, transfer and import freight, handling of related documents, customs procedures and implementation of any security procedure agreed between the parties or required by the circumstances;

Mail handling includes physical handling of incoming and outgoing mail, handling of related documents and implementation of any security procedure agreed between the parties or required by the circumstances.

Ramp handling comprises marshalling the aircraft on the ground at arrival and departure; assistance to aircraft packing and provision of suitable devices; communication between the aircraft and the air-side supplier of services; the loading and unloading of the aircraft, including the provision and operation of suitable means, as well as the transport of crew and passengers between the aircraft and the terminal, and baggage transport between the aircraft and the terminal; the provision and operation of appropriate units for engine starting; the moving of the aircraft at arrival and departure, as well as the provision and operation of suitable devices and the transport, loading on to and unloading from the aircraft of food and beverages.

Aircraft services comprise the external and internal cleaning of the aircraft, and the toilet and water services; the rearrangement of the cabin with suitable cabin equipment, the storage of this equipment.

Fuel and oil handling comprises the organization and execution of fuelling and refuelling operations, including the storage of fuel, also if adjacent to the airport, and the control of the

quality and quantity of fuel deliveries; the replenishing of oil and other fluids.

Aircraft maintenance comprises routine services performed before flight; non-routine services requested by the airline; the provision and administration of spare parts and suitable equipment; the request for or reservation of a suitable parking and/or hangar space.

Flight operations and crew administration comprise the preparation of the flight at the departure airport or at any other point; in-flight assistance, including re-dispatching if needed; post-flight activities; crew administration.

Surface transport comprises the organization and execution of crew, passenger, baggage, freight and mail transport between different terminals of the same airport, but excluding the same transport between the aircraft and any other point within the perimeter of the same airport and any special transport requested by the airline.

'licence' means a valid licence granted by the Civil Aviation Authority or its equivalent under valid Regulations of States Parties to an airline, a travel agent, a tour operator

'Non-eligible African airline' means any airline duly licensed by a State Party and authorised to operate international routes but has not been certificated as an eligible airline to operate under the terms of the Yamoussoukro Decision and actually operating the flight in question under these regulations.

'Non-African airline' means an airline licensed by a third party state and authorised by a state party to lift and put down passengers, cargo and mail in the territory of one or more state parties and actually operating the flight in question under these regulations.

'State Party' shall include 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

Article 3 – Scope of application of the Regulations

- (1) This Regulation shall apply to the implementation of Article 9.6 of the Yamoussoukro Decision
- (2) It prescribes rights of the passengers originating from or destined for the territory of a State Party and lays down responsibilities of airlines and other service providers
- (3) This Regulation shall not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. However, it shall apply to passengers having tickets issued under a frequent flyer programme or other commercial programme by an airline or tour operator.

Article 4 – Objectives and principles

The objective of these Regulations is to protect the consumer of air transport services provided in the territories of state parties of the Yamoussoukro Decision from suffering unfair treatment in the provision of services and lack of or inadequate information on services provided leading to a poor treatment.

PART ONE CONSUMER LOSSES

Article 5 – Interruption of services

(1) No airline, travel agency, consolidator, packaged tour operator, shall accept payment to lift passengers, mail and cargo from the territory of any state party into another state party or the territory of a state not party to the Abuja Treaty unless it has insurance coverage to fulfil the contract with consumers in case of interruption of services.

(2) The Executing Agency shall establish a framework for mitigating losses incurred by consumers resulting from the interruption of services by airlines, travel agents, consolidators and packaged tour suppliers.

(3) An airline, travel agent, package tour operator, consolidator or any other individual or organisation may not be permitted to accept payment for any service for air transportation, tour or tour component from a consumer, unless it has a valid insurance as required by Article 6.7 of the Yamoussoukro Decision.

(4)

PART TWO PROHIBITIONS

Article 6 – Prohibitions: Unfair and deceptive practices

(1) On the initiative of the Executing Agency, a Regional YD Authority, a State Party (hereafter, Consumer Protection Agency), or the complaint of a consumer, an association or associations of consumers, an eligible airline, a non-eligible African airline, a non-African airline, or a air ticket agent, and if the Executing Agency, the Regional YD Authority or the State Party considers it is in the public interest, it may investigate and decide whether an eligible airline, a non-eligible African airline, a non African airline or ticket agent has been or is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation.

If the Consumer Protection Agency in question, after notice and an opportunity for a hearing, finds that an airline or ticket agent is engaged in an unfair or deceptive practice, it shall order that eligible airline or ticket agent to stop the practice or method.

In enforcing this Article against an eligible airline, the Consumer Protection Agency may opt to apply Article 4 (1) of the [draft Competition Regulations].

(2) Subject to the power of the Consumer Protection Agency to review, the following are inherently unfair practices and in breach of paragraph 1 of this provision:

a) Misleading Advertising

- i. It shall be considered a misleading advertisement; an unfair marketing and deceptive practice for any seller of scheduled air transportation within, to or from any country in Africa, or of a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from any state party, to increase the price of that air transportation, tour or tour component to a consumer, including but not limited to an

increase in the price of the seat, an increase in the price for the carriage of passenger baggage, or an increase in an applicable fuel surcharge, after the air transportation has been purchased by the consumer, except in the case of an increase in a government-imposed tax or fee. A purchase is deemed to have occurred when the full amount agreed upon has been paid by the consumer.

- ii. No airline or travel agent shall charge or collect additional fare (whether taxes, commissions, brokerage fees, administrative charges, or any other fees) from passengers not expressly advertised, displayed in the marketing material or expressly communicated to the consumer at the initial inquiry displayed.

b) Disclosure Requirement for Sellers of Tickets for Flights

Where an eligible airline, a non-eligible African airline, a non-African airline, or a air ticket agent fails to disclose, whether verbally in oral communication or in writing in written or electronic communication, prior to the purchase of a ticket

- i. (A) the name of the air carrier providing the air transportation; and
- ii. (B) if the flight has more than one flight segment, the name of each air carrier providing the air transportation for each such flight segment.

c) Internet offers

In the case of an offer to sell tickets described in subsection (l) on an Internet Web site, disclosure of the information required by paragraph (1) shall be provided on the first display of the Web site following a search of a requested itinerary in a format that is easily visible to a viewer.

- d) It is an unfair and deceptive practice if an airline persistently denies boarding to passengers involuntarily, without requesting for volunteers or where so requested fails to allow a reasonable time for passengers to volunteer or persistently fails to pay the accepted amount of compensation.

- e) It is an unfair and deceptive marketing practice if an airline persistently denies checked-in passengers their right to sit on the seat classes they have paid for and / or have been assigned to them at check-in as a result of the imposition of a free seating policy.

- f) The Consumer Protection Agency shall monitor the terms, conditions and extent of compliance by airlines of their obligations under the Warsaw Convention applicable in any State Party. Where it is observed that any practice, conduct, policy or procedure adopted by an airline consistently falls short of the required obligations including but not limited to compelling consumers to accept compensation regimes less than what they are entitled to, imposing additional burdens calculated at or capable of frustrating their efforts to obtain compensation, or where compensation, though paid is paid under such terms as to nullify the usefulness of such compensation. Such practices shall be considered as unfair and deceptive practice.

- g) Failure by an eligible airline to obtain and, at all material times, maintain the required insurance cover shall be adjudged unfair practice and deceptive practice. The Consumer Protection Agency may demand that details of the insurance schedule and any amendments thereto be filed with it.

- h) A chronically delayed flight shall be considered as unfair and defective practice. Flights shall be considered chronically delayed flight as a flight by an airline, that is operated at least [X] (30) times in a calendar quarter and arrives more than 15 minutes late, or is cancelled, more than [xx] 70 percent of the time during that quarter.

Article 7 - Obligations of Service Providers

This section lays down general and specific obligations of service providers providing services directly to the passenger and includes airlines, tour operators, consolidator, travel agents, airport operators, Air Navigation Services Providers, Caterers and ground handling agencies whether operating as agents of one provider or not.

PART THREE

OBLIGATIONS ON SERVICE PROVIDERS

General Obligations

Article 8 - Maintaining adequate third party insurance cover

- (1) Each service provider shall at all material times maintain an insurance cover as required by the laws of the state party in which it operates, including but not limited to third party liability, and shall visibly display the insurance schedule or certificate at a reception visited by or accessible to passengers visiting the premises.
- (2) Where demanded by public officials inspecting the airline under Article 19 of the Executive Council Regulation on the Powers and Functions of the Executing Agency, the service provider shall demonstrate compliance with this Article by providing the officials with a deposit of an insurance certificate or other evidence of a valid insurance from a recognised third party insurance company.
- (3) The Executive Council may, on a proposal from the Executing Agency approved by the Council of Ministers for Air Transport in Africa adopt rules on insurance designed to benefit the end-consumer.

Article 9 – Non-Discrimination

- (1) Within the scope of application of this Regulation, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality, race, sex, age, colour, creed, physical ability, physical stature, shall be prohibited.
- (2) The Executive Council may, on a proposal from the Executing Agency and adoption by the Conference (Committee) of Ministers of Transport of the Subcommittee of Ministers responsible for civil aviation and after consulting the African Parliament adopt rules designed to prohibit such discrimination.

Article 10 - Telephone and Email contact

- (1) Airlines, tour operators, consolidators and agents shall be obliged at all material times to obtain and hold a telephone number or email address of the passenger or, in the case of a group, the group leader or the person responsible for arranging the booking or for payment of

the booking, and where more than one mode of communication is offered, obtain from the person concerned the preferred mode of communication in emergencies.

(2) Subject to the data protection rules applicable in the territories of state parties, the contact details, including telephone number, fax or email address obtained shall only be used to contact the passenger to rearrange a flight, inform him of any possible delay or arrange for alternative means of transport or pass any essential information relevant to the flight in question.

(3) Where a passenger is unable to offer either a telephone number or an email for any destination, the airline shall inform him of a telephone number at which the local office at the destination in question may be reached, in which language he can contact the local office and at what times the office will be open. Where such information is available on the website of the airline, it shall suffice that a reference is made either on the ticket, or the website, at the airport check-in desk, on board each flight, at the destination airport or in a leaflet made available to each passenger. In applying this provision the airline shall pay particular attention to the language barriers in the territories of the state parties, and any difficulty any particular passenger may have in reading in any particular language.

(4) Service providers concerned shall ensure that they utilise the preferred mode of contact of each passenger in cases involving anticipated cancellations, overbooking, delays, save that where the notice is in less than [12] hours of the departure of the flight in question, unless the passenger has confirmed that he is able to retrieve his emails on a mobile device, such notice shall be communicated by phone or SMS.

(5) The burden of proof as to whether the preferred details of a passenger was obtained and when it was used to contact the passenger or alternatively whether alternative means of communication has been furnished and under what circumstances shall rest with the service provider in question.

Article 11 - Information to the consumer

(1) The travel agent, airline, tour operator, and the ground handling agent shall be obliged at the time of purchase of the ticket and at check-in by the passenger shall be obliged to inform the passenger in a language understood by the passenger of his rights in the following situations:

- a. to be informed in his own language of his obligation to supply a means of communication for emergencies;
- b. to be informed at least 12 hours before the flight of any planned cancellations or long term delays anticipated;
- c. to be informed of the airline's obligations in case of denied boarding, free seating, flight cancellation, delayed flight in particular in relation to alternative solutions and compensation
- d. to request for documents, policies procedures on insurance, compensation, assistance, complaints procedures in line with these Regulations;
- e. as an illiterate and/or visually impaired, and/or physically challenged to appropriate alternative means of communication;
- f. Any other information the consumer protection agency may demand to be displayed to the passenger under the terms of this provision.

(2) Airlines, travel agents, tour operators, airports, cargo handling agents, shall visibly display information at their premises, on their websites, marketing materials and brochures stating the rights of the consumer in relation to specific services provided by them to the consumer.

(3) Information displayed under the terms of sub-paragraph 2 of this Article shall include (a) mission of the institution with specific regard to customer service, (b) right of the client to specific information regarding the services provided by the institution (c) right to complain against the institution in case of a failure of the service provider in question to meet the minimum service standard, (d) complaints procedures indicating the agency to whom the complaint may be submitted, and e) right to specific redress including but not limited to compensation as prescribed in this regulation and its Appendixes.

Article 12 - Complaints Procedures

Every service provider shall establish a consumer relations desk and particularly at every airport it operates and shall appoint an officer to manage the desk for the purpose of receiving, resolving and channelling complaints to their Head offices, as well as liaising with the Civil Aviation Authority of the state party where necessary.

Article 13 – Filing of advanced flight and Passenger Information

(1) Airlines shall transmit in advance of arrival into the territory of a state party information on each flight and on each passenger carried on board into an airport of a state party whether or not the passenger in question is destined to enter the state.

(2) The advanced flight and passenger information which shall be filed in accordance with national legislation of each state party shall be transmitted to the authorised recipient notified in schedule of this regulation and shall contain no less than the standard set of information notified numbers 1 and 2 of schedule 1. States party who require further information listed in number 3 of schedule 1 shall submit a specific requirements list to the airline.

(3) The Executing Agency shall liaise with states parties and propose further measures to the Sub Committee on Transport of the Specialised Technical Committee (STC) No.4 on Transport, Intercontinental and Interregional Infrastructure, Energy and Transport. State parties may submit formal complaints to the Executing Agency against an airline which persistently fails to supply the required advanced information.

(4) Without prejudice to paragraph 3 of this Article, the Executing Agency shall conduct a thorough review within 5 years of entry into force of these Regulations including but not limited to the need for a continental or regional administration of the data.

Article 14 - Compliance with Warsaw Liability Regimes

Airlines shall strictly comply with compensation requirements under the Warsaw Liability as applicable to each passenger and shall not impose any onerous terms and conditions on the passenger or otherwise apply policies and procedures or make any such demands of the consumers as is calculated or may be interpreted as limiting or having the effect of limiting its relevant liabilities.

Article 15 - Denied Boarding

(1) An airline shall, in overbooking a flight, utilise intelligent market analysis tools to assist it analyse regular loading patterns which may eventually result in certain flights being oversold but shall take all necessary measures including offering passengers SMS or online boarding facilities.

(2) When, upon utilising pre-boarding facilities an airline reasonably expects to deny boarding on a flight, it shall, (where such can be established in excess of six hours before the flight, contact passengers by phone, SMS or email, where a passenger has offered to accept email in emergency communication) first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the airline but at any rate not which shall not be lower than the compensation scheme applied in **Article 23** to these Regulations. Airlines shall, in this regards, pay particular attention to passengers travelling furthest from the departing airport as a measure of preventing unnecessary hardship in aborted and shall for this matter compile information on which part of the territory passengers are likely to travel from.

(3) In the event of the airline having to deny boarding at check-in or during boarding on the day of the flight, the airline shall be permitted to make discrete requests for volunteers subject to requested volunteers being informed of their rights as prescribed under Article (6 (iv), above under right of information).

(4) If an insufficient number of volunteers come forward, the airline may then deny boarding to passengers against their will subject to the following conditions:

- a) that the smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily;
- b) that passengers are compensated in accordance with its compensation scheme which shall not be lower than the compensation scheme applied in **Article 23** to these Regulations

Article 16 - Delay

When an airline reasonably expects a flight to be delayed beyond its scheduled time of departure:

- a. between two and four hours the airline shall:
 - i. inform the passengers every 45 minutes of the earliest time they will be expecting to depart, the specific reasons for the delay and, where the flight that is supposed to last for less than 3 hours, informed of their right to reschedule their flight without incurring any penalties and travel within an agreed period on the same route on a flight operated by the same airline;
 - ii. refreshments including water, soft drinks, confectioneries or snacks;
 - iii. two international telephone calls, SMS or e-mails, and
 - iv. that an announcement will be made at their airport of arrival of the new estimated time of arrival.
- b. for four hours or more, the airline shall:
 - i. inform the passengers every 45 minutes of the earliest time they will be expecting to depart, the specific reasons for the delay and, where the flight is supposed to last for less than 2 hours, informed of their right to reschedule the flight without incurring any

- penalties and travel within an agreed period on the same route on a flight operated by the same airline;
- ii. refreshments including water, soft drinks, confectioneries or snacks;
 - iii. a meal;
 - iv. hotel accommodation;
 - v. two international telephone calls, SMS or e-mails, and
 - vi. transport between the airport and place of accommodation (hotel or other accommodation); and
 - vii. that an announcement will be made at their airport of arrival of the new estimated time of arrival.
- c. when the reasonably expected time of departure is at least six hours after the time of departure previously announced, the airline shall:
- i. inform the passengers of their right to immediate reimbursement of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return flight to the first point of departure, at the earliest opportunity;
 - ii. re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
 - iii. re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.
- d. In applying this provision the following additional terms shall apply when arrangements are made under paragraphs a – c above:
- i. In instances where a passenger opts to reschedule a flight under paragraph a (1) or b(1) above, the airline shall ensure itself of the availability of seats on the flight the passenger is requesting.
 - ii. When an airline offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.
 - iii. The airline shall, at all materials times, prioritize the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied minors.

Article 17 - Cancellation of Flight

- (1) In case of cancellation of a flight,
- a) Where the decision to cancel the flight is taken less than 24 hours before the scheduled departure of the flight in question and the passengers are informed at the airport, or where

the passenger on a connecting flight may have begun the earlier part of his flight hours before the decision to cancel the flight and may only know of the cancellation on arrival at the airport, the airline shall:

- i. inform the passengers of the specific reasons for the cancellation and, inform them of their rights under this provision including but not limited to:
 - (i) Right to cancel their booking in accordance
 - (ii) Right to be re-routed or offered an alternative means of transport, where convenient to the passenger in question, and
 - (iii) Right to compensation.
- ii. Offer refreshments including water, soft drinks, confectioneries or snacks;
- iii. two international telephone calls, SMS or e-mails

b) Where the decision to cancel is taken at least 24 hours before the flight the airline shall immediately contact passengers affected by the decision, offer them the option not to travel to the airport if they have not already set off and advise them of their rights under this provision including but not limited to:

- i. Right to cancel their booking
- ii. Right to be re-routed or offered an alternative means of transport, where convenient to the passenger in question, and
- iii. Right to compensation.

(2) When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport which may include but not be limited to travel on the same airline but on a different date or time whether or not from the same airport, travel on another airline from the same airport on a different date or time whether or not from the same airport, travel on another mode of transport, where reasonable and convenient to the passenger.

(3) Passengers shall have the right to compensation by the airline for a cancelled flight unless:

- a) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
- b) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
- c) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

(4) An airline shall not be obliged to pay compensation in accordance with Article 22, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

(5) The burden of proof concerning the questions as to whether and when the passenger was informed of the cancellation of the flight or of the alleged extraordinary circumstances shall rest with the airline.

Article 18 - Downgrading

(1) If an airline places a passenger in a class lower than that for which the ticket was purchased, including but not limited to operating a free seating policy, it shall within seven days reimburse

- (a) 25 % of the price of the ticket for all flights of 3 hours duration or less, or
- (b) 50 % of the price of the ticket for all flights of more than 3 or more hours duration.

(2) If an airline places a passenger in a class higher than that for which the ticket was purchased, it shall not be entitled to any supplementary payment.

Article 19 – Travel Agents and Package Tour Operators

Subject to the general obligations in this Part of the Regulations, where applicable the travel agent and or tour operator, in a contract that involves air travel provided by an airline as well as other services including but not limited to accommodation and other tourist services, shall:

- a) provide the consumer, in writing or any other appropriate form, before the contract is concluded, with general information on passport and visa requirements applicable to nationals of the State Party concerned and in particular on the periods for obtaining them, as well as with information on the health formalities required for the journey and the stay;
- b) provide the consumer, in writing or any other appropriate form, with the following information in good time before the start of the journey:
 - i. the times and places of intermediate stops and transport connections as well as details of the place to be occupied by the consumer;
 - ii. the name, address and telephone number of the organizer's and/or retailer's local representative or, failing that, of local agencies on whose assistance a consumer in difficulty could call.
 - iii. Where no such representatives or agencies exist, the consumer must in any case be provided with an emergency telephone number or any other information that will enable him to contact the agent;
 - iv. in the case of journeys or stays abroad by minors, information enabling direct contact to be established with the child or the person responsible at the child's place of stay;
 - v. information on the optional conclusion of an insurance policy to cover the cost of cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness.
 - vi. Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his

intention before departure, to a person who satisfies all the conditions applicable to the package. The transferor of the package and the transferee shall be jointly and severally liable to the organizer or retailer party to the contract for payment of the balance due and for any additional costs arising from such transfer.

Article 20 - Airport Operators

Subject to the general obligations in this Part of the Regulations, Passengers and all other persons attending the airport in any capacity excluding those waving off, dropping off, picking up or welcoming passengers, shall, subject to national security and safety legislation, be entitled to:

- a) Visible notices on passengers rights
- b) decent and healthy toilet facilities
- c) reasonable seating space before check-in, after security and passport checks and while waiting for arriving or departing aircraft, and
- d) reasonably clean and safe environment

PART FOUR RIGHTS OF THE CONSUMER

Article 21 – Right to reimbursement

(1) When reference is made in this Regulation to the right of the passenger to reimbursement, reimbursement shall be made within seven days of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return flight to the first point of departure, at the earliest opportunity.

(2) The reimbursement shall be paid in cash, by electronic bank transfer, bank orders or, with the signed agreement of the passenger, in travel vouchers and/or other services.

Article 22 - Right to be re-routed

Where passengers are offered the right of re-routing, passengers shall have the choice of:

- reimbursement within seven days of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
- a return flight to the first point of departure, at the earliest opportunity and accommodation;

- re-routing, under comparable transport conditions, to their final destination at the earliest opportunity and accommodation; or

a) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

b) When, in the case where a town, city or region is served by several airports, an airline offers a passenger a flight to an airport alternative to that for which the booking was made, the airline shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.

Article 23 - Right to compensation

(1) Where reference is made to this Regulation to the passenger's right to compensation, other than compensation pursuant to the Warsaw Convention as applicable in the state party, passengers shall receive compensation amounting to:

- a) USD 250 for all flights with an estimated duration of 3 hours or less for the entire flight;
- b) USD 400 for all flights an estimated duration between 3 hours and 6 hours for the entire flight;
- c) USD 600 for all flights with an estimated duration of more than 6 hours for the entire flight.

(2) In determining the duration of the flight, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time and shall include all scheduled stop over, transit or any other scheduled break in the flight.

(3) When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 22, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked

- a) by two hours, in respect of all flights of 3 hour duration or less; or
- b) by three hours, in respect of flights lasting between 3 and 6 hours; or
- c) by four hours, in respect of all flights in excess of 6 hours,

the airline may reduce the compensation provided for in paragraph 1 by 50%.

(4) The compensation shall be paid in cash, by electronic bank transfer, bank orders or, with the signed agreement of the passenger, in travel vouchers and/or other services.

PART FIVE

ADMINISTRATION

Article 24 - Administrative Procedures

(1) Each Civil Aviation Authority shall appoint a customer relations officer at each airport to whom complaints may equally be addressed.

(2) The Executing Agency and the Regional YD Authority shall establish consumer protection

units and advertise their details, including but not limited to their contact details and their procedures on a website dedicated to the implementation of this regulation.

(3) A complainant may make a complaint to the Civil Aviation Authority against a service provider, or failing a satisfactory resolution to the RYA or the Executing Agency, in relation to the breach of these Regulations by filling and submitting a Complaint Form, after the consumer must have notified the service provider in question of such a breach and the complaint remains unresolved.

(4) A complaint may be made in writing as in the prescribed form and transmitted to the Civil Aviation Authority.

(5) Every complaint shall be accompanied by:

- a) A copy of the airline ticket;
- b) A copy of the letter to the air service provider in question stating a claim for breach of the regulations;
- c) any response or responses or correspondence thereto;
- d) any other relevant document(s).

(6) Where a Complaint has been made in a representative capacity, the representative shall provide the complainant's written authority to act on his or her behalf.

(7) Complainants can present a class action before the Civil Aviation Authority especially in relation to a service provider that owes them a duty of care under Article 25, but must appoint a representative for the class.

Article 25 - Investigation

(1) The Executing Agency, the RYA or the Authority shall cause an investigation to be carried out on the substance of the complaint and the response of the service provider within a reasonable period of time after the receipt thereof.

(2) In carrying out any assessment under these Regulations, an officer designated by the Authority shall have all the powers of investigation under national law or under the provisions of the Dispute Resolution Regulation, and in addition may request for submissions to be made by any interested person(s) in relation to a complaint;

(3) The Authority shall amongst other things:

- (a) Notify the Respondent that a request has been lodged under these rules;
- (b) Require the Respondent to respond to the complaint within 7 days;
- (c) Require the Respondent to describe the procedure it has taken to resolve the matter.

Article 26 - Determination of Complaints

(1) After every assessment, the investigator shall make an assessment report and shall make recommendations therein.

(2) Upon a consideration of the assessment report, the nature of the conduct alleged against the

Respondent, the extent of the claim by the complainant, public interest and other relevant factors, the Authority shall make a determination in one of the following respects:

- a) the complaint lacks merit pursuant to which the complaint would be struck out;
- b) the complaint is of such a nature as to advise the parties to resolve the dispute through mediation.
- c) the complaint is of such a nature as to be subjected to the Authority's administrative hearing procedure in accordance with national law.

(3) The Authority shall give notice of its determination to the interested parties.

Article 27 - Penalty

- (1) Any service provider that violates any provision of these Regulations shall, subject to national law, be liable to penalties imposed by the Authority.
- (2) The penalties imposed by the Authority under Section shall be dissuasive, proportionate to both the gravity of the case, and the economic capacity of the service provider concerned. The defaulter's compliance record shall also be considered.
- (3) It shall be unlawful for any service provider, their employees or agent to obstruct or prevent the Authority or any of its designated officers from carrying out investigations or refuse to provide information requested by the Authority, relating to any violation of these Regulations.
- (4) The Executive Council may, on a proposal from the Executing Agency and adoption by the Council of Ministers for Air Transport and after consulting the African Parliament adopt and maintain in place a schedule of penalties to be imposed for breach of provisions of this regulation.

PART SIX MISCELLANEOUS

Article 28 - Duty of Care

- (1) Consumers shall have no claim against air navigation service providers, airports, ground handling companies, travel agents, consolidators, cargo handling companies, freight forwarders, tour operators and other service providers for any delay, cancellation or overbooking of their flights or the failure by the airline to transport their cargo and or mail which delay, cancellation, overbooking or failure to transport cargo or mail is the direct action or omission of the airline.
- (2) Without prejudice to the generality of the paragraph 1 of this Article [7], service providers in a contractual relationship with the airline owe a duty of care to the consumer not to negligently or recklessly provide unsafe services to the airline as may be relied on by the airline without exceptional caution make the aircraft or the operation of the aircraft unsafe

and endanger the lives of passengers on board the aircraft or cause damage to cargo or mail on board the aircraft.

(3) The consumer shall, without prejudice to paragraph 2 of this Article, be required to prove the damage, the negligence or recklessness of the third party service provider and the causal relationship between defective service rendered to the airline and damage sustained.

(4) Consumers shall have no claim on any service provider for the delay, or cancellation of their flights or the failure by the service to transport or effect the transportation of their cargo and or mail which delay, cancellation, or failure to transport cargo or mail is the direct consequence of a natural disaster and over which no service provider shall have been able to control.

(5) Where, as a result of the provisions of this Regulation, two or more service providers are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

(6) The Executive Council may, on a proposal from the Executing Agency and adoption by the Council of Ministers for Air Transport and after consulting the African Parliament adopt appropriate rules on liability of service providers in relation to unsafe services.

Article 29 - Service providers right of redress

In cases where an airline pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any service provider, including third parties, in accordance with the law applicable in the state party. In particular, this Regulation shall in no way restrict the airline's right to seek reimbursement from a travel agent, ground handling company, airport operator, air navigation service provider, tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a travel agent or tour operator or a third party, other than a passenger, with whom an airline has a contract, to seek reimbursement or compensation from the airline in accordance with applicable laws.

Article 30 - Review by the Executing Agency

Within 2 years of entry into force of this Regulation, the Executing Agency shall report to the Council of African Ministers in charge of Transport on the operation and the results of this Regulation. The report shall be accompanied where necessary by legislative proposals.

Article 31 - Entry into Force

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

Schedule 1

In relation to Article 13 the following constitute the data to be supplied by each airline:

<u>Data relating to the flight</u>		
No.	Data Required	Data Description
1	Flight Identification	IATA Airline code and flight number
2	Scheduled Departure Date	Date of scheduled departure of aircraft based on local time of departure location
3	Scheduled Departure Time	Time of scheduled departure of aircraft (based on local time of departure location)
4	Scheduled Arrival Date	Date of scheduled arrival of aircraft (based on local time of arrival location)
5	Scheduled Arrival Time	Time of scheduled arrival of aircraft (based on local time of arrival location)
6	Last Place/Port of Call of Aircraft	Aircraft departed from this last foreign place/port of call to go to "place/port of aircraft initial arrival"
7	Place/Port of Aircraft Initial Arrival	Place/port in the country of destination where the aircraft arrives from the "last place/port of call of aircraft"
8	Subsequent Place/Port of Call within the country	Subsequent place/port of call within the country
9	Number of Passengers	Total number of passengers on the flight

<u>Data relating to each individual passenger :</u>		
(a) Core Data Elements as may be found in the Machine Readable Zone of the Official Travel Document		
1	Official Travel Document Number	Passport or other official travel document number
2	Issuing State or Organization of the Official Travel Document	Name of the State or Organization responsible for the issuance of the official travel document
3	Official Travel Document Type	Indicator to identify type of official travel document
4	Expiration Date of Official Travel Document	Expiration date of the official travel document
5	Surname/Given Name(s)	Family name and given name(s) of the holder as it appears on the official travel document.
6	Nationality	Nationality of the holder
7	Date of Birth	Date of birth of the holder
8	Gender	Gender of the holder
(b) Additional Data elements		
9	Visa Number	Number of the Visa issued
10	Issue Date of the Visa	Date of the Visa issuance
11	Place of Issuance of the Visa	Name of the place where the Visa was issued
12	Other Document Number Used for Travel	The other document number used for travel when the official travel document is not required
13	Type of Other Document used for Travel	Indicator to identify type of document used for travel
14	Primary Residence	
a.	Country of Primary Residence	Country where the traveller resides for the most of the year
b.	Address	Location identification such as street name and number
c.	City	City
d.	State/Province/County	Name of the State, Province, County, as appropriate
e.	Postal code	Postal code

15	Destination Address	
a.	Address	Location identification such as street name and number
b.	City	City
c.	State/Province/County	Name of the State, Province, County, as appropriate
d.	Postal code	Postal code
16	Place of Birth	Place of birth such as city and country
17	Traveller's Status	Passenger, Crew, In-transit
18	Place/Port of Original Embarkation	Place/port where traveller originates foreign travel, refer to 8.1.6
19	Place/Port of Clearance	Place/port where the traveller is cleared by the border control agencies
20	Place/Port of Onward Foreign Destination	Foreign place/port where traveller is transiting to, refer to 8.1.7
21	Passenger Name Record Locator Number (or unique identifier)	As available in the traveller's Passenger Name Record in the carrier's airline reservation system

Schedule 2

Details of Recipients of API Data and required mode of communication

Country	Main Contact Point	Receiving Authority	Address	Mode of Communication
People's Democratic Republic of Algeria				
Republic of Angola				
Republic of Benin				
Republic of Botswana				
Burkina Faso				
Republic of Burundi				
Republic of Cameroon				
Republic of Cape Verde				
Central African Republic				
The Republic of Chad				
Union of the Comoros				
Republic of the Congo				
Republic of Cote d'Ivoire				
Democratic Republic of the Congo				
Republic of Djibouti				
Arab Republic of Egypt				
Republic of Equatorial Guinea				
State of Eritrea				
Federal Democratic Republic of Ethiopia				
Gabonese Republic				
Republic of the Gambia				
Republic of Ghana				
Republic of Guinea				
Republic of Guinea-Bissau				
Republic of Kenya				
Kingdom of Lesotho				
Republic of Liberia				
Libya				

Republic of Madagascar				
Republic of Malawi				
Republic of Mali				
Republic of Mauritania				
Republic of Mauritius				
Kingdom of Morocco				
Republic of Mozambique				
Republic of Namibia				
Republic of Niger				
Federal Republic of Nigeria				
Republic of Rwanda				
Republic Arab Saharawi Democratic				
Democratic Republic of Sao Tome and Principe				
Republic of Senegal				
Republic of Seychelles				
Republic of Sierra Leone				
Somali Republic				
Republic of South Africa				
Republic of South Sudan				
Republic of The Sudan				
Kingdom of Swaziland				
United Republic of Tanzania				
Togolese Republic				
Tunisian Republic				
Republic of Uganda				
Republic of Zambia				
Republic of Zimbabwe				
Republic of Western Sahara				

9.4 Appendix 5: Regulation on Dispute Settlement Mechanisms Relating To the Implementation of the Yamoussoukro Decision

<p style="text-align: center;">DRAFT ANNEX 8 OF THE YAMO USSOUKRO DECISION: REGULATION ON DISPUTE SETTLEMENT MECHANISMS RELATING TO THE IMPLEMENTATION OF THE YAMO USSOUKRO DECISION</p>

- | | |
|-------------|---|
| Article 1. | Object |
| Article 2. | The List Error! Bookmark not defined. |
| Article 3. | Composition of the Boards of Appeal Error! Bookmark not defined. |
| Article 4. | Members of the Boards of Appeal |
| Article 5. | Exclusion and objection |
| Article 6. | Decisions subject to appeal |
| Article 7. | Persons entitled to appeal |
| Article 8. | Time limit and form |
| Article 9. | Revision of the original decision |
| Article 10. | Examination of appeals |
| Article 11. | Decisions on appeal |
| Article 12. | Actions before the Court of Justice |
| Article 13. | Procedures to be applied and effect of outcome of appeals |

THE CONFERENCE OF AFRICAN MINISTERS OF TRANSPORT

CONSIDERING the Constitutive Act of the African Union adopted in Lomé 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, approved by the Conference of Heads of State and Government of OAU and signed by the current Chairman in Lomé on 12th July 2000;

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

CONSIDERING the Decision EX. CI/Dec.369 (XI) of the Assembly of Heads of State and Government of the African Union establishing the Executing Agency of the Yamoussoukro Decision of 1999, hereinafter called the African Executing Agency of 27 July 2007;

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 African airlines operations and effectively meeting the challenges of globalisation of international air transport;

CONSIDERING that a considerable number of disputes arising from the implementation of the Yamoussoukro Decision are likely to be raised before the RYA of the regional economic communities, the Executing Agency or the Monitoring Body;

DESIROUS of resolving disputes in a speedy and cost effective fashion and utilising the dispute settlement measures provided for in the;

RECOGNISING the right of State Parties and airlines to have recourse to the courts and arbitration to resolve disputes that they opt to settle outside the ambit of the offices of the Executing Agency and or the Monitoring Body;

DESIROUS of using the mechanism of the office of the Executing Agency and the Monitoring Body dispute settlement mechanism as a means of settling through disputes through negotiation and or arbitration;

DESIROUS of developing a mechanism for disputes settlement through negotiation and arbitration between the Member States the designated African airlines and the consumers' associations within the African Union;

DESIROUS of utilizing the UNCITRAL Rules in effect as the basis for arbitration relating to any dispute, controversy or claim arising out of or relating to the Yamoussoukro Decision or the breach, termination, or invalidity thereof.

HEREBY DECIDES:

PART ONE

Article 1

Object

- 1 The object of this Part of these regulations is to provide for measures of resolving disputes arising from measures of the Executing Agency and the Monitoring Body.
- 2 States Parties and airlines may also opt to use these regulations to appeal against acts of the RYA of the regional economic communities.
- 3 Where appropriate, state parties and airlines in resolving their disputes may, in agreement with the executing agency, use this part of these regulations instead of part two.
- 4 Part One of these regulations is not meant to and shall at no time be used to obtain the interpretation of provisions of the Yamoussoukro Decision.

Article 2

The List

1. The qualifications required for the members of each Board of Appeal shall be determined by the Monitoring Body in consultation with the Legal Counsel of the African Union Commission and upon the advice of the Secretary General.
2. The List, which shall be submitted to the Pan-African Parliament for approval as members of the Board of Appeal and Arbitral Tribunal, shall be maintained by the Office of the Legal Counsel of the African Union.
3. Once approved, the members of the Boards of Appeal/Arbitral Tribunal may not be removed either from office or from the list during their respective terms, unless there are serious grounds for such removal and the Office of the Legal Counsel of the African Union, after obtaining the opinion of the Monitoring Body may recommend to the Pan-African Parliament for the removal of a member.

Article 3

Composition of the Boards of Appeal

1. A Board of Appeal shall consist of a Chairperson and two other members.
2. The Chairperson and the two members shall have alternates who will represent them in their absence.
3. The Chairperson, the other members and their respective alternates shall be appointed by the Legal Counsel of the African Union Commission from the list of qualified candidates drawn up under Article 3 of this Regulation.

4. Where the Board of Appeal considers that the nature of the appeal so requires, it may call up to two further members from the aforesaid list for that case.

Article 4

Members of the Boards of Appeal

1. The term of office of the members of the Boards of Appeal, including their Chairperson and their respective alternates, shall be five years. This term shall be renewable.
2. The members of the Boards of Appeal shall be independent. In making their decisions they shall not be bound by any instructions.
3. The members of the Boards of Appeal may not perform any other duties in the Agency or the Monitoring Body. The function of the members of the Boards of Appeal may be a part-time function.

Article 5

Exclusion and objection

1. Members of the Boards of Appeal may not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal.
2. If, for one of the reasons mentioned in paragraph 1 or for any other reason, a member of a Board of Appeal considers that he/she should not take part in any appeal proceedings, he/ she shall inform the Board of Appeal accordingly.
3. Members of the Boards of Appeal may be objected to by any party to the appeal proceedings on any of the grounds mentioned in paragraph 1, or if suspected of partiality. An objection shall not be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has taken a procedural step. No objection may be based on the nationality of members.
4. The Boards of Appeal shall decide as to the action to be taken in the cases specified in paragraphs 2 and 3 without the participation of the member concerned. For the purposes of taking this decision, the member concerned shall be replaced on the Board of Appeal by his/her alternate.

Article 6

Decisions subject to appeal

1. An appeal may be brought against decisions of the Agency .
- 2.
3. An appeal lodged pursuant to paragraph 1 above shall not have suspensory effect. The Agency may, however, if it considers that circumstances so permit, suspend the application of the contested decision.
4. An appeal against a decision which does not terminate proceedings as regards one of the parties may only be made in conjunction with an appeal against the final decision, unless the decision provides for separate appeal.

Article 7

Persons entitled to appeal

Any State Party or airline may appeal against a decision addressed to that party, or against a decision which, although in the form of a decision addressed to another party, is of direct and individual concern to the former. The parties to proceedings may be party to the appeal proceedings.

Article 8

Time limit and form

The appeal, together with the statement of grounds thereof, shall be filed in writing at the Agency within two months of the notification of the measure to the State Party or airline concerned, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 9

Revision of the original decision

1. If the Secretary General considers the appeal to be admissible and well founded, he/she shall rectify the decision. This shall not apply where the appellant is opposed to another party to the appeal proceedings.
2. If the decision is not rectified within one month after receipt of the statement of grounds for the appeal, the Agency shall forthwith decide whether or not to suspend the application of the decision and shall remit the appeal to the Board of Appeal.

Article 10

Examination of appeals

1. If the appeal is admissible, the Board of Appeal shall examine whether the appeal is well founded.
2. When examining the appeal, the Board of Appeal shall act expeditiously. It shall as often as necessary invite the parties to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make oral presentations.

Article 11

Decisions on appeal

The Board of Appeal may exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency. The latter shall be bound by the decision of the Board of Appeal.

Article 12

Actions before the Court of Justice

1. An appeal may be brought before the African Court of Justice or before court or tribunal of the regional economic community, against decisions of the Boards of Appeal.
2. Should the Agency fail to take a decision, proceedings for failure to act may be brought before the African Court of Justice or, subject to the agreement to the court or tribunal of the regional economic community.
3. The Agency shall be required to take the necessary measures to comply with the judgment of the African Court of Justice or, subject to the agreement to the court or tribunal of the regional economic community.

Article 13

Procedures to be applied and effect of outcome of appeals

1. In conducting its affairs, the Board of Appeal shall determine its own procedures, nature of its awards and costs.
2. The Board may award costs against the Executing Agency, any State Party or airline concerned or an organ of the African Union.

PART TWO

CHAPTER 1: General Provisions

ARTICLE 1

Scope of Application and Purpose

1. These Regulations apply to international commercial arbitration between two or more State Parties to the Yamoussoukro Decision or between an airline or airlines and one or more State Parties in relation to the interpretation and/or the implementation of the Yamoussoukro Decision its Appendixes, supplementary Rules and Regulations and for which the parties have opted not to utilise the complaints procedure of the Executing Agency and or the Monitoring Body.
2. These Regulations shall not affect any other law of a State Party by virtue of which certain disputes may not be submitted to arbitration or may only be submitted to arbitration according to provisions other than those of these Regulations.

ARTICLE 2

Definitions

For the purposes of these Regulations:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract, treaty or in the form of a separate agreement.
- (c) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (d) "court" means a body or organ of the judicial system of a State Party, a regional economic community or the African Union;

ARTICLE 3

Receipt of Written Communications

- (1) Unless otherwise agreed by the parties:
 - (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at the place of business or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
 - (b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

(3) For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-work day in the State of the addressee, the period is extended until the first work day which follows. Official holidays or non-work days occurring during the running of the period of time are included in calculating the period.

ARTICLE 4

Waiver of Right to Object

A party who knows that any provision of these Regulations from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

ARTICLE 5

Extent of Court Intervention

In matters governed by these Regulations, no court shall intervene except where so provided in these Regulations.

ARTICLE 6

Court Or Other Authority For Certain Functions Of Arbitration Assistance And Supervision

- The functions referred to in articles 11 (3), 11(4), 13 (3), 14, 16 (3) and 44(2) shall be performed by President of the African Court of Justice or the President of a court or tribunal of a regional economic community in which jurisdiction the arbitral tribunal shall conduct its sitting.
- The case shall be administered by the Executing Agency which shall take charge of the archives of the arbitration proceeding. In addition, upon written request of all the parties or of the arbitral tribunal, it shall act as a channel of communication between the parties and the arbitral tribunal provide secretariat services and/or serve as registry.

CHAPTER II. ARBITRATION AGREEMENT

ARTICLE 7

Definition and Form of Arbitration Agreement, Notice of Arbitration and Representation and Assistance

- 1) The arbitration agreement shall be in writing.
- 2) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- 3) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- 4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- 5) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.
- 6) The party initiating recourse to arbitration (hereinafter called the 'claimant') shall give to the other party (hereinafter called the 'respondent') a notice of arbitration.
- 7) Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.
- 8) The notice of arbitration shall include the following:
 - a) A demand that the dispute be referred to arbitration;
 - b) The names and addresses of the parties;
 - c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
 - d) A reference to the treaty or other agreement out of or in relation to which the dispute arises;
 - e) The general nature of the claim and an indication of the amount involved, if any;
 - f) The relief or remedy sought;
 - g) A proposal as to the number of arbitrators, if the parties have not previously agreed thereon.
- 9) Each party shall appoint an agent. The parties may also be assisted by persons of their choice. The name and address of the agent must be communicated in writing to the other party, to the Executing Agency and to the arbitral tribunal after it has been appointed.

ARTICLE 8

Arbitration Agreement And Substantive Claim Before Court

- 1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- 2) Where an action referred to in paragraph (1) of this article has been brought, arbitral

proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

ARTICLE 9

Arbitration Agreement and Interim Measures by Court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, an interim measure of protection from a court and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

ARTICLE 10

Number of Arbitrators

- 1) The parties are free to determine the number of arbitrators.
- 2) Failing such determination, the number of arbitrators shall be three.

ARTICLE 11

Appointment of Arbitrators

- 1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- 2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- 3) Failing such agreement,
 - a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
 - b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
- 4) Where, under an appointment procedure agreed upon by the parties,
 - a) a party fails to act as required under such procedure, or
 - b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

ARTICLE 12

Grounds for Challenge

1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

ARTICLE 13

Challenge Procedure

1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

ARTICLE 14: Failure or Impossibility to Act

1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

2) If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

ARTICLE 15

Appointment of Substitute Arbitrator

1) Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

2) If under articles 13 to 15 the sole arbitrator or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

ARTICLE 16

Competence of Arbitral Tribunal to Rule on Its Jurisdiction

1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary

question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 7 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER V: INTERIM MEASURES AND PRELIMINARY ORDERS

Section 1. Interim Measures

ARTICLE 17

Power of Arbitral Tribunal to Order Interim Measures

- 1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- 2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - a) Maintain or restore the status quo pending determination of the dispute;
 - b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - d) Preserve evidence that may be relevant and material to the resolution of the dispute.

ARTICLE 18

Conditions for Granting Interim Measures

- 1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
 - a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

- 2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary Orders

ARTICLE 19:

Applications for Preliminary Orders and Conditions For Granting Preliminary Orders

- 1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
- 2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
- 3) The conditions defined under article 18 apply to any preliminary order, provided that the harm to be assessed under article 18 (1)(a), is the harm likely to result from the order being granted or not.

ARTICLE 20

Specific Regime for Preliminary Orders

- 1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
- 2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
- 3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
- 4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
- 5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

SECTION 3: Provisions Applicable To Interim Measures and Preliminary Orders

ARTICLE 21

Modification, Suspension, Termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

ARTICLE 22

Provision of Security

- 1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
- 2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

ARTICLE 23

Disclosure

- 1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
- 2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

ARTICLE 24

Costs and Damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4: Recognition and Enforcement of Interim Measures

Article 25

Recognition and Enforcement

- 1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 27.
- 2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
- 3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

ARTICLE 26

Grounds for Refusing Recognition or Enforcement

- 1) Recognition or enforcement of an interim measure may be refused only:
 - a) At the request of the party against whom it is invoked if the court is satisfied that:
 - i. Such refusal is warranted on the grounds set forth in article 36 (1)(a)(i), (ii), (iii) or (iv); or
 - ii. The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - iii. The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
 - b) If the court finds that:
 - i. The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
 - ii. Any of the grounds set forth in article 36 (1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5: Court-Ordered Interim Measures

ARTICLE 27

Court-Ordered Interim Measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of any State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

ARTICLE 28

Equal Treatment of Parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

ARTICLE 29

Determination of Rules of Procedure

- 1) Subject to the provisions of these Regulations, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- 2) Failing such agreement, the arbitral tribunal may, subject to the provisions of these Regulations, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

ARTICLE 30

Place of Arbitration

- 1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- 2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.
- 3) The award shall be made at the place of arbitration.

ARTICLE 31

Commencement of Arbitral Proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

ARTICLE 32

Language

- 1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

ARTICLE 33

Statements of Claim and Defence

1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

3) The arbitral tribunal shall, after inviting the views of the parties, decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the period of time for communicating such statements.

4) The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed ninety days. However, the arbitral tribunal may set longer time limits, if it concludes that an extension is justified.

ARTICLE 34

Hearings, Written Proceedings and Evidence

1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

2) Each party shall have the burden of proving the facts relied on to support its claim or defence.

3) The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in its statement of claim or statement of defence.

4) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

5) At any time during the arbitral proceedings the arbitral tribunal may call upon the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine. The tribunal shall take note of any refusal to do so as well as any reasons given for such refusal.

6) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

7) In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

8) If witnesses are to be heard, at least thirty days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses it intends to present, the subject upon and the languages in which such witnesses will give their testimony.

9) The Executing Agency shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal and the International Bureau at least thirty days before the hearing or such longer period before the hearing as the arbitral tribunal may determine.

10) Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

11) Evidence of witnesses may also be presented in the form of written statements signed by them.

12) The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

ARTICLE 35

Default of A Party, Closure of Hearings and Waiver of Rules

- 1) Unless otherwise agreed by the parties, if, without showing sufficient cause,
 - a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;
 - b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
 - c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

2) The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

3) A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

ARTICLE 36: Expert Appointed By Arbitral Tribunal

- 1) Unless otherwise agreed by the parties, the arbitral tribunal
 - a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
 - b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

- 2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

ARTICLE 37

Court Assistance in Taking Evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of any State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

ARTICLE 38

Rules Applicable To Substance Of Dispute

- 1) The arbitral tribunal shall apply the law chosen by the parties, or in the absence of an agreement, shall decide such disputes in accordance with international law by applying: International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
 - (a) International custom, as evidence of a general practice accepted as law;
 - (b) The general principles of law recognized by civilized nations;
 - (c) Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

- 2) This provision shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto.

- 3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the air transport or aviation industry applicable to the transaction.

ARTICLE 39

Decision-Making by Panel of Arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

ARTICLE 40

Settlement

1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

2) An award on agreed terms shall be made in accordance with the provisions of article 32 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case

ARTICLE 41

Form and Contents of Award

1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 31.

3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

ARTICLE 42

Termination of Proceedings

1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

b) the parties agree on the termination of the proceedings;

c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason

become unnecessary or impossible.

3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

ARTICLE 43

Correction and Interpretation of Award; Additional Award

1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

- a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
- b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

2) If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

3) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

4) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

5) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

6) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

ARTICLE 44

Application for Setting Aside As Exclusive Recourse Against Arbitral Award

1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

2) An arbitral award may be set aside by the court specified in article 6 only if:

- a) the party making the application furnishes proof that:
 - i. a party to the arbitration agreement referred to in article 8 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or,

failing any indication thereon, under the law of a concerned State; or

- ii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- iii. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- iv. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of these Regulations from which the parties cannot derogate, or, failing such agreement, was not in accordance with these Regulations; or

b) the court finds that:

- i. the subject-matter of the dispute is not capable of settlement by arbitration under the applicable law; or
- ii. the award is in conflict with the public policy of the African Union or any concerned State.

3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

ARTICLE 45

Recognition And Enforcement

1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of the State, the court may request the party to supply a translation thereof into such language.

ARTICLE 46

Grounds for Refusing Recognition or Enforcement

1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

- a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - i. a party to the arbitration agreement referred to in article 8 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - ii. the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - iii. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - iv. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - v. the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- b) if the court finds that:
 - i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - ii. the recognition or enforcement of the award would be contrary to the public policy of the African Union or the concerned State.

2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Section IX : Costs and Fees

ARTICLE 47

Costs

The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:

- a) The fees of the arbitral tribunal;
- b) The travel and other expenses incurred by the arbitrators;
- c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- e) Any fees and expenses of the appointing authority as well as the expenses of the Executing Agency.

ARTICLE 48

Fees of Arbitral Tribunal

- 1) The fees of the arbitral tribunal shall be reasonable in amount, taking into account the complexity of the subject-matter, the time spent by the arbitrators, the amount in dispute, if any, and any other relevant circumstances of the case.
- 2) When a party so requests, the arbitral tribunal shall fix its fees only after consultation with the Registrar of the African Court of Justice which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Article 49

Parties' Costs and Apportionment

- 1) Each party shall bear its own costs of arbitration. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- 2) When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration in the text of that order or award.
- 3) No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award.

Article 50

Deposit of Costs

- 1) The Executing Agency following the commencement of the arbitration, may request each party to deposit an equal amount as an advance for the costs referred to above. All amounts deposited by the parties pursuant to this paragraph and paragraph 2 of this article shall be directed to the Executing Agency, and disbursed by it for such costs, including, *inter alia*, fees to the arbitrators, and administration costs of the Executing Agency.

2) During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3) If the requested deposits are not paid in full within sixty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

4) After the award has been made, the Executing Agency shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Part Three

ARTICLE 51

Sanctions

1) Each Member State of the African Union undertake not to allow, in the air space above its territory, the operation of an eligible airline, if the Executing Agency, the Monitoring Body or a Board of Appeal has decided that that airline does not comply with a final decision taken in accordance with the provisions of these Regulations .

2) The Executing Agency may recommend to the Executive Council to impose sanctions on the state concerned.

ARTICLE 52

Reports

The Executing Agency of the Yamoussoukro Decision shall prepare each year a special report on disputes settlement, which shall be presented to the African Union's organs.

ARTICLE 53

Amendments and Revision

1) The provisions of these Regulations may be amended or revised by the Assembly of Heads of State and Government of the African Union.

2) However, no amendment shall be applicable to any case under review, except with the unanimous consent of the concerned Parties.

ARTICLE 54

Entry into force

These Regulations shall enter into force immediately following their endorsement by the Assembly of Heads of State and Government.

9.5 References

No	Title	Author (s)
1	Study on the implementation of the resolution to entrust AFCAC with the mission of execution agency of the 1999 Yamoussoukro decision, 2008	E. Lombolou
2	AFCAC-22/WP2, Working Paper on proposals for the Ad Hoc Committee of the 21 st AFCAC Plenary in charge of the Organizational Structure, the Work Programme, the Budget, the Plan and the Staffing Issues (8-10- Dec 2010)	AFCAC
3	Constitution of the African Civil Aviation Commission (Dec 2009)	
4	Constitutive Act of the African Union (July 2000)	
5	Protocol of the Court of Justice of the African Union (July 2003)	
6	Protocol Relating to the Establishment of the Peace and Security Council of the African Union (July 2002)	
7	Treaty Establishing the African Economic Community (June 1991)	
8	Various Decisions of the Assembly of the Union	
9	Various Decisions of the Executive Council of the Union	
10	Clarification of Issues and Articles of the Yamoussoukro Decision (undated)	
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13	Progress Report of the Commission on the Implementation of Assembly Decision AU/DEC.227 (XII) on the Specialised Technical Committee (EX.CL/666 (XIX) (June 2011)	
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