



## TWELFTH MEETING OF THE AFCAC AIR TRANSPORT COMMITTEE

(Dakar, Senegal, 30-31 October 2012)

### Air Transport

## FAIR COMPETITION AND AFRICAN AIR TRANSPORT

(Presented by AFCAC)

### SUMMARY

This paper presents the Yamoussoukro and the competition regimes developed as excellent answers to the challenge of small and developing economies finding their way in participating in air transport and contributing to the global market as of right.

It proposes that the designation rules in the YD, its multilateral nature and the eligibility criteria is a unique opportunity for global competition regulation and an answer to concerns about ownership.

### INTRODUCTION

1. Liberalised regimes do not only seek to remove monopolies and inefficiencies. They cause an imbalance in regulatory sphere. They display the relative strengths of participants in the economic venture. Weaker participants are left to either accept the fact of their inability to participate or attempt to introduce a balanced playing field on which their perceived right of participation is guaranteed.
2. The Yamoussoukro Decision of 1999 establishes a perfect blend of opportunities enabling states to ensure that commercial air transport activities are carried on within their territories and regulated in accordance with international norms without any particular state suffering from the negative impact of its relative strength in the industry.
3. The African experiment if logically carried through could impact how air transport is perceived on the continent and how African designations under bilateral are received.

### 1. COMPETITION REGULATION IN SPATIAL ELEMENTS

1. Commercial air transport is currently characterised by 4 spatial elements: (a) purely domestic operation (b) direct inter-state operations, (c) intra-regional (continental) operations, and (d) inter-regional (continental) operations. Spatial elements C and D are operable in situations of blocked trade, economic or political associations such as the 1962 Yaoundé Treaty (Air Afrique) States; regional economic blocs in Africa and Europe such as COMESA, ECOWAS, SADC, European Union and the African Union.
2. Competition, whether fair or unfair, has different considerations depending on which of the four spatial elements one is involved in regulating or contemplating issues relating to regulation.



3. While essentially competition is about the normal practice of commercial entities offering and disposing of their wares and services in exchange for consideration and by so doing offering better service for value in order to attract maximum or high value customers, competition in air transportation is of a slightly differing character.
4. The most important point of difference remains the entrenched idea, albeit gradually waning, that air transport is a public utility. The consequences of this deep-rooted belief of the role of air transportation in national and international trade is that even in the current era of liberalised air transportation, competition regulation is underpinned by very important issues demanding the introduction and implementation of safeguards of various forms.

## 2. SOCIO-POLITICAL CONCERNS

1. These so-called 'extraneous' issues rooted in the natural right of a state to participate in international air transport, often coupled with the globally popular right of the state to ensure the perpetual survival of the national carrier invariably conflicts with the legitimate commercial operations of aggressive foreign carriers.
2. The extraneous issues can be perceived in the table below as having various impacts in most of the identified spatial elements.

|    | <b>Competition Policy Involves or revolves round</b>  | <b>Purely Domestic Operations</b> | <b>Direct inter-state operations</b> | <b>Intra-regional/ Continental Operations</b> | <b>Inter-regional/ Continental Operations</b> |
|----|---|-----------------------------------|--------------------------------------|---|---|
| 1  | Study, identification and elimination of anti-competitive practices                                 | X                                 | X                                    | X   | X   |
| 2  | Prevention of capacity dumping  | X                                 | X                                    | X   | X   |
| 3  | Study, identification and prevention of abuse of dominant (monopoly) position                       | X                                 | X                                    | X   | X   |
| 4  | Prevention and regulation of discriminatory government practices favouring particular airlines      | X                                 | X                                    | X   | X   |
| 5  | Preventing and regulating grant of subsidies by states to air transport undertakings                | X                                 | X                                    | X   | X   |
| 6  | Penalising unfair practices and abuses  | X                                 | X                                    | X   | X   |
| 7  | Right of national airline to participate in air transport   |                                   | ➤ X                                  | ➤ X   | ➤ X   |
| 8  | Size of national market plays a major role in whether to liberalise or prevent regional completion. |                                   |                                      | ➤ X   | ➤ X   |
| 9  | Relative size of national carrier remains a determining factor in cross-border competition          |                                   |                                      | ➤ X   | ➤ X   |
| 10 | Particular concern about the strength of other airlines overtaking domestic/national carrier        |                                   | ➤ X                                  | ➤ X   | ➤ X   |
| 11 | Concern about loss of national airline  |                                   |                                      | ➤ X   | ➤ X   |

**Table 1: Essential and Extraneous issues of fair competition**

3. A critical examination of the history of air transport deregulation starting from the late 1970's through European liberalisation of the 80's, African initiatives at liberalisation under the Yamoussoukro structure, through the current wave of strong Middle Eastern carriers operating



on African and European routes and stronger European carriers dominating the African market will show that the concerns raised and highlighted in red **X** still continue to plague a large number of African countries.

### **3. SAFEGUARDS**

1. The typical argument for the delayed implementation of the Yamoussoukro had been that (a) either stronger African carriers were likely to swallow the leaner national carriers, (b) that the size of the national market could not sustain bigger carriers with its attendant cost in expansion of airport infrastructure, (c) the likelihood of undesirable passengers from other countries overrunning the economies of other states or other such logical socio-political arguments.
2. The same arguments are heard in the current debate of foreign carriers dominating the African market and operating 6<sup>th</sup> freedom rights among others. Undoubtedly these arguments are justified and always remain the basis for the call for safeguarding measures.
3. An added consideration is whether or not a particular state or economic bloc has a functioning global competition regime prior to liberalisation. It needs to be said that less than 20% of African countries have general competition law.
4. If considered as a tool to encourage normal operation and only step in to prevent abuses, one will then see competition regulation not as a measure of providing a socio-politically fair playing field but rather as a measure to ensure that operators engage in normal commercial transactions under normal rules.
5. While Africa's unique experiment in a special set of air transport competition rules could be seen as the need for safeguards or an attempt at levelling the playing field in the transition from protectionist politico-commercial operations to a free and liberalised market under the YD, the current measures on the continent could however lead to an innovative solution of the quest for a fair balance between commercial air transport operations and the obligation of each state to protect and enhance its economy.

### **4. THE STATUS OF THE AFRICAN EXPERIMENT**

1. Following a 10 year delay in implementing measures required under the Yamoussoukro Decision, as Working Paper ATCM-WP/2 has indicated, a study has been conducted which, albeit incomplete, provides for a number of solutions that the developing continent of Africa can utilise to (a) ensure the achievement of a liberalised African air transport market, (b) secure a fair and balanced intra-continental and intra-regional air transport operation, (c) effectively manage any perceived uncompetitive practices, abuse of dominant position and other forms of economic imbalances resulting from African and non-African air transport operators.
2. It will be recalled that the regional economic communities (RECs) such as COMESA-EAC-SADC and ECOWAS have adopted competition rules applicable to their territories.
3. The ongoing study commissioned by the African Union under the management and for the benefit of the African Civil Aviation Commission (AFCAC) seeks to:
  - a. Empower AFCAC as Executing Agency to manage and supervise the air transport liberalisation in Africa;
  - b. Liaise with the Regional YD Authorities to ensure a seamless implementation of the YD, including implementing the harmonised competition regime of the regional and continental levels;



- c. Enable AFCAC to impose sanctions when needed
  - d. Enable AFCAC to apply various dispute resolution measures, including applying to court when needed.
4. The study proposed draft harmonised competition rules to be applied to African and non African air transport services providers including but not limited to airlines, airport operators and air navigation service providers. The competition rules harmonises the rules that have been existing in the RECs and seeks to create synergies of what is currently available in the RECs.
  5. The proposed draft regulates items 1 – 8 listed on Table 1 above and further provides for a role for the Executing Agency and RYAs in the regulation of competition. As stated, it does not limit itself to eligible carriers but also applies to non-African airlines and other service providers providing services in one or more African countries.
  6. To facilitate the effective management of the liberalisation of air transport a number of tools are proposed predominant of which is the consideration of intra-regional routes as a common route network within each common territory of a Regional YD Authority is recognised as a **public good** to be managed by the RYA in trust for the states members of the RECS in question. The aggregation of the route network as a public good means that considerations that would typically be left to be handled by one member state is raised to a multinational level and considered within the objective of enhancing regional economies. Competition regulation, the implementation of safeguards and the speedier liberalisation of air transport are successfully dealt with through the regionally recognised management.
  7. At the level of the RECs, it is also important to note that the Tripartite Group of RECS comprising COMESA, EAC and SADC, having empowered the Joint Competition Authority (JCA) in 2008 in Kampala have also started measures to operationalise the JCA.
  8. It is anticipated that the current wave of activities at the continental and regional levels will soon see the implementation of measures to ensure effective liberalisation and the monitoring of a competitive environment using the tools offered by the harmonised competition regime.
  9. Thus through the implementation of the concept of a public good and the harmonised competition rules at the regional and continental levels, the necessary atmosphere is created for traffic growth within regions, within the continent and beyond the continent. Such growth is meant to be generated by African airlines freely operating the route networks, freely competing but monitored by the regional and continental competition regulators.

## 5. The Future of the African Experiment on Air Transport Competition

1. What then is the perceived future of the African experiment?
2. How should Africa regulate free competition in all four spatial elements?
3. Could the perceived future provide pointers to a roadmap for global regulation?
4. The Yamoussoukro Decision introduces a number of opportunities that make it easy for the Executing Agency and the Regional YD Authorities to implement a fair competition policy in the three most important spatial elements identified above, namely in direct inter-state operations, intra-regional operations and inter-regional operations. Additionally the same level of fair play can be secured in inter-continental travel.
5. Tools introduced in the Decision and enhanced in the current draft instruments include the following:



- a. States are permitted to designate an eligible airline from another state party to operate from their territory – this implies that commercial agreements could be concluded by smaller states that may not have operating airlines and airlines of other states parties. This will logically be subject to the designating state exercising effective control from within its territory over the third state airline and in accordance with Safety regulations. The logical extension of this concept is the beginning of the breakdown of the ‘national sentiments’ that underpins a number of the so-called extraneous issues listed above. Lessons could be drawn from a federal United States airline industry and, to a lesser extent, the ongoing European low-cost market expansionism.
  - b. The principle of **third state designation** could be coupled with **foreign investment** in an airline of a smaller state to enable that state participate in inter and intra-regional air transport under the Yamoussoukro Decision. Africa is a large continent of 55 countries with a growing economic strength that is currently matching some of the developed countries. The ability of Africa to implement cross-border investment in airlines to enable them utilise the opportunities of the YD means that the concept of ownership of African airlines could result in a better structured air transport market within Africa. This in itself helps create a level playing field on ownership of airlines within the continent.
  - c. The harmonised competition rules empower the Executing Agency, and through that agency, the regional YD Authorities to enforce competition rules against third party airlines which could include airlines from other RECs as well as airlines from other continents. This power accorded the RYA and the Executing Agency enables the regulator to critically review the practices of undertakings on a case by case basis to determine whether or not any infringement of the rules has taken place and in consequence impose penalties as required.
  - d. Most importantly the Yamoussoukro Decision enables the multilateral exchange of traffic rights and thereby the regulation of the air transport as a genuine multilateral or plurilateral economic activity.
6. The above measures and more serve initially to re-enforce thought on inter and intra-regional air transport as purely normal commercial business demanding the necessary safety and security regulation and no more. The premium of the national flag in a diversified, cross-border financed air transport industry drops significantly in terms of ownership.
  7. The consequence of the African experiment, if carried to a logical conclusion, building on the strengths of the relatively poor to develop the needed infrastructure for the continent could be the acceptance of ‘the African airline’ in designation provisions of BASAs agreed by African countries and non Africans.
  8. Importantly, the psychological safeguards are provided through the synergies created.

### **Action Required**

The meeting is requested to examine the above in detail and:

- e. Consider the active implementation of the Competition regime, as well as
- f. Consider the African experiment as a basis for global regulation of competition and safeguards.