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**MEETING OF AFRICAN MINISTERS
RESPONSIBLE FOR AIR TRANSPORT
FIRST ORDINARY SESSION
16 – 19 May 2005
Sun City, South Africa**

**AU/AT/3c (I)
Original: English**

**THE DEVELOPMENT AND IMPLEMENTATION OF COMPETITION
REGULATIONS IN EASTERN AND SOUTHERN AFRICA**



COM/INFRA/TC/CV
May, 2005
Original: English

**COMMON MARKET FOR EASTERN AND
SOUTHERN AFRICA**

Meeting of Experts on African Air Transport

Sun City, South Africa
16th – 17th May, 2005

**THE DEVELOPMENT AND IMPLEMENTATION OF COMPETITION
REGULATIONS IN EASTERN AND SOUTHERN AFRICA**

Rmm/smz(03)

I. INTRODUCTION

The importance of the role of air transport in facilitating the movement of people and cargo and hence facilitating development has increased steadily since the fifties following the deployment of jet aircraft and the decline of passenger transport by sea. In this respect, the African continent has taken cognizance of this role of the air transport industry and sought to develop it in order to promote its development agenda.

In order to set up viable civil aviation industry, it is necessary to establish appropriate infrastructure and systems configured to provide adequate and competitive air transport services first within the continent and also with the rest of the world. This has entailed the adoption of a continental strategy to build capacity in the industry and to remove barriers which constrain the interstate provision of air transport services.

At the continental level, the Yamoussoukro Decision is a landmark initiative to develop the industry through the removal of barriers by promoting the liberalization of the industry and providing guidelines on policy harmonization, regulatory issues and cooperation among air services providers. On the basis of the Yamoussoukro Decision, the various regional economic communities have commenced to fast track the liberalization of air transport services with the aim of converging gradually into a continental regime.

An effective regime of liberalization of air transport services requires the establishment of competition regulations to govern the conduct of operators with respect to fair trading practices and consumer protection.

This paper outlines the initiatives taken by the RECs in Eastern and Southern Africa to develop competition regulations and the institutions necessary to administer them on a regional basis.

II. EVOLUTION OF AIR TRANSPORT LIBERALISATION IN ESA

The COMESA Air Transport Liberalisation Programme was adopted by the Council of Ministers in November, 1999 and was launched through Legal Notice No 2 of 1999.

The Council of Ministers has adopted the following time-table for implementation of the liberalised air transport industry in COMESA:

- a. **Phase I:** October 1999
 - (i) Introduction of free movement of intra-COMESA air cargo and non-scheduled passenger services;
 - (ii) Introduction of free movement of intra-COMESA scheduled passenger services with frequency limit of up to two daily

- frequencies between any city pairs. Beyond the two daily frequencies bilateral air services agreements will apply; and
- (iii) Adoption of multiple designation and elimination of capacity restrictions.

b. **Phase II:** October 2000

Free movement of intra-COMESA air transport services.

The Council also established the COMESA Air Transport Regulatory Board to oversee the implementation of the liberalization programme.

In 2001, Council deferred the implementation of Phase 2 awaiting the preparation of competition regulations.

While each country in the region has a technical regulatory regime for the air transport sector based on the ICAO framework for civil aviation, economic regulation in many countries has been managed through the general national competition framework and the provisions contained in the individual bilateral air services agreements signed between states.

This has been the case worldwide until the late seventies, when the United States and the European Union started developing specific legal instruments to carry out economic regulation of the sector.

III. PREPARATION OF COMESA, EAC AND SADC COMPETITION REGULATIONS

In the ESA region, the primary sources of the legal provisions dealing with competition in the civil aviation sector can be found in the COMESA Treaty, the SADC Protocol on Transport, Communications and Meteorology and the East African Community Treaty. These provisions are mainly of a general nature and it was found necessary to prepare specific competition regulations to manage the sector.

In COMESA, the preparation of the regulations was undertaken through a consultative process involving all stakeholders who were initially consulted during the study to prepare the draft regulations. The stakeholders also participated in the regional workshop held in Mombassa to discuss the draft documents.

Due to the need to apply common regulations for the entire ESA region where member states jointly belong to a number of regional economic communities, the COMESA Draft Competition Regulations and those prepared by SADC were considered together and a common draft was adopted by a joint ministerial meeting of COMESA, EAC and SADC ministers responsible for civil aviation in September, 2002.

The common draft regulations were adopted by the SADC and COMESA Councils of Ministers in 2004. The regulations are therefore a product of two legislative initiatives from COMESA, EAC and SADC. The main elements of the approved competition regulations are summarized hereunder:

1. Object and Scope of Application (Article 3)

The object of the Regulations is to promote and guarantee free and fair competition in air transport services within COMESA, EAC and SADC regions in order to develop the industry and contribute to the welfare of the citizens of COMESA, EAC and SADC Member States.

The scope of the Regulations covers scheduled and non-scheduled air transport services within COMESA, EAC and SADC Member States, including any practice, agreement or conduct which shall have an anti-competitive effect within the COMESA, EAC and SADC regions.

2. Anti-Competitive Practices, Agreements and Decisions (Article 4)

The regulations stipulate that any practice, agreement or decision which negate the objective of free and fair competition in air transport services shall be prohibited. In this regard, Member States undertake to ensure that any agreement between undertakings, any decision taken by associations of undertakings and any concerted practice which negatively affect liberalisation of air transport services within the COMESA, EAC and SADC Regions and which has as its object or effect the prevention, restriction or distortion of competition within the COMESA, EAC and SADC Regions shall be prohibited.

This article also states that subject to paragraph 3(a) of the Article and Article 8 of the Regulations, anti-competitive practices and agreements, shall be deemed illegal.

Such practices include, but are not limited to, any agreement between undertakings, any decision by associations of undertakings and any concerted practice which:

- directly or indirectly fixes purchase or selling prices 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;
- limits or controls markets, technical development, or investment;
- involves the addition of excessive capacity or frequency of services;
- divides markets or sources of supply by allocating passengers, territories, or specific types of services;

- applies dissimilar conditions to similar transactions with other trading parties, thereby placing them at a competitive disadvantage;
- 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 contracts; and
- has a detrimental effect on consumers.

The regulations further stipulate that 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.

Further the Regulations provide that without prejudice to the generality of paragraph 3(a) of the Article any practice, agreement or decision shall not be deemed to be anti-competitive unless:

- it is sustained rather than temporary;
- it has an adverse economic effects on or cause economic damage to any competitor;
- it reflects an apparent intent or has the probable effect of crippling, excluding or driving any competitor from the market; or
- it limits the rights or interests of consumers.

3. Abuse of Dominant Position (Article 5)

The regulations **stipulate** that any abuse by one or more undertakings of a dominant position within the COMESA, EAC and SADC Regions shall be prohibited insofar as it may affect air transport services between Member States. Such abuse includes:

- a. Directly introducing unfair trading conditions to the prejudice of competitors such as:
 - the introduction on a route or sector thereof of excessive capacity which is likely to have adverse impact upon any competing undertaking;
 - the introduction by an undertaking on a route or sector thereof of an excessively low price, which is likely to have adverse impact on any competing undertaking and is likely to be perceived as specifically designed, targeted and intended to keep out a new undertaking or to drive out another undertaking; or

- the introduction by an undertaking on a route or sector thereof of an excessively high price because of a lack of price competition or collusion.
- b. Limiting production, capacity or markets to the prejudice of consumers such as:
- charging excessively high prices to the detriment of consumers;
 - the introduction by an undertaking on a route or sector thereof of capacity, which is designed, targeted and intended to drive out another undertaking;
 - the intentional under-supply, by an undertaking, of capacity contrary to the set objectives of healthy and sustained competition; or
 - the allocation of capacity by an undertaking 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 at a competitive disadvantage including discriminating between different consumers and competitors in equivalent transactions of services of like quality in terms of-
- the price charged;
 - any discount, allowance, or rebate given or allowed in relation to the supply of services;
 - the provision of services; and
 - payment for services.
- 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.

4. Non-discrimination in National Legislation and Administrative Measures (Article 6)

This article stipulates that national legislation or administrative measures in a Member State shall not discriminate against the provision of services by undertakings or associations of undertakings of other Member States.

It also provides that a Member State may, before enacting legislation or adopting administrative measures which its view may have the effect of discriminating against undertakings of other Member States, invite the Joint Competition Authority to review the legislation in question and recommend

appropriate amendment of any provision that may directly or indirectly permit or promote anti-competitive behaviour.

5. Subsidies (Article 7)

The regulations prohibit the granting of any subsidy by any Member State which distorts or threatens to distort competition and entrust the regional competition authorities with the task to develop rules indicating circumstances under which subsidies might be granted.

The issue of granting of subsidies will be considered in the Implementation Guidelines

6. Exemptions and Safeguard Measures (Article 8)

This article stipulates that the Joint Competition Authority may, on application by an undertaking, exempt any practice, agreement or decision which may otherwise have been deemed illegal or prohibited under Article 4. It may also on application by a Member State, 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 the Regulations.

Copies of all applications for exemption or approval of measures under paragraphs 1 and 2 of Article 8 are to be sent to the competent authorities of the Member States.

7. The Joint Competition Authority (Article 9)

The regulations stipulate that the Council of Ministers of COMESA, EAC Council of Ministers and Council of Ministers of SADC shall establish a joint body to be known as “the Joint Competition Authority.”

The Joint Competition Authority shall comprise seven members, two drawn from each region and the seventh being the Chair. The Chair shall be nominated by one of the regions in a rotational manner. The tenure of the members shall be thirty-six months, provided that half the members shall be appointed for eighteen months when the body is first established. Members shall be nominated by the regional competition authorities and appointed by the relevant institutions in each region.

The function of the Joint Competition Authority would to monitor the implementation of the Yamoussoukro Decision and these Regulations. It would also be responsible for:

- implementing measures to increase transparency in the air transport sector;
- implementing measures to develop public awareness of the provisions of these Regulations;

- investigating and evaluating alleged violations of Chapter 2;
- granting, refusing or revoking exemptions in terms of Article 8;
- reviewing legislation or administrative measures of Member States in terms of Article 6;
- reporting to the Council or Committee of Ministers as the case may be, on any matter relating to the application of these Regulations; and
- performing any other function assigned to it under these Regulations.

The functions of the Joint Competition Authority referred to in paragraph 4 are to be performed by the regional competition authorities prior to the establishment of the Joint Competition Authority.

8. Complaints (Article 10)

On complaints, the regulations provide that any Member State, 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.

The Joint Competition Authority may, on its own motion, initiate an investigation into a suspected breach of these Regulations by an undertaking.

On receipt of the complaint, the Joint Competition Authority shall within 30 days forward a copy of such complaint to the competent authorities of the Member States and such competent authorities shall have the right of audience before the Joint Competition Authority.

9. Investigation and Procedural Fairness (Article 11)

The regulations provide that in the execution of its duties under the Regulations, the Joint Competition Authority, or the competent authorities of Member States as required by the Joint Competition Authority may undertake all necessary investigations into undertakings and associations of undertakings.

The Joint Competition Authority shall within a reasonable time, prior to the envisaged investigation inform the competent authorities of the Member States of the proposed investigation and the identity of the authorised officials. The competent authorities of the Member States shall assist the officials of the Joint Competition Authority if so requested.

This article stipulates that in the execution of its duties, the Joint Competition Authority shall act with due regard for the rules of natural justice.

10. Hearing of the Parties Concerned (Article 12)

The regulations provide that before taking any decision affecting undertakings or associations of undertakings, the Joint Competition Authority shall give the undertakings or associations of undertakings concerned the opportunity of being heard. There shall be a written record of the hearing.

11. Outcome of Complaint (Article 13)

In a complaint where the Joint Competition Authority finds that there has been an infringement of any provision of Chapter Two of the Regulations, it shall direct the undertaking or association of undertakings concerned to bring such an infringement to an end.

If the Joint Competition Authority, 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.

The Joint Competition Authority 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.

12. Provisional Measures (Article 14)

The article stipulates that where there is *prima facie* evidence before the Joint Competition Authority 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.

Such provisional measures shall apply for a period not exceeding ninety (90) days. The Joint Competition Authority may extend the provisional measures for a period not exceeding thirty (30) days.

13. Cooperation with Member State Authorities and Access to Information (Article 15)

This article provides that the Joint Competition Authority shall execute its powers and procedures in collaboration with the competent authorities of the Member States. In carrying out the duties assigned to it by these Regulations, the Joint Competition Authority may request all necessary information from the competent authorities of the Member States and from an undertaking or association of undertakings.

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.

The Joint Competition Authority 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.

14. Penalties (Article 16)

The Regulations stipulate that the Joint Competition Authority 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:

- infringe any provision of these Regulations;
- supply incorrect or misleading information in connection with an application; or
- supply incorrect information in response to a request made, or do not supply information within the time limit fixed by a decision.

In cases of a second or subsequent infringement, the Joint Competition Authority may impose a stiffer penalty.

The Joint Competition Authority is also obliged to review such penalties from time-to-time.

15. Review by the Court of Justice and Tribunal (Article 17)

Decisions made by the Joint Competition Authority, can be reviewed by the Court of Justice or the Tribunal. The Court of Justice or the Tribunal may also review any penalty imposed by the Joint Competition Authority.

Any party whose rights, interests or legitimate expectations have been affected by a decision of the Joint Competition Authority may apply to the Court of Justice or the Tribunal for a review of such decision.

16. Dispute Settlement (Article 18)

The article provides that If any dispute arises between Member States relating to the interpretation or application of the Regulations, the Member States concerned shall endeavour to settle the dispute by negotiation.

If the Member States concerned fail to reach a settlement of the dispute by negotiation within twenty-one (21) days, either Member State may submit the dispute for arbitration in accordance with the arbitration procedures set forth in Appendix 2 of the Yamoussoukro Decision unless the Member States decide to settle the dispute in accordance with the provisions of the COMESA Treaty, the EAC Treaty or the SADC Treaty.

17. Professional Secrecy (Article 19)

This article stipulates that information acquired as a result of the application of the Regulations shall be used only for the purpose of the relevant request or investigation.

It also states that the Joint Competition Authority and the competent authorities of the Member States, 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 the Regulations.

18. Publication of decisions (Article 20)

This article stipulates that the Joint Competition Authority shall publish the decisions which it makes under these Regulations. It provides that in publishing any decision, the Joint Competition Authority shall state the names of the parties and the main contents of the decision.

In so doing, the Joint Competition Authority shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

19. Implementation Provisions (Article 21)

The Regulations stipulate that the Joint Competition Authority shall formulate implementing provisions for adoption by the relevant institutions on, *inter alia*::

- guidelines on subsidies in terms of Article 7;
- rules of procedure on exemptions granted in terms of Article 8;
- the standard form, content and other details pertaining to:

- applications submitted in terms of Article 8; and
- complaints submitted in terms of Article 10 and outcomes of complaints in terms of Article 13;
- the rules on hearings provided for in Article 12;
- penalties imposed in terms of Articles 16;
- guidelines and rules of procedure for the implementation of these Regulations; and
- guidelines dealing with frivolous complaints.

20. Amendments (Article 22)

The Regulations stipulate that any Member State may propose an amendment to these Regulations.

- Any proposal for amendment to these Regulations shall be submitted to the Joint Competition Authority in writing which shall within thirty (30) days of its receipt communicate it to the Member States
- Any amendment to these Regulations shall come into force after approval by the COMESA Council of Ministers, EAC Council of Ministers and the SADC Council of Ministers in accordance with their respective procedures.

The COMESA, EAC and SADC Competition Regulations have been adopted by the relevant policy making organs of the three organizations. The main task outstanding is the preparation of implementation guidelines which is now ongoing.

A consultant has already been engaged to prepare the draft implementation guidelines. The adoption of the implementation of the guidelines will be carried out through a consultative framework among the RECs, member states and interested stakeholder.

IV. RESULTS OF THE COMESA AIR TRANSPORT REGULATIONS

For the period that COMESA has been implementing the Air Transport Liberalisation Programme, very significant changes have taken place in the region in terms of service frequencies among city pairs and the level of airfares.

The frequencies between city pairs have increased and many city pairs for which services were not provided have been linked. The scenario of changes in frequencies is shown in Annex 2 attached.

Several countries have also extended fifth freedom rights to others on various routes. Countries granting fifth freedom traffic rights include Burundi, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Uganda, Zambia and Zimbabwe.

V. CHALLENGES IN IMPLEMENTATION OF THE COMPETITION REGULATIONS

While the ESA sub-region has advanced faster than the rest in terms of implementing the air transport liberalization programme, the following are the challenges the sub-region faces in developing its air transport sector:

- Adoption and implementation of competition regulations by member;
- The proliferation of open skies agreements entered to by states especially with the United States;
- Rulemaking Mechanisms; and
- Funding of the Joint Competition Authority

VI. WAY FORWARD

In order to make rapid progress in establishment of a uniform continental framework for managing the economic regulation of the civil aviation sector, it is necessary to coordinate and develop the following instruments:

- Harmonised Air Transport Competition Regulations;
- Uniform Implementation Procedures;
- Common Approach in dealing with other groupings such as EU or large countries in entering agreements or other arrangements in the air transport sector;
- Cooperation in policy development and rulemaking in order to continue to have harmonized policies and unified body of laws to govern the sector

Furthermore, it is important to share and utilize the experience gained by the various regional economic communities in Africa and also the systems in place in other economic blocks such as the European Union and elsewhere.