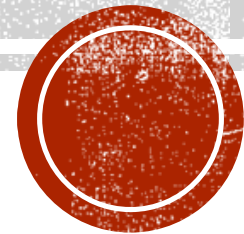


# **YD TEXTS CAPACITY BUILDING WORKSHOP 1**

Competition Regulations

Addis Ababa 18 and 19 February 2019



**Kofi Henaku, PhD**

# SESSION OUTLINE

1. Life Before Annex 5 - Introduction
2. Annex 5
  1. Offending Actions – Section One
    1. Anti- Competitive Practices
    2. Abuse of Dominant Position
    3. 15 Minute discussion of Offending Actions
  2. Management of Offending Actions – Section Two
    1. State Management – *it starts from the States*
    2. Regional Management – *Pillars of the Union*
    3. Continental, Regional and State Management - *Annex 4 is just high level document*
    4. *25 Minute Discussion on Management*
  3. *Summary and the way forward*

# LIFE BEFORE ANNEX 5 - 1

## ▪ YD – ART 3

- State Parties grant third, fourth and fifth freedoms of the air on scheduled and non-scheduled

## YD – Art 4

- no approval required by the aeronautical authorities of State Parties concerned for tariff to be charged
- airlines to file such tariffs 30 working days before they enter into effect.

## ▪ YD Art. 5

- no limit on the number of frequencies and capacity offered

## ▪ YD Art. 6

- Each State Party shall have the right to designate in writing at least one airline to operate the intra-Africa air transport services

# LIFE BEFORE ANNEX 5 - 2

## Yamoussoukro Decision '99

### ▪ **Article 7 Competition Rules**

7.1 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.

## Regional Activities

- **COMESA/EAC/SADC Competition Rules – Answer to threat Dominant Carrier?**
- **ECOWAS Competition Rules???**
- **Tripartite Air Transport Committee**

# OBJECTIVES OF AIR TRANSPORT REGULATION

1. reduce State's costs in performing its economic regulatory functions
  2. increase consumer's benefits and choices;
  3. improve air connectivity; and
  4. create more competitive business opportunities in the marketplace;
- thereby contributing to the sustainable economic development and to the expansion of trade and tourism.
  
  - Who is the Client of Air Transport Policy?

# ANNEX 5 CONTENTS

## SECTION ONE: OFFENDING ACTIONS

- Air Transport Service Providers
  - Anti-competitive Practices, Agreements, Decisions (Article 4)
  - Abuse of Dominant Position (Article 5)
- States
  - Non Discrimination (Art. 6)
  - Subsidies (Art. 7)
- Exemptions and Safeguard Measures (Art. 8)

## SECTION TWO: Management

- Complaints (Article 10)
- Investigation & Procedural Fairness (11)
- Hearing of Parties 12
- Outcome of Complaint 13
- Provisional Measures 14
- Role of States 15
- Penalties 16
- Review of Decisions 17
- State Dispute Settlements (Article 18)

### Underlying Assumptions

The Executing Agency (Article 9) *p57*

Confidentiality (Article 19) – *p60*

Publication of Decisions (Article 20) – *p61*



# ANNEX 5 - SECTION ONE

Review of Offending Activities - Anticompetition – Air Transport Service Providers and States

# ART. 3 — GEOGRAPHICAL SCOPE - P53

*apply to ..... intra-Africa air transport services, ..... within the separate and joint territories of the regional economic communities and within the entire African continent*

- Intra African transport ?????
  - Flights involving African Eligible Airlines
  - Flights on eligible carriers originating in and terminating in REC and Africa?
  - Flights on eligible carriers originating outside and terminating in REC and Africa?
  - Flights involving eligible carriers terminating in Africa
- No?????
  - Cabotage flights
  - Non eligible African carrier flights originating or terminating in Africa ????????????
  - Non African carrier flights originating and terminating in Africa ????????????



# ART.4 (3) B – ANTI COMPETITIVE PRACTICES – *P53*

Practice is not anticompetitive unless is it:

- ✓ **Sustained** rather than temporary; (Temporal Scope)
- ✓ Has **adverse economic effect** on or causes economic damage to any competitor; (Effect doctrine) – Indirect
- ✓ Reflecting an **apparent intent** or having the **probable effect** of *crippling, excluding or driving any competitor* from the market; (Direct Effect/Targeting) or
- ✓ Limiting the rights or interests of consumers (Consumer impact).

# ART.4(1) ANTI COMPETITIVE PRACTICES- P53

1. Any **practice, agreement or decision** which negates the objective of free and fair competition in air transport services shall be prohibited

- **Agreement** - *any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings*
- **(4.2) those:**
  - directly or indirectly *fixing* purchase or selling or any other trading conditions;
  - *limiting or controlling* markets, technical development, or investment;
  - addition of excessive capacity or frequency of services;
  - dividing markets or sources of supply; or
  - applying dissimilar conditions to similar transactions with other airlines;
  - making the conclusion of contracts subject to acceptance by the other parties of unconnected supplementary obligations

# ART. 5 - ABUSE OF DOMINANT POSITION *P54*

- *Abuse by one or more airlines of a dominant position prohibited*
- **directly introducing unfair trading conditions to the prejudice of competitors**
- **limiting capacity or markets to the prejudice of consumers**
- **applying dissimilar conditions to similar transactions with other trading parties**
- **making the conclusion of contracts subject to acceptance by the other parties, of unconnected supplementary obligations**

# STATE OFFENDING PRACTICES –P55

- **Art. 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 other State Parties.
  
- **Art. 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

# EXEMPTIONS AND SAFEGUARD MEASURES *P56*

- The Executing Agency may exempt any particular practices, agreements or decisions which may be deemed illegal or prohibited under Article 4 hereof
- 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.
- **Form A - Application for an exemption – 1003/14/A (pp 70 – 71)**



# OFFENDING ACTIONS - DISCUSSION

15 Minute Interaction

# DISCUSSION AREAS

## Anti Competitive Practices

- What are some of the airline activities that we consider likely to be anti-competitive and in breach of Article 4?
- Should we look at the system of the air transport sector when talking anti-competition or merely focus on Eligible airlines?

## Abuse of Dominant Position

- Should we look at the system of the air transport sector when talking anti-competition or merely focus on Eligible airlines?
- Can we truly make a distinction between airlines or look at their close relation with other service providers?



# MANAGEMENT OF OFFENDING ACTIONS

Enforcement, Investigations, Dispute Settlement



# ART. 10- COMPLAINTS – *P57*

- Any State Party, air transport undertaking, regional competition authority or any interested party **may lodge a complaint** in writing with the Executing Agency against an air transport undertaking **concerning an alleged breach** of these Regulations by that air transport undertaking.
- The Executing Agency shall within thirty (30) days of receipt of a complaint made under paragraph 1, forward a copy of such complaint to the competent authority of the State Parties.
- **Form B – Complaint Form – 1003/14/B (pp 71 – 73)**

# ART. 11 – INVESTIGATIONS – *P58*

- ..... the Executing Agency may undertake all necessary investigations into air transport undertakings and associations of air transport undertakings.
- Where a regional competition authority or the competent authority of a state party undertakes investigation into an air transport undertaking or association of air transport undertakings either of its own motion or on the delegated authority of the Executing Agency, the Authority shall submit its investigation report to the Executing Agency within a reasonable period.

# ART 12 – HEARING OF THE PARTIES – *P58*

- Before taking any decision under these Regulations affecting air transport undertakings or associations of air transport undertakings, the Executing Agency shall give the air transport undertakings or associations of air transport undertakings concerned the opportunity of being heard. There shall be a written record of the hearing.
- The hearing shall be conducted in accordance with the Executing Agency's Rules of Procedure and there shall be a written record of the hearing.

# ART. 13 OUTCOME OF COMPLAINT –

## *P58/59*

- Where the Executing Agency finds that there has been an infringement of any provision of Chapter Two of these Regulations, it shall direct the air transport undertaking or association of air transport undertakings concerned to bring such an infringement to an end, failing which it may impose such provisional measures or penalties as appropriate.
- no grounds for intervention in respect of any agreement, decision or concerted practice, it shall reject the complaint
- send a copy of its decision to the competent authority of the State Party in whose territory the head office

# ART.14 PROVISIONAL MEASURES – P59

- Where there is *prima facie* evidence ..... that certain practices are contrary to these Regulations and have the object or effect of directly jeopardising the existence of an air transport 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.
- shall apply for a period not exceeding ninety (90) days

# ART.15 ROLE OF STATES IN INVESTIGATIONS – *P59*

- the Executing Agency may request all necessary information from the competent authorities of the State Parties and from an air transport undertaking or association of air transport undertakings
- A copy of the request for information to an air transport undertaking or association of air transport undertakings shall also be sent to the competent authority of the State Party
- ..... 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 the time limit

# **PENALTIES — *P60***

- ..... may decide, depending on the gravity and the duration of the infringement, to impose penalties on an air transport undertaking or association of air transport 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 indicated by the Executing Agency.

# ART. 17 REVIEW OF EA DECISIONS – *P60*

- Any party whose rights, interests or legitimate expectations have been affected by a decision of the Executing Agency may appeal to the ~~Board of Appeals~~ or the ~~African Aviation Tribunal~~, as applicable under the terms of the Regulations on Dispute Settlement Mechanisms Relating to the Implementation of the Yamoussoukro Decision



# ART. 18 STATE DISPUTE SETTLEMENT

- If any dispute arises between State Parties relating to the interpretation or application of these Regulations, the State Parties concerned shall have recourse to the dispute settlement mechanisms outlined in the Regulations on Dispute Settlement Mechanisms Relating to the Implementation of the Yamoussoukro Decision

# **GUIDELINES AND PROCEDURES FOR THE IMPLEMENTATION OF THE REGULATIONS ON COMPETITION - SCHEDULE TO ANNEX 4 (*PP 62 – 73*)**

- Guidelines
- Rules of Procedure

# DISCUSSION ON MANAGEMENT

**Executing Agency and Fairness**

**RECS, States and Interested Parties**

# THANK YOU FOR YOUR ACTIVE PARTICIPATION

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