

REGULATIONS ON COMPETITION IN AIR TRANSPORT SERVICES WITHIN AFRICA

ANNEX 5 To the Yamoussoukro Decision {Assembly/AU/Dec 676(XXX) - Decision on Legal Instruments}

Regulations on Competition in Air Transport Services within Africa,

PREAMBLE

WE, the Ministers responsible for Transport, Infrastructure, Energy and Tourism meeting at the First Ordinary Session of the African Union Specialized Technical Committee on Transport, Transcontinental and Interregional Infrastructure, Energy and Tourism in Lomé, Togo, 17th March 2017 have adopted these Regulations, developed by the Bureau of the Conference of African Ministers of Transport, meeting in Malabo, Republic of Equatorial Guinea, on 18th and 19th December 2014, on the occasion of the Fourth Meeting of the Bureau of the Conference of African Ministers of Transport dedicated mainly to implement the Executive Council Decisions EX.CL/Dec.826(XXV) endorsing the report of the Third Session of the Conference of African Ministers of Transport (CAMT);

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 3 rd 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 14 th November 1999, hereinafter called the Yamoussoukro Decision;

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

Considering EX.CL/Dec.359 (XI) wherein the Executive Council endorsed the Resolution of the 3 rd Session of the Conference of African Ministers of Transport (CAMT) in Malabo, Equatorial Guinea in 2014 entrusting the functions of the Executing Agency of the Yamoussoukro Decision of 1999 to the African Civil Aviation Commission (AFCAC), hereinafter called the Executing Agency;

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

Desirous of ensuring fair opportunity on a non-discriminatory basis for the designated eligible African airlines, to effectively compete in providing air transport services within the African Air Transport Market.

HEREBY MAKE THE FOLLOWING REGULATIONS:

Chapter 1 Definitions, objectives and the scope of application

Article 1 Definitions

In these Regulations,:

“Abuja Treaty” means 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.

“Aeronautical Authority” means any Governmental authority, body corporate or organ duly authorised to perform any function to which these Regulations relate.

“Air transport undertakings” includes airlines and other air transport service providers.

“Air Transport Services” means any scheduled or unscheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

“Air Transport Service Providers” shall include airports, air navigation service providers, airport ground passenger and cargo handling companies, travel agents, suppliers of computer reservations systems or global distribution systems, and all other categories of services provided to airlines directly at the airports.

“Airline” means an air transport enterprise holding a valid Air Operators Certificate and operating air transport services.

“Capacity” means 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 a body established in a State Party and charged with regulating competition in the air transport sector, or in absence of such an institution.

“Dominant position”: means a position of one or more airlines which enables them to prevent effective competition being maintained within the market or part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end users.

“Executing Agency” means the African Air Transport Executing Agency provided for under Article 9 (4) of the Yamoussoukro Decision.

“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 Yamoussoukro Decision 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 a Member State that has ratified or acceded 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.

“Scheduled and non-scheduled air services” shall 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” means an association of airlines with the aim of promoting co-operation activities of its members.

Article 2

Object

The purpose of this Regulation is to promote and guarantee free and fair competition in Intra-African air transport services in order to develop the air transport industry and to contribute to the welfare of the citizens of the State Parties.

Article 3

Scope of Application

This Regulation shall apply to scheduled and non-scheduled intra-Africa air transport services, 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 2

Prohibited Practices, Agreements And Decisions

Article 4

Prohibited 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 an association of airlines and any concerted practice which negatively affects the liberalization of intra-Africa air transport services and which has as its object or effect the prevention, restriction or distortion of competition, 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; or

(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.

3.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 causes 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

1. Any abuse by one or more airlines of a dominant position within the African Air Transport market 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; or

IV. 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.

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 other 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 rules on the conditions 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 be deemed illegal or prohibited under Article 4 hereof.
- 2.** The Executing Agency may, on application by an eligible airline, approve measures designed to remedy any adverse effects a State Party 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 the relevant Regional Competition Authority and the Executing agency.
- 4.** Notwithstanding paragraph 1 of this Article, in the event of negative economic 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 Executing Agency.
- 5.** These safeguard measures shall remain in force for a maximum period of one (1) 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(5) hereof distorts, threatens to distort or has the effect of distorting competition.
- 7.** The regional competition authority and/or the Executing Agency shall recommend to a State Party 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 the Regulations 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(8) 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 3 **Enforcement, investigation, negotiation, arbitration and** **Judicial review**

Article 9 **The Executing Agency**

1. 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 State Parties in terms of Article 6;
- (f)** reporting to the organ of the African Union responsible for the air transport sector on any matter relating to the application of these Regulations; and
- (g)** Performing any other function assigned to it under these Regulations.

2. The Executing Agency may delegate its functions or powers of investigation to the Regional Competition Authority or a State Party

Article 10 **Complaints**

1. Any State Party, air transport undertaking, or any interested party may lodge a complaint in writing with the Regional Competition Authority or Executing Agency against an air transport undertaking concerning an alleged breach of these Regulations by that air transport undertaking.

2. The relevant Regional Competition Authority or 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.

3. Such competent authorities shall have the right of audience before the Executing Agency.

4. The Executing Agency may, on its own motion, initiate an investigation into a suspected breach of these Regulations by an air transport undertaking.

Article 11 **Investigation and Procedural Fairness**

1. 1. In the execution of the duties under these Regulations, the Executing Agency may undertake all necessary investigations into air transport undertakings and associations of air transport undertakings.

2. 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.

3. Without prejudice to paragraphs (1) and (2) above, the investigating body shall submit its preliminary findings within thirty (30) days and complete its investigation and final report within sixty (60) days of receipt of a complaint.

4. The Executing Agency or relevant Regional Competition Authority shall within a reasonable time, prior to the envisaged investigation inform the competent authority of the State Parties of the proposed investigation and the identity of the authorised officials. The competent authority of the State Parties shall assist the officials of the Executing Agency or Regional Competition Authority if so requested.

5. In the execution of its duties, the Executing Agency or Regional Competition Authority shall act with due regard to the rules of natural justice.

Article 12 **Hearing of the Parties Concerned**

1. Before taking any decision under these Regulations affecting air transport undertakings or associations of air transport undertakings, the Regional Competition Authority and/or 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.

2. The hearing shall be conducted in accordance with appropriate Rules of Procedure and 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 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.

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 authority of the State Party in whose territory the head office of the air transport undertaking or association of air transport 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 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.

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. 1. The Executing Agency shall exercise its powers and apply its procedures in collaboration with the Regional Competition Authorities and competent authorities of the State Parties.

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 State Parties and from an air transport undertaking or association of air transport undertakings.

3. 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 in whose territory the head office of the air transport undertaking or association of air transport 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 for the failure to supply information within the time limit indicated by the Executing Agency.

Article 16

Penalties

1. The Executing Agency may, depending on the gravity and the duration of the infringement, decide to impose penalties on an air transport undertaking or association of air transport undertakings where they intentionally or negligently:

(a) infringe any provision of these Regulations;

(b) supply incorrect or misleading information in connection with an application; or

(c) Supply incorrect information in response to a request made, or fail to supply information within the time limit indicated by the Executing Agency.

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 appeal to the relevant institutions applicable under the terms of the Regulations on Dispute Settlement Mechanisms Relating to the Implementation of the Yamoussoukro Decision.

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 the dispute settlement mechanisms outlined in the Regulations on Dispute Settlement Mechanisms Relating to the Implementation of the Yamoussoukro Decision.

Article 19

Confidentiality

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, the Regional Competition Authorities 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 confidentiality and which has been acquired by them as a result of the application of these Regulations. The Executing Agency shall develop and strictly enforce appropriate rules to give effect to this provision.

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 air transport undertakings in the protection of their business secrets.

Article 21
Implementing provisions

The Executing Agency shall formulate implementing provisions for adoption by the relevant institutions on, inter alia:

- (a) guidelines on subsidies;
- (b) rules of procedure on exemptions;
- (c) the standard form, content and other details pertaining to:
 - (i) applications; and
 - (ii) complaints and their outcomes;
- (d) the rules on hearings;
- (e) penalties;

Article 22
Amendments

1. Each State Party may propose amendments to this Regulation.
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 Regulation shall enter into force after their approval by the Assembly of Heads of State and Government of the African Union.

Article 23
Entry into Force

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

{Adopted by the 30th Ordinary Session of the Assembly, 28-29 January 2018, Addis

APPENDIX 1

TO ANNEX 5 TO THE YAMMOUSSOUKRO DECISION: GUIDELINES AND PROCEDURES FOR THE IMPLEMENTATION OF THE REGULATIONS ON COMPETITION IN AIR TRANSPORT SERVICES WITHIN AFRICA

Whereas the Regulations on Competition in Air Transport Services within Africa 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:

GUIDELINES

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 interline able 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 interline able 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 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

(h) 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

(i) 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;

(d) In addition 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 authority of the State Party 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 State Parties 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 – 1003/17/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 Executing Agency 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 Executing Agency, 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 Executing Agency 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 Executing Agency 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 Form – 1003/17/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 authority of a State Party 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):