



A FRAMEWORK FOR THE OPERATIONALISATION OF THE COMESA-EAC-SADC JOINT COMPETITION AUTHORITY (JCA)

FINAL REPORT – PART TWO LEGAL REGIME ESTABLISHING THE JCA

CONTRACTING AUTHORITIES
COMESA

BENEFICIARY
COMESA, EAC, SADC

Service Agreement Number TMSA-SC-12-31



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Final Report Part 2 – Legal Regime Establishing the JCA

Project: A Framework for the Operationalisation of the
COMESA EAC-SADC Joint Competition Authority (JCA)

Service Agreement No: TMSA-SC-12-31

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ABBREVIATIONS

Acronyms	Definition
AA	Aeronautical Authorities
AFCAC	African Civil Aviation Commission
AFRAA	African Airline Association
ASA	Air Service Agreement
ATC	Air Traffic Control
ATM	Air Traffic Management
AU	African Union
AUC	African Union Commission
BASA	Bilateral Air Service Agreement
CAA	Civil Aviation Authority
CAC	Civil Aviation Committee (of SADC)
DCA	Directors of Civil Aviation
Doc.	Document
EA	Executing Agency
EASA	European Aviation Safety Agency
EAYD	Executing Agency of the Yamoussoukro Decision
e-bulletin	Electronic news letter
ECA or UNECA	United National Economic Commission for Africa
EU	European Union
FAA	Federal Aviation Administration
FE	Financial Expert
GHC	Ground Handling Company
H/Q	Headquarters

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Acronyms	Definition
HR	H uman R esources E xpert
IATA	International A ir T ransporters A ssociation
ICAO	International C ivil A viation A ssociation
IT	I nformation T echnology
JCA	J oint C ompetition A uthority
MASA	M ultilateral A ir S ervice A greement
MIDT	M arketing I nformation D ata T ransfer
OAG	O fficial A irline G uide
OAU	O rganisation of A frican U nity
PM	P roject M anager
POL	P olicy A nalyst
RECs	R egional E conomic C ommunities
SADC	S outhern A frican D evelopment C ommunity
SC	S teering C ommittee
SG	S ecretary G eneral
TE	T ransport E conomist
TL	T eam L eaders
TOR	T erms of R eference
WASA	W orld A ir S ervice A greements
YD	Y amoussoukro D ecision

1 Executive Summary

The scope of work, specific task for the consultant as defined in the terms of reference as well as summary findings are addressed in this section.

Against the objective of defining the functions of the JCA as envisaged by the mandate of the Heads of States, the Joint Competition Regulations of 2004, Guidelines of 2007 and, by reference, the Yamoussoukro Decision and developing legal instruments, management and secretariat structures to reflect the functions to be performed by the JCA, the consultant analysed the institutional relationships, in particular in relation to complaints procedures and rulemaking structures, assessed the functions of the JCA vis-à-vis the Member States and the other participants.

The analysis resulted as required under the terms of reference of this study on the draft of a legal instrument, namely: a **Regulation establishing the Joint Competition Authority**.

The draft Regulation which was also thoroughly reviewed after the Harare Stakeholders workshop, underscores the sovereignty of states and a number of principles as basic underlying objectives of the Regulation. It provides for a location and establishing, immunity as well as liability of the JCA. The draft Regulation it is important to note re-examines the role assigned by the Tripartite Summit and attempts to extend the mandate of the JCA beyond the confines of managing the Competition Regulation. Consequently certain functions are included such as training, database development, development of rules on liberalisation,. Assisting or supporting states in third party negotiations, undertaking extensive research in support of liberalisation of the air transport sector.

Logically institutions are provided for including the Tripartite institutions, The JCA Board, the Executive Director and his Staff,. The Regulation provides for collaboration between the JCA and other air transport coordinator institutions and most importantly outlines rights and responsibilities of various parties in terms of raising complaints, appealing against decision of the JCA as well as in recommending rules for adoption by Tripartite Institutions.

In relation to dispute settlement, the draft makes provisions for usage of a Board of Appeals as well as an Appeals Tribunal to be constituted by the Tripartite Summit from among the membership of the COMESA and EAC Courts of Justice and the SDADC Tribunal.

One primary recommendation flowing from the analysis and the legal draft is the need to empower the JCA to supervise an eventual multilateral air services agreement.

2 Introduction

This report is prepared under in the framework of COMESA Service Agreement No **TMSA-SC-12-31** to develop a framework for operationalising the JCA in accordance with the Competition Regulations 2004. It contains and draft Regulation establishing the JCA, Annexes to the draft and an explanatory memorandum of the Regulation Establishing the Joint Competition Authority.

2.1 Terms of Reference

Under this task the Consultant is required to develop an appropriate legal instrument to provide for the establishment of the JCA in accordance with the Regulations for Competition in Air Transport Services, 2004.

2.2 Structure of the Report

This Report covers the following:

- Analysis of the relevant Competition Regulations and related instruments
- An analysis of State commitments
- Analysis of the functions, mandate and Rules of Procedure of relevant Ministerial level meetings in the 3 RECs, as well as Director of Civil Aviation;
- Analysis of Member States procedures for economic regulation of air transport
- The JCA within the legal framework of the Tripartite
- An examination of the role of the JCA vis-à-vis the technical bodies within the RECS
- The draft Regulation establishing the Joint Competition
- Annex One to the draft Regulation – Boards of Appeal
- Annex 2 to the draft Regulation – Rulemaking Procedures, and
- An Overview of provisions of the draft Regulation

2.3 Competition Regulations

The Regulations for Competition in Air Transport Services within COMESA, EAC and SADC signed in Pretoria in 2002 and approved by Council of Ministers of SADC, COMESA and EAC in 2004 (Competition Regulations) has the object 'to promote and

guarantee free and fair competition in air transport services within the COMESA, EAC and SADC Regions in order to develop the industry and contribute to the welfare of the citizens of Member States' (Article 3(1)).

It prohibits any practice, agreement or decision which negates the objective of free and fair competition in air transport services in Article 4, any abuse by a dominant position in Article 5, national legislation or administrative measures that discriminate against the provision of services by undertakings in Article 6, the granting of any subsidy by any Member State which distorts or threatens to distort competition in Article 7.

In terms of the administrative structure, the Competition Regulations in its Article 9 required the establishment of the Joint Competition Authority (hereafter the JCA or the Authority) of COMESA, EAC and SADC to monitor the implementation of the Yamoussoukro Decision and the Competition Regulations Article 9 (3).

Pursuant to Article 9 (4), the Joint Competition Authority shall have the function of:

- (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 anti-competitive acts, abuse of dominant positions, anti-discriminatory practices and grants of subsidies;
- (d) granting, refusing or revoking exemptions in terms of the grant of subsidy;
- (e) reviewing legislation or administrative measures of Member States in terms of discriminatory measures and legislation;
- (f) reporting to the Council or Committee of Ministers as the case may be, on any matter relating to the application of these Regulations; and
- (g) performing any other function assigned to it under the Competition Regulations.

The Competition Regulations provides for investigatory, complaints and dispute settlement measures in addition to powers to adopt implementing guidelines. In 2006, Guidelines, Provisions and Procedures for the Implementation of the Regulations for Competition in Air Transport Services within the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) were drafted pursuant to Article

21 of the Competition Regulations. The 3rd Meeting of the Joint COMESA, EAC and SADC Ministers responsible for Transport held in Harare, Zimbabwe, in November 2008 adopted the Guidelines, Provisions and Procedures for the Implementation of Regulations for Competition in Air Transport Services within COMESA, EAC and SADC.

2.3.1 RECs adoption of Competition Regulation

The Competition Regulation as an instrument of Member States of the three Regional Economic Communities were adopted in accordance with the statutory requirement of the RECs. As noted earlier, the SADC and COMESA Councils of Ministers adopted these joint Regulations at their respective levels in 2004. It is not clear how or when the Council of Ministers of the East African Community approved the Competition Regulations.

The East African Community's Air Transport Sub-Committee has been actively engaged in addressing a multilateral liberalisation regime.

2.4 Member States Domestication of Economic Regulation

A study conducted by SADC in March 2009¹ recommended that Member States should express their commitment to implementing YD by enacting enabling legislation and repealing any laws that are in conflict with YD.

An evaluation in July 2008 of Legal Notice No 2² also addressed the issue of domestication of international legal instruments, and the perception it creates among practitioners that nothing is being done in terms of implementation. According to the report:

The adoption of the liberalisation programme by the Council of Ministers made it a legally binding instrument under the COMESA Treaty. However, the perception by most states was that Legal notice No. 2 was not enforceable as it had not been domesticated. This perceived non-enforceability of the

¹ Assessment of Potential Impact of Implementation of the Yamoussoukro Decision on Open Skies Policy in the SADC Region, Rexter Ndhlovu and Andy Ricover, March 2009

² Study on the Evaluation of Legal Notice No. 2 of 1999 on the COMESA Regulations for the Implementation of the Liberalised Air Transport Industry, Rexter R. Ndhlovu

programme was considered a major impediment to its implementation. The view was that without domestication or due recognition by States, the regulations were not binding on member States.

Accordingly, it was recommended that States should take appropriate actions to domesticate Legal Notice No. 2 to create the necessary legal and administrative framework for its effective implementation.

The same challenge was observed in a SADC Evaluation of 2009³ which concluded that there was a need to request SADC Ministers of Transport to confirm that they are legally bound by the YD, and, if not, for which reason; and to also request National Competition Authorities in SADC Member States, or where there are no such Authorities, the Ministers responsible for competition matters, to confirm that they and their natural and corporate citizens are bound by the COMESA/EAC/SADC Regulations for Competition in Air Transport Services and the Guidelines, Provisions and Procedures for the Implementation of the Regulations for Competition in Air Transport Services, and, if not, which legislative or regulatory action, if any, is envisaged to remedy this situation.

The above show a similar trend in all regional economic communities and particularly in relation to air transport. This is not unique to air transport. It is a typical challenge facing most integrationist goals. While states are willing to implement regionally agreed regulations, national policies and structures sometimes delay the domestication of such regulations.

In view of the traditional challenge, most regulatory regimes are adopted without specific commitments and often domestication obligation in the following terms:

Pursuant to Article 5(2)(b) of the Treaty, Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of these Regulations or resulting from action taken by the Commission under These Regulations. They shall facilitate the achievement of the objects of the Common Market. Member States shall abstain from any measure which could jeopardise the attainment of the objectives of these Regulations.⁴

³ Evaluation of Southern African Development Community (SADC) Member States' Compliance in Implementing the Yamoussoukro Decision (YD), Request No. 2009/202993

⁴ COMESA Competition Regulations (Draft Art. 5),

2.5 General Obligations of State Commitments

The Treaties establishing the three regional economic communities have various formulations of state commitment to domestication of the Treaty and or subsidiary legislation. Any attempt to secure effective implementation of the Yamoussoukro Decision will be based on these obligations of the Member States.

Article 5 of the **COMESA Treaty** provides:

1. The Member States shall make every effort to plan and direct their development policies with a view to creating conditions favourable for the achievement of the aims of the Common Market and the implementation of the provisions of this Treaty and shall abstain from any measures likely to jeopardize the achievement of the aims of the Common Market or the implementation of the provisions of this Treaty.
2. Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular:
 - (a) to confer upon the Common Market legal capacity and personality required for the performance of its functions; and
 - (b) to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.
3. Each Member State shall:
 - (a) designate a Ministry with whom the Secretary-General may communicate in connection with any matter arising out of the implementation and application of this Treaty, and notify such designation to the Secretary-General;
 - (b) transmit to the Secretariat copies of all relevant existing and future legislation and its official gazettes; and
 - (c) where it is required under this Treaty, supply or exchange information to or with another Member State and send copies of such information to the Secretariat.

Article 8 of the **EAC Treaty**⁵ provides:

⁵ Article 8, Treaty Establishing the East African Community

2. Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular -(a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and

(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.

3. Each Partner State shall –

(a) designate a Ministry with which the Secretary General may communicate in connection with any matter arising out of the implementation or the application of this Treaty, and shall notify the Secretary General of that designation;

(b) transmit to the Secretary General copies of all relevant existing and proposed legislation and its official gazettes; and

(c) where it is required under this Treaty, to supply to or exchange with another Partner State any information, send copies of such information to the Secretary General.

Article 6 of the **SADC Treaty** provides:

1. Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

.....

4. Member States shall take all steps necessary to ensure the uniform application of this Treaty.

5. Member States shall take all necessary steps to accord this Treaty the force of national law.

The above provisions from the various Treaties underscore the general obligations of Member States of the RECs. As the above clearly shows, there is no specific set of obligations requiring Member States to specify actions undertaken in respect of

legislation subsidiary to the Treaties. Member States obligations are stated in generalities.

Fortunately, nothing prevents the RECs from specifying specific commitments in respect to domestication of regional integrative rules adopted by their respective Council. In other words, if the Council of Each REC is to specify clear actions relating to adoption of subsidiary legislation, such a requirement may not be in breach of the Treaties of the RECs unless such specific action is considered unreasonable or in breach of the Constitutions of the Member States.

Indeed financial, customs, taxation, agricultural and insurance regulations of the RECs have largely provided for specific commitments of Ministers and subsidiary institutions in respect of adoption at national level of regulations or of specific acts in regulations. The specification of commitments particularly in customs treaties have meant that States have supplied community institutions with details of required actions. Such notifications required in regulations on integration have by and large resulted in much better coordination or at least much clearer evaluation of commitments.

2.6 State Commitments under the Yamoussoukro Decision

The air transport sector has by and large based itself on general statements. COMESA's Legal Notice No. 2 contains no specific commitments for Civil Aviation Authorities to provide information on the domestication of the Notice. The Notice contains very many specific obligations in relation to air carriers which normally would have required Civil Aviation Authorities to notify a central organisation of activities being undertaken in each state.

The same situation applies to the Yamoussoukro Decision and the Competition Regulations, with the slight exception of 3 declarations on commitment in Annexes 1 (a), (b) and (c). Declaration 1 (a) applies to State Parties that are not parties to the Abuja Treaty and wish to be parties to the Decision. 1(b) applied to States that are not parties to the Abuja Treaty and wish to be parties to the Decision with limitation of their commitment, and 1(c) applied to States that are parties to the Abuja Treaty who wish to limit the extent of their commitment.

The Yamoussoukro Decision contains a considerable number of situations requiring notification of action by Civil Aviation Authorities, to the Monitoring Body and the Executing Agency. The major challenge in relation of to decisive determination of whether the Decision is being implemented or not is the lack of an authoritative compelling data source of commitments.

Unfortunately, the Joint Competition Regulations adopted by COMESA, EAC and SDADC contain the same shortfall. The only times where some form of commitment or notification or application is required of states are in relation to:

- Application by states in respect exemptions – Article 8
- Complaints lodged by states – Article 10 (1)
- The JCA may request for information Article 15 (2)

There is no commitment for notification regarding domestication of the Competition Regulations. Thus the assumption will always be that subject to the terms of the Treaties as reviewed above, the Competition Regulations are binding on the States. The reality though is that this does not answer the essential question whether or not the Competition Regulations (1) have been domesticated –irrespective of whether or not it is required- and (2) whether or not any effect is being given to the Regulation in question. A negative commitment not to undertake any measure to defeat the Treaty obligations, of which the Competition Regulation is a part, does not suffice.

Table 1: Matrix of Commitments under the YD - sample

No	Article	Content
1	2	Declaration of Acceptance of YD precedence
2	2	Declaration of Agreements in compliance with YD
3	2	Declaration of Agreements not in compliance with YD and notification of date of compliance
4	2	Statement of compliance re future Agreements and individual notification of compliant or non-compliant agreements
5	3.1	Notification of exchanges of freedoms of the air including parties
6	3.1	List of eligible airlines operating under 3.1
7	3.2 (a)	Declaration of limitation of commitment under 10.1
8	3 (2) (b)	Declaration of limitation

As can be seen above, just 2 provisions of the YD would require at least 8 forms of regular or irregular statements or notifications to a centralised mechanism under the Decision. The challenge in air transportation is not just the absence of commitments to be bound by Treaties but in understanding various obligations and identifying compelling declarations, statements or notifications that are needed to ensure continuous implementation of the Treaties or Regulations.

It is important that the Joint Competition Authority be granted the authority not merely to request but where necessary demand, on pain of some form of agreed penalties, information to enable the system work.

2.7 JCA Precedence

The Tripartite Summit of 2008 launched the JCA to oversee the full implementation of the Yamoussoukro Decision within the Tripartite Region.

Essentially the JCA provided for under the Competition Regulations was assigned a much broader role by the Tripartite, namely: to oversee the implementation of the YD. While the Competition Regulation referred to the YD implementation, the role assigned the JCA was to monitor implementation. This terminology is a more coordinatory role. The more specific language in the Competition Regulation related to the Competition rules.

Following the 2008 Communique therefore the JCA has become the single organisation charged within the three regions with implementing the Competition Regulations and overseeing the implementation of the UD. It is our view that the role assigned to the JCA overshadows the activities of any institution appointed by any of the RECs on their own. It is suggested that any institution established by any of the 3 RECS to oversee the implementation of the YD will have to report to the JCA or be recognised as operating in a subsidiary position. Indeed nothing prevents the JCA from establishing regional chapters to enable it undertake its assignment effectively. Any such delegation should be within the mandate of the Tripartite Communique of 2008 and the Competition Regulations of 2004.

It is important that no such duplication exist at any material time. The elimination of such duplication is indeed what is sought to be achieved by the Tripartite and approved in the Competition Regulations.

2.8 The JCA and the Tripartite Structure

While the JCA was created by the Competition Regulations, its status was enhanced when it was launched by the Tripartite Summit.

Article 6 of the Tripartite MOU established an institutional framework of the Tripartite, namely the Summit, the Council of Ministers, the Sectoral Ministerial Committee, the

Tripartite Committee of Senior Officials and Experts (COSOE) and the Taskforce of Secretariats. It is our view that the Joint Competition Authority falls to be considered as a Committee of Senior Officials and Experts answerable directly to the Sectoral Ministerial Committee on Infrastructure.

Figure 1 below compares the institutional framework in the Competition Regulation 2004 with the Tripartite MOU.

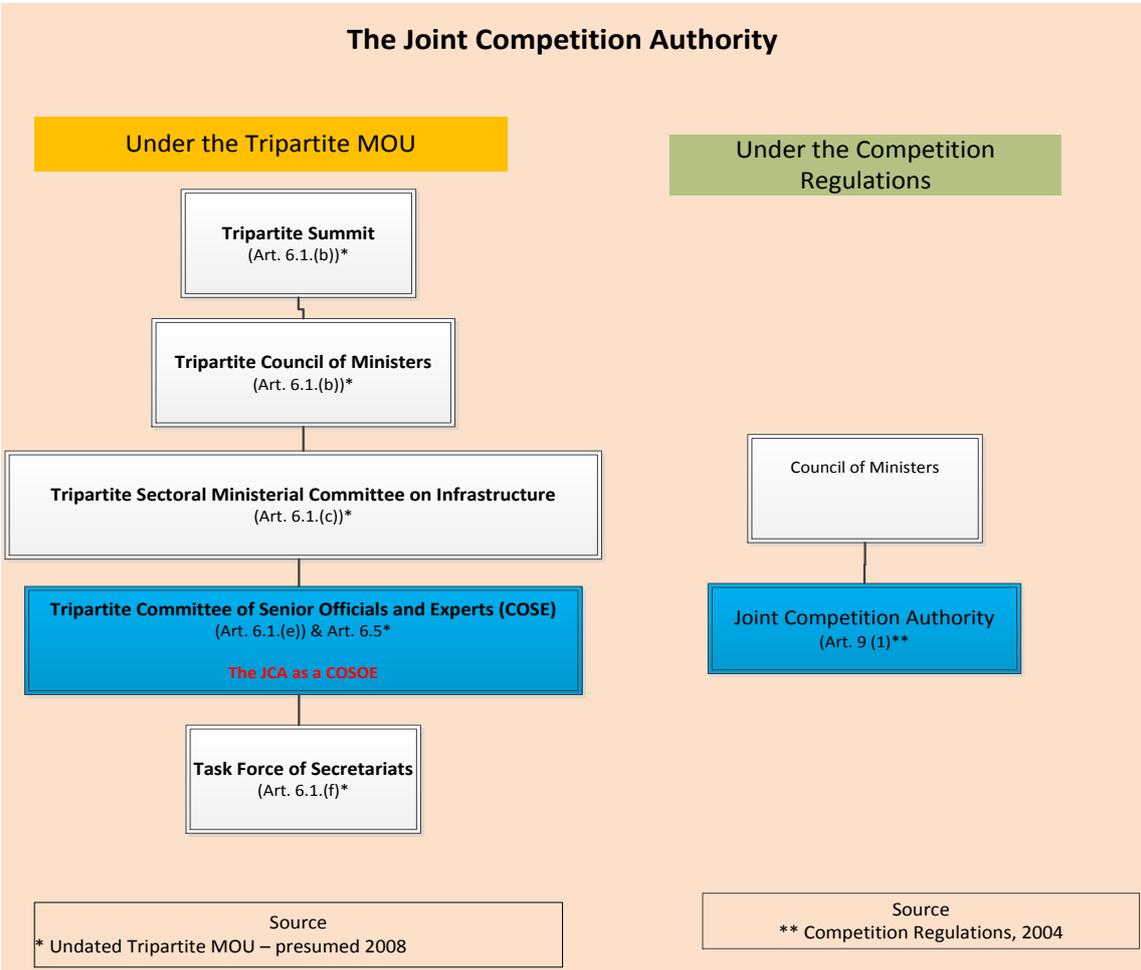


Figure 1: The JCA within the Institutional Framework of the Tripartite

2.9 The JCA and Technical Coordinating Bodies

The three RECs have standing committees of Aeronautical Authorities that have been coordinating activities in technical, economic, safety and other aspects of air transport.

COMESA has the Meeting of Directors of Civil Aviation and Aeronautical Authorities (DCAAA), EAC has the Meeting of Heads of Civil Aviation and Airport Authorities (HCAAA) while SADC has the Meeting of the Civil Aviation Committee (CAC)⁶.

These organs of the RECS have subsidiary committees coordinating economic regulation and in particular the implementation of the YD. The current state of the organisational framework is as depicted in Figure 2 below.

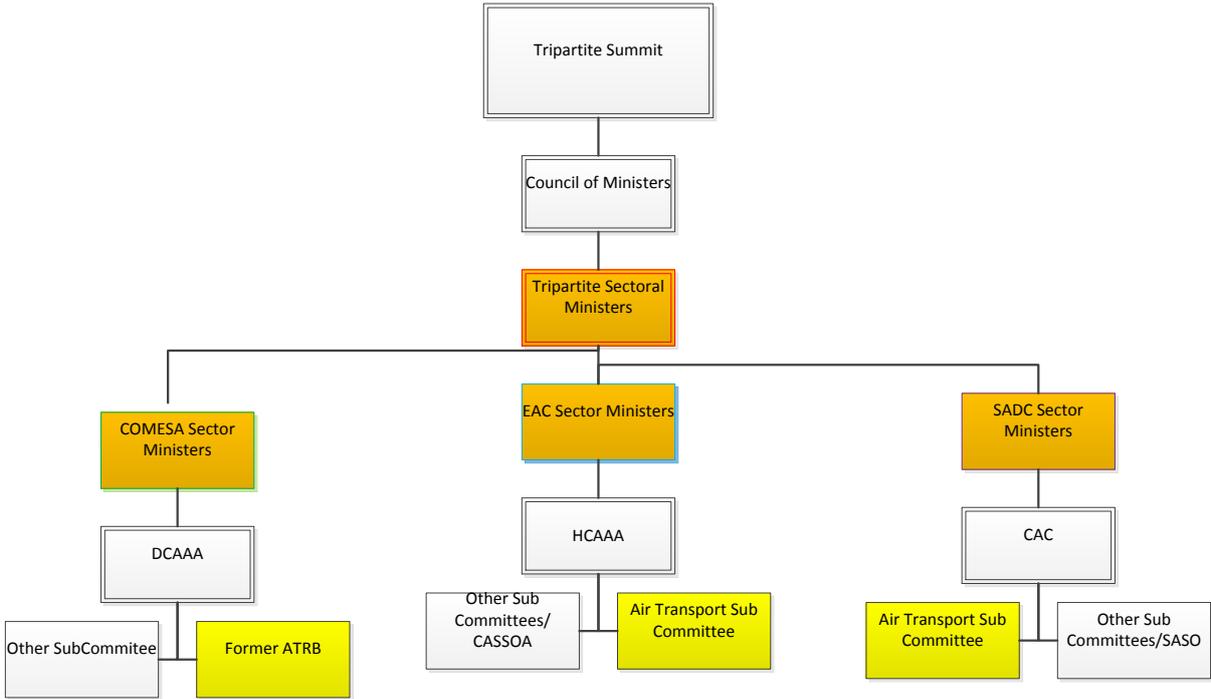


Figure 2: Dynamics of Air transport Integration in RECs

2.9.1 Alternative Structures

In view of the statutory character of these institutions, the operation of the JCA, be it in regulating competition or the implementation of the YD, will have to take them into

⁶ Article 13.6 (1) d , SAD Protocol on Transport Communications and Meteorology

consideration. The question then is how does the JCA fit into the scheme of structures and how is it the structure to be harmonised?

3 alternative structures have been examined. The first structure presents the JCA as a subsidiary of the air transport sub-committees. In this model, it reports to the air transport sub-committees.

2.9.1.1 JCA as a subsidiary to the Air Transport Sub Committees

This model supposes the regulatory role of the JCA as subsidiary to the coordinator role of the Air Transport Sub-Committees of the RECs.

Clearly this structure is different from the reality where some air transport sub-committees such as the COMESA ATRB has long been dissolved in anticipation of the JCA or the SADC YD Implementation Group also held in abeyance. This in reality will also be in breach of the provisions of the Competition Regulations.

Figure 3 depicts this scenario. The challenges to be faced by this model will include:

- Having to re-establish 3 air transport sub committees
- Defeating the object sought to be achieved in the Tripartite
- Breaching the Tripartite MOU
- Introducing additional cost structures

In view however of the existence of the EAC Air Transport Sub Committee, a solution will have to be found.

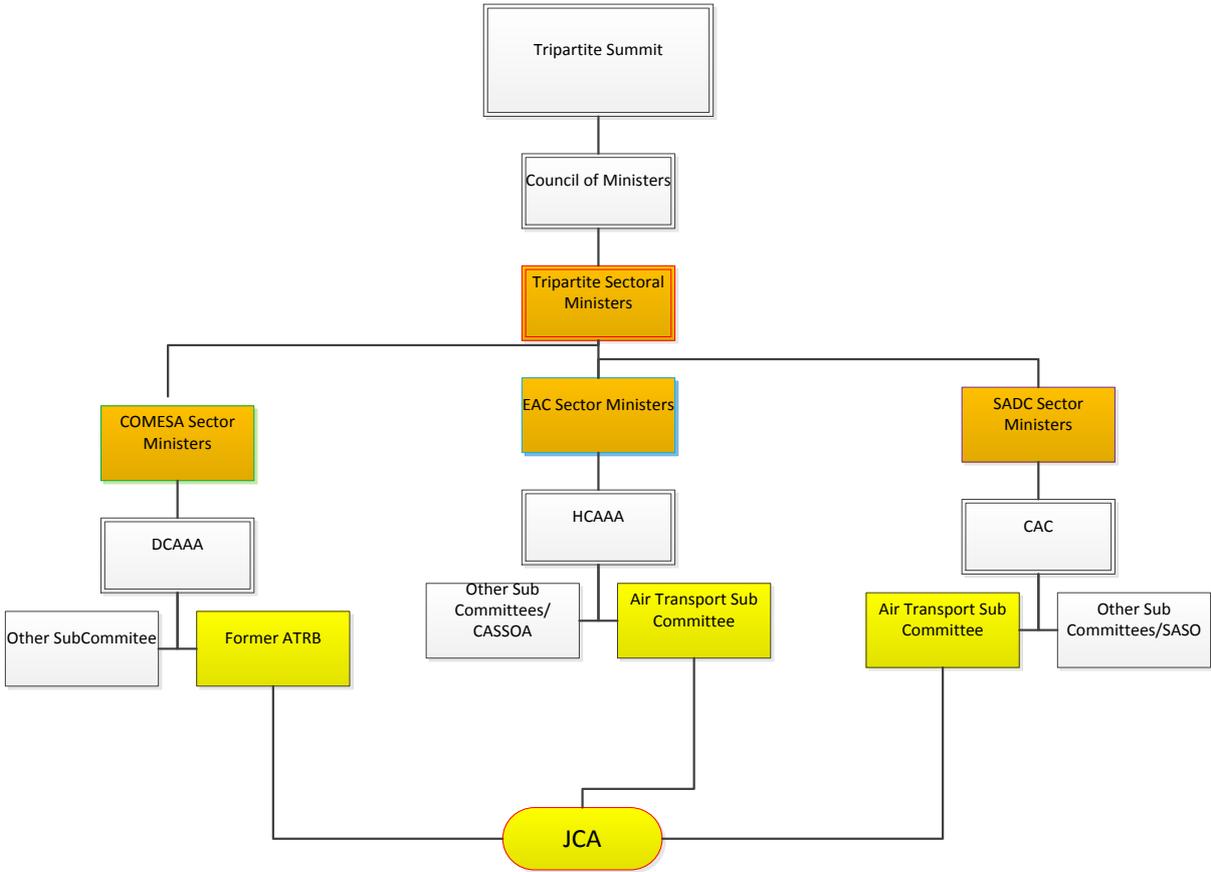


Figure 3: The JCA as a Subsidiary to Air Transport Sub-Committees

2.9.1.2 The JCA as a replacement of the Air Transport Sub-Committees

In this model, the JCA serves as a replacement of the 3 air transport sub-committees. Thus in this model, all three subcommittees are dissolved and amalgamated into the 7 - person Joint Competition Authority. Figure 4 below depicts this scenario

While this model, is a better alternative to the first, the JCA is subjected to the say of the three Director level organisations. Thus the JCA will have to comply with decisions of each of the three RECS organs individually and not jointly.

The disadvantages will be:

- Escalating cost of meeting the requirements of all three
- Potential conflicting instructions
- Lack of independence

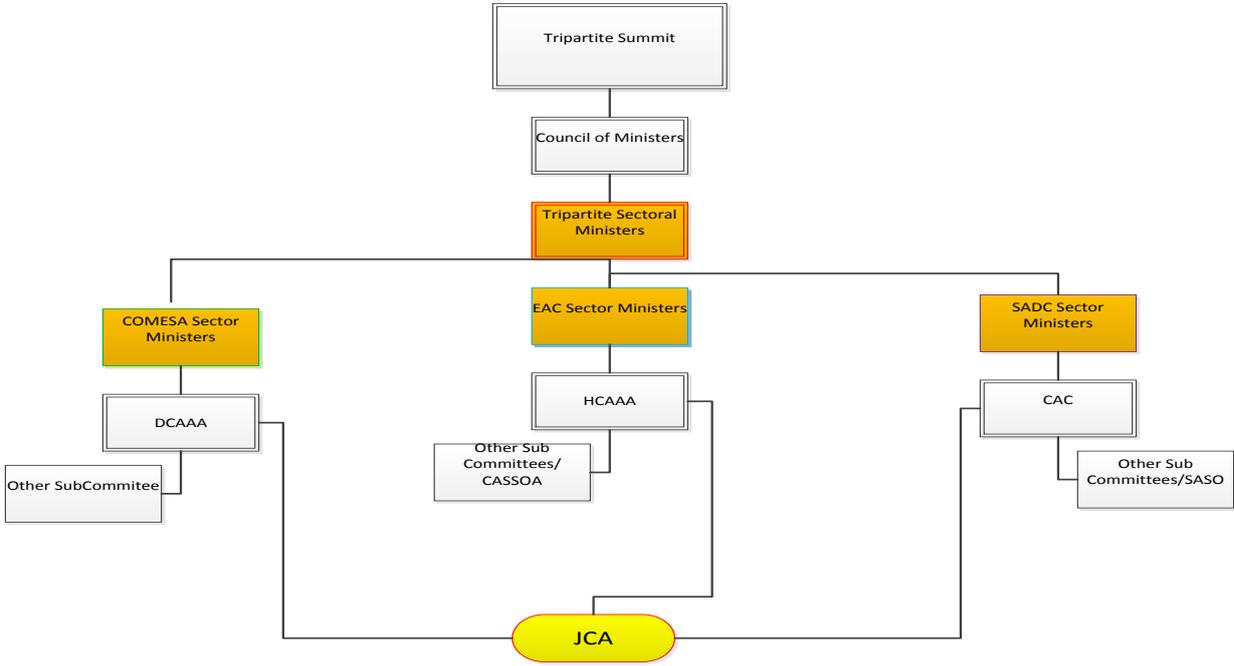


Figure 4: The JCA as a replacement of Air Transport Sub-Committees

2.9.1.3 An Independent JCA

In this model, the JCA owes its inception to nominations from the DCA level. But it operates independently of the DCAs as individual organs. As the effective economic regulatory coordinator, it can be seen as having been delegated by the Ministers to deal with all matters economic regulatory in place of the DCAs. Indeed this is clearly in line with the 2008 Communique and the Competition Regulations.

It is proposed that nominations be made at the DCA level and approved by the Sector Ministers. Nominees must be named persons and provided with named alternatives. In other words, at the DCA level the states nominated will propose candidates for the position as well as their alternates. The candidates should be vetted by the DCA to ensure that the Authority is not hollow. The nominated candidates should then be forwarded to a meeting of Tripartite Transport Ministers to approve.

In relation to its operations, it is also recommended that the JCA attempts to organise a joint DCA level consultation thus enabling the DCA level to serve as an advisory Council to the JCA. Indeed the advisory Council could be composed of a finite group

of Directors of Civil Aviation whose term may be linked to the terms of the serves members of the JCA Authority.

The advisory council could thus be composed of or organised around a troika system where past representatives still serving in DCA capacity could be used as well as potential representatives.

While the JCA will operate independently of the DCA's, checks and balances are assured through prior approval of the members of the Authority. While the Advisory Council of Directors of Civil Aviation may not have the power of dismissing the JCA, the Directors as a collective should be afforded the power to recommend the withdrawal of a member of the JCA in its extreme, the entire Authority.

The JCA shall report to the Ministers of Transport. The same body should approve its budget and annual plans.

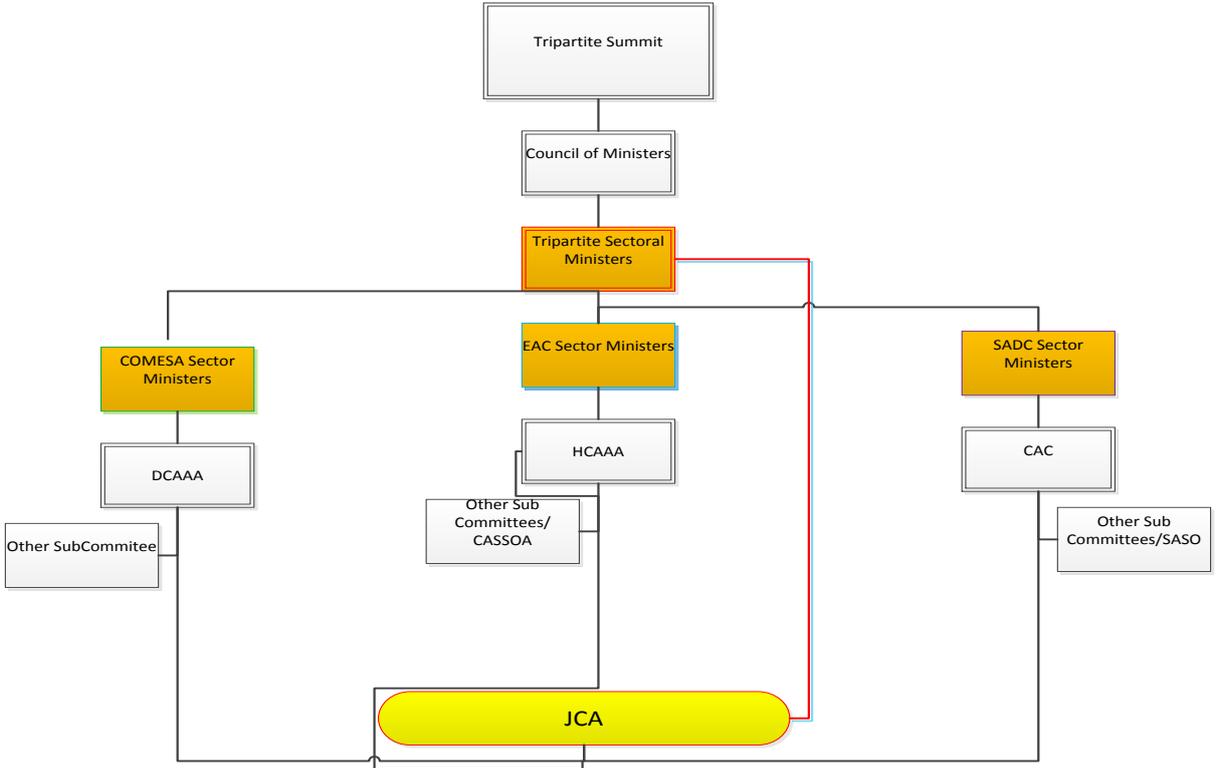


Figure 5: An Independent Collaboratory JCA

Advisory Councils are essential in an effective operationalisation of the JCA. It is proposed that the JCA be given the power and budget to set up advisory councils or working groups, whether adhoc or stand-by.

2.10 Recommendations

The Joint Competition Authority launched in the Competition Regulations and by the Tripartite Summit of 2008 is to be established under the terms of the draft Regulation reviewed above.

It is recommended:

- a) That the JCA be recognized as having been delegated economic regulatory powers by which powers it will be able to coordinate air transport liberalization and assist states fully implement the YD regime
- b) The JCA should not be given unfettered rights. It should be possible to challenge its decisions internally and failing which recourse could be had to the Appeals Tribunal.
- c) That the JCA be mandated to impose sanctions on non-state stakeholders and recommend sanctions against States.
- d) Most importantly, the JCA should be required to exercise true administrative procedures of informing parties before taking any major decision regulating in sanctioning. Stakeholders should be given the opportunity to oppose or rectify.
- e) The JCA should be mandated to acquire, maintain, analyse and report on air traffic and air transport data and that all stakeholders be obliged to supply such data when requested to do so.
- f) The members of the Authority should be drawn from the highest level possible to enhance the value of the JCA and individuals nominated should be vetted by the RECs before being put forward as RECs nominees. A scheme of alternates should also be introduced in order to ensure smooth operation of the Authority.
- g) The Executive Director as substantive head of the Secretariat should be answerable to the Board.

3 REGULATION ESTABLISHING THE JOINT COMPETITION AUTHORITY

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Regulation Establishing the Joint Competition Authority

PREAMBLE

WE, the Heads of State and Government of the Tripartite States of the Common Market of Eastern and Southern Africa (hereinafter, COMESA), the East African Community (hereinafter, EAC), the Southern African Development Community (hereinafter, SADC) globally identified as the Tripartite Summit comprising the following:

The Republic of Angola

The Republic of Botswana

The Republic of Burundi

The Union of the Comoros

The Democratic Republic of Congo

The Republic of Djibouti

The Arab Republic of Egypt

The State of Eritrea

The Federal Democratic Republic of Ethiopia

The Republic of Kenya

Libya

The Kingdom of Lesotho

The Republic of Madagascar

The Republic of Malawi

The Republic of Mauritius

The Republic of Mozambique

The Republic of Namibia

The Republic of Rwanda

The Republic of Seychelles

The Republic of South Africa

The Republic of Sudan

The Kingdom of Swaziland

The United Republic of Tanzania

The Republic of Uganda

The Republic of Zambia

The Republic of Zimbabwe

RECALLING the Regulations for Competition in Air Transport Services within COMESA, EAC and SADC (hereafter, Competition Regulations) signed in Pretoria in 2002 and approved by the Council of Ministers of COMESA, EAC and SADC in 2004;

RECALLING the Council Decision of the African Union Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa (hereafter, the Yamoussoukro Decision) adopted by Council in November 1999 under CM/2178 (LXX11) and endorsed by the Assembly of Heads of State and Government of the under AHG/OAU/AEC/Dec.1(IV) and which entered into force on 12 August 2000;

NOTING that Article 9 of the Competition Regulations requires the Council of Ministers to establish the Joint Competition Authority to monitor the implementation of the Yamoussoukro Decision and the Competition Regulations;

FURTHER NOTING that the Guidelines, Provisions and Procedures for the Implementation of the Regulations for Competition in Air Transport Services within the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) approved in Harare on 22 November 2006 (hereafter, Competition Regulations Guidelines) provides for detailed provisions implementing the Competition Regulations;

RECOGNISING that the Joint COMESA, EAC and SADC Heads of State and Government Tripartite Summit held in Kampala, Uganda on 20th October 2008 launched the Joint Competition Authority to oversee the full implementation of the Yamoussoukro Decision;

OBSERVING that COMESA, EAC and SADC as pillars of implementation of the Abuja Treaty are required to coordinate their implementation of the Yamoussoukro Decision with the institutions established pursuant to said Decision;

RECALLING the Ministerial Decision of the third African Union Conference of Ministers responsible for Air Transport adopted in Addis Ababa, Ethiopia on 11 May, 2007 and subsequently endorsed by the Assembly of Heads of State and Government in Accra, Ghana on 29 June 2007 entrusting AFCAC with the responsibility of being the Executing Agency for the Yamoussoukro Decision;

THEREFORE, in conformity with Article 9 of the COMESA Treaty, Article 13 of the EAC Treaty and Article 24 of the SADC Treaty;

HEREBY MAKE THE FOLLOWING REGULATIONS:

Article 1

Citation

This instrument shall be cited as “Regulation Establishing the Joint Competition Authority”

Article 2

Definitions

The following words used in this document, unless the context otherwise requires, shall have the following meanings:

“Abuja Treaty” means the Treaty Establishing the African Economic Community adopted at Abuja, Nigeria on 3 June, 1991 and which entered into force on 12 May 1994

“AFCAC” means the African Civil Aviation Commission

“AFRAA” means African Air transport service providers Association

“Air Transport Service Providers” means air transport service providers, air navigation service providers, airport operators, aviation fuel service providers, airport ground handling companies, as the case may be whether operating as a governmental agency or a private undertaking;

“Air Navigation Service Provider” shall be as defined by the International Civil Aviation Organisation

“Airline” means an air transport company issued with a valid operating licence by a Member State to operate scheduled, non-scheduled or air taxi services

“Airport” shall be as defined by the International Civil Aviation Organisation

“COMESA” means the Common Market for Eastern and Southern Africa

“Competition Regulation Guidelines” means Guidelines, Provisions and Procedures for the Implementation of the Regulations for Competition in Air Transport Services within the Common Market for Eastern and Southern Africa (COMESA), the East

African Community (EAC) and the Southern African Development Community (SADC), 2006

“Competition Regulations” means the Regulations for Competition in Air Transport Services within COMESA, EAC and SADC approved by the SADC and COMESA and Council of Ministers in August 2004 and December 2004 respectively;

“Court” means the Court of Justice of Common Market for Eastern and Southern Africa or the East African Community;

“Civil Aviation Committee” means a sub-sectorial committee established in terms of the SADC Protocol on Transport, Communications and Meteorology;

“DCAAA” means Directors of Civil Aviation and Aeronautical Authorities of COMESA;

“Directors General” means the Heads of the Civil Aviation Authorities of the Member States or the equivalent thereof;

“EAC” means the East African Community

“HCAAA” means Heads of Civil Aviation and Aeronautical Authorities

“Executive Director” means the Head of the JOINT COMPETITION AUTHORITY Secretariat;

“ICAO” means International Civil Aviation Organization;

“ICAO SARPs” means ICAO Standards and Recommended Practices as contained in the Annexes to the Convention on International Civil Aviation, 1944;

“Member State” means a Member State to the COMESA Treaty, EAC Treaty and or the SADC Treaty;

“Council of Ministers” means a Council of Ministers responsible for Civil Aviation of the Member States of the Tripartite;

“Monitoring Body” means the Monitoring Body established under Article 9 of the Yamoussoukro Decision

“NPR” means Notice of Proposed Rulemaking

“Regional Economic Community” means a regional economic community recognised by the African Union.

'Rulemaking' shall mean the development and issuance of rules for the full implementation of the Yamoussoukro Decision, the Regulation, the Competition Regulations, the Multilateral Air Services Agreement and any subsidiary legislation.

'Rules' comprise the following:

- decisions of the JOINT COMPETITION AUTHORITY
- opinions concerning the scope, implementation, compliance with and content of the Yamoussoukro Decision the Regulation, the Competition Regulations and any subsidiary legislation;
- recommendations of the JOINT COMPETITION AUTHORITY to Organs of the Tripartite intended to result in the application of a sanction against a Member State
- guidelines
- guidance material, which is non-binding material that helps to illustrate the logical procedures, processes and materials in implementing a rule and which does not provide presumption of compliance.

"SADC Treaty" means the Treaty establishing the Southern African Development Community, as amended;

"Tribunal" means the Tribunal established by Article 9 of the Treaty establishing the Southern African Development Cooperation.

"Tripartite REC" means COMESA, EAC and SADC;

"Tripartite Region" means the geographical area covering COMESA, EAC and SADC as constituted at all material times

"Yamoussoukro Decision" means the Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa, 2000.

Article 3

Objective and Scope of Application

1. The objective of this Regulation is to empower the Joint Competition Authority to supervise and manage the implementation of the Yamoussoukro Decision and in particular enforce the Competition Regulations and any additional legal instruments adopted by the Council Ministers within the context of the Regulation.
2. This Regulation applies to the liberalisation of air transport within the Tripartite Region of COMESA, EAC and SADC.
3. The Regulation which shall be binding on Member States and relevant organs

of the Tripartite, the regional economic communities, and air transport service providers, prescribes rights and obligations for Member States of the Tripartite and airlines and empowers the Joint Competition Authority to apply the Competition Regulations to natural and legal persons providing air transport services including but not limited to airlines, air navigation services providers and airports.

Article 4

Basic Principles

1. National aviation authorities shall retain primary responsibility over the regulation of air transport within their territories.
2. Air transport within the Tripartite Region shall be smooth, safe, comfortable, affordable and efficient.
3. The interest of the consumer shall be protected by national civil aviation regulators, the Joint Competition Authority and all other relevant institutions.
4. Member States, RECs and the Joint Competition Authority shall assist air transport service providers to identify potentially attractive routes based on long term focused economic activities in different localities of the Tripartite Region.
5. Member States and the Joint Competition Authority shall define and implement policies that will assist air transport service providers to effectively utilize airport slots and airports infrastructure and services and encourage economic activities at and around airports of the Tripartite Region.
6. Liberalised routes shall be considered as a public good held for the use of and interest of the citizens of the Tripartite States.
7. In the interest of smooth, economical and efficient transportation of citizens of the Tripartite Region eligible Tripartite airlines shall enjoy fifth freedom traffic rights throughout the Tripartite Region.
8. The Joint Competition Authority shall hold regular joint consultations with the Secretariats of the Tripartite RECs to review performance of programmes and projects and in particular with a view to eliminating duplication of efforts.

Article 5

Establishment of the Joint Competition Authority

1. For the purpose of the full implementation of the Regulation on Competition in Air Transport Services, 2004, the Yamoussoukro Decision of 2000 and the Communiqué of the Tripartite Summit of 2008 the Joint Competition Authority in existence prior to the entry into force of this Regulation shall be deemed established under this Regulation.

2. The Joint Competition Authority shall be a joint Institution of COMESA, EAC and SADC and shall enjoy, in the territory of each Member State, legal capacity accorded to international legal persons under the national laws of the Member States as may be necessary for the fulfilment of its objectives and the exercise of its functions.
3. The Joint Competition Authority, its Members and Staff shall enjoy in the territory of each Member State, the privileges and immunities accorded to the Representatives and Staff of COMESA, EAC and SADC respectively in their respective territories.

Article 6

Location of the Joint Competition Authority

1. The Joint Competition Authority may establish its headquarters and local offices in the Member States subject to their consent and the approval of the Tripartite Summit of Heads of State and Government.
2. The headquarters and local offices shall be governed by a Host Agreement negotiated between the Joint Competition Authority and the Host Country.

Article 7

External Relations

1. The Joint Competition Authority shall, in cooperation with the Regional Safety Oversight Organisations assist Member States to comply with their international obligations, in particular those under the Yamoussoukro Decision and the Chicago Convention.
2. The Joint Competition Authority may, subject to relevant legislation of Member States and of COMESA, EAC and SADC, support and advise the Member States in their relations with third countries.
3. The Joint Competition Authority may cooperate with the Member States, the Executing Agency, the Secretariats of COMESA, EAC and SADC, other institutions established by or under the constituent treaties of COMESA, EAC and SADC, aeronautical authorities of third countries and international organisations competent in matters covered by this Regulation.

Article 8

Liability

1. The contractual liability of the Joint Competition Authority shall be governed by the law applicable to the contract in question, save that the Joint Competition Authority shall endeavour to subject its contractual liability, applicable law and jurisdiction to a nominated Court of Justice or Tribunal and the laws of a nominated regional economic community.
2. In the case of non-contractual liability, the Joint Competition Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties and the nominated Court or Tribunal shall have jurisdiction in disputes relating to compensation for damage.
3. The liability of the Joint Competition Authority towards its staff and the personal liability of staff towards the Joint Competition Authority shall be governed by the provisions laid down in the Staff Rules and Regulations applicable to them.

Article 9 **Functions of the Joint Competition Authority**

1. The Joint Competition Authority shall -
 - a. Perform all functions assigned to it under Article 9 of the Competition Regulations and any functions directly related to the performance of such tasks;
 - b. Manage and supervise the full, equal and transparent implementation of the Yamoussoukro Decision within the Tripartite Region;
 - c. Support States to improve their economic regulatory framework and assist them with their implementation of the Yamoussoukro Decision, the Competition Regulations and this Regulation;
2. Without prejudice to the functions laid down in sub paragraph 1 of this Article, the Joint Competition Authority shall perform the following specific functions:
 - a. Define, set and monitor measurement criteria for full implementation of the Yamoussoukro Decision.
 - b. Outline, stipulate and enforce conditions under which a state may limit its commitment under Article 3.2 of the Yamoussoukro Decision;
 - c. Continuously review, recommend to the Council of Ministers and, where applicable enforce modern and effective measures of:-
 - i. tariff notification under Article 4,
 - ii. frequency and capacity notification under Article 5.1 and
 - iii. designation and authorization of eligible airlines under Article

- 6.1, 6.2 and 6.3 of the Yamoussoukro Decision;
- d. Submit Annual Reports on the state of the air transport industry within the Tripartite Region including but not limited to detailed tri-annual reports on each Member State.
 - e. Conduct and encourage studies and analysis into air transport liberalisation, economics, capacity, traffic, tariffs, financial performance and productivity of service providers, route structure, airports, employment as well as competition and continuously assess the net impact of liberalization on consumers and air transport service providers.
 - f. Conduct studies, monitor and ensure the protection of consumers
 - g. In cooperation with the Executing Agency, COMESA, EAC and SADC, AFRAA and Member States ensure the design and deployment of a database, the collection, collation and analysis of air transport and related data to enable it perform its functions.
 - h. Liaise with the Regional Safety Oversight Organisations to ensure that air transport service providers comply with ICAO safety and security standards.
 - i. Set up relevant standing and adhoc committees to be composed of representatives of national aviation authorities, air transport service providers and other relevant bodies.
 - j. Undertake measures to regularly review and ensure consistent interpretation of provisions of the Competition Regulations and the Yamoussoukro Decision.
 - k. Develop guidelines and policies relating to air transport relations with third countries and, where necessary, recommend the same to Member States and the Council of Ministers.
3. Perform such other functions as may be assigned to it by the Tripartite Summit, the Council of Ministers, the Executing Agency or the Monitoring Body or as may be necessary for it to achieve the objectives of this Regulation.

Article 10

Powers of the Joint Competition Authority

1. The Joint Competition Authority shall have the power to:
 - a) Enforce relevant decisions, resolutions, regulations and directives of the Tripartite Summit and the Tripartite Council of Ministers.
 - b) Formulate opinions, make decisions, adopt guidelines and guidance materials.
 - c) Initiate actions against Member States and air transport service providers, or, at its own discretion, intervene in disputes as an interested party in matters

involving the implementation of the Yamoussoukro Decision, the Competition Regulation and this Regulation.

- d) Request and accept specific commitments, notifications and actions, including but not limited to commitments and notifications on compliance with provisions of this Regulation and the Competition Regulation, data and reports of States within the scope of its mandate and in pursuance of the effective implementation of the Yamoussoukro Decision.
- e) Make determinations on the state of compliance of the Yamoussoukro Decision, the Competition Regulation and any relevant implementing rules and regulations by a Member State and/or a service provider and take appropriate remedial action.
- f) Make recommendations to the Tripartite Council of Ministers including but not limited to the imposition of sanctions on State, where appropriate.
- g) Impose sanctions on air transport service providers including fines and penalty payments.
- h) Require that a breach or infringement be brought to an end.
- i) Order interim measures.
- j) Report annually or as often as is determined by the Council of Ministers on the status of implementation of the Yamoussoukro Decision and the Competition Regulations.
- k) Subject to the laws of Member States, conduct investigations in the territories of the Member States and undertake all necessary measures within the powers conferred on it by the Competition Regulation, the Yamoussoukro Decision or any other regulations.
- l) Exercise such other powers as are vested in or conferred on it by the Tripartite Council of Ministers, any other organ of this Regulation or of the Yamoussoukro Decision.

2. In exercising the above powers the Joint Competition Authority shall operate in full regard of the sovereign rights of Member States and the commercial interests of air transport service providers, except that no civil aviation authority or a regional economic community shall of its own have the power to dictate the terms and conditions of operations of the Joint Competition Authority.

Article 11 **Acts of the Joint Competition Authority**

1. The Joint Competition Authority shall, where appropriate:
 - a. make **recommendations** for the consideration of the Tripartite Council of Ministers.
 - b. issue **opinions** either on its own initiative to legal and natural persons or upon instruction of the Tripartite Council of Ministers to Member States and other

- organs of the Tripartite .
- c. take appropriate **decisions** for the application of this Regulation and the Competition Regulations.
 - d. issue guidelines to Member States and service providers.

Article 12

Training and Research

1. The Joint Competition Authority shall encourage research into areas of its competence, encourage or, where called upon by the Council of Ministers or Member States, facilitate training of senior management personnel directly involved in the implementation of the Decision, the Competition Regulations and this Regulation or are likely to be involved in any investigations and inspections to be conducted under provisions of the Competition Regulation.
2. Where the Joint Competition Authority sponsors or obtains sponsorship for any particular participant from a Member State it shall conclude an agreement on funding with the Member State and the person or persons involved which shall at the minimum stipulate:
 - a. the cost of the training, including any travel and other expenses,
 - b. terms of repayment of the sponsorship, where any special conditions are breached
 - c. special conditions of the sponsorship including minimum terms of employment of the participant in question in the same position.
3. The Joint Competition Authority may propose rules on sponsorship in accordance with paragraph 2 of this Article.
4. The Joint Competition Authority shall maintain a publicly available database of research undertaken by itself, States, regional economic communities and other regional organisations, academic and research institutions.
5. The Joint Competition Authority may develop, finance and undertake financed research in so far as it relates to the improvement of activities in its field of competence and particularly under the following conditions:
 - a. It shall coordinate its research activities with those of the regional economic communities and States so as to ensure that policies and actions are mutually consistent and to prevent duplication of efforts.
 - b. Results of research funded, facilitated, coordinated by or in any way owned by the Joint Competition Authority that are not classified as confidential shall be published in the manner the Joint Competition Authority deems it. Where published as a commercial publication, at least the executive summary of such reports shall be made freely available on the website of the Joint Competition Authority.

Article 13 Monitoring

1. Having regard to the object of this Regulation, the Joint Competition Authority shall monitor the application of the Yamoussoukro Decision and the Competition Regulations by national aeronautical authorities and air transport service providers and shall submit annual reports to the Tripartite Council of Ministers.
2. It shall, in fulfilment of its reporting function,
 - a. conduct regular investigations,
 - b. carry out evaluations,
 - c. request for and review national aviation regulations including but not limited to economic regulations, air services agreements, and operational statistics of all aspects of air transport falling within its field of competence. It may submit recommendations to Member States.
3. The Joint Competition Authority shall publish a comprehensive state report on each State every 3 years on the level and effectiveness of application of the Yamoussoukro Decision the Competition Regulations and any relevant implementing rules and regulations.
4. The Joint Competition Authority shall submit the following additional reports to the Council of Ministers:
 - a. annual reports on implementation of the Decision and the Competition Regulations,
 - b. sanctions imposed on service providers, and
 - c. any other matter it proposes to report on.
5. The Joint Competition Authority shall:
 - a. be entitled to request reports from states, and service providers who shall be obliged to submit requested reports quarterly or annually or as frequently as may be determined by the Joint Competition Authority or sanctioned by the Tripartite Council of Ministers.
 - b. adopt rules on means of enforcing sub-paragraph (a) including but not limited to:
 - i. providing states will clearly defined requirements for notifications
 - ii. submitting a report to the Council of Ministers on States that appear to be persistently in breach of obligations on submission of reports or other information requested;
 - iii. Obtaining permission from the Council of Ministers and publication on a secure section of its website of a list of states discharging or not discharging their reporting obligations; and

- iv. any other action or sanction it may consider reasonable to recommend to the Council of Ministers.
- c. Apply any sanction approved by the Council of Ministers.

Article 14
Annual Planning

1. The Joint Competition Authority shall, within 6 months of the entry into force of this Regulation, submit an annual work plan to the Council of Ministers for approval.
2. It shall, within 6 months of entry into force of this Regulation, submit to the Council of Ministers an annual list of proposed regulatory activities to be undertaken in pursuance of Article 19 of this Regulation.
3. The annual work plan and the list of proposed regulatory activities shall be submitted on the anniversary of the date of the first submission in accordance with paragraphs 1 and 2 above.

Article 15
Database, Website, Privacy and Publication

1. The Joint Competition Authority, civil aviation authorities, regional economic communities and air transport services shall exchange information among themselves using the most secure, expeditious, efficient and cost effective means of communication. In this regard, the Joint Competition Authority shall:
 - a. encourage the use of modern means of information technology to transact its business.
 - b. ensure that national authorities have direct access to its information network and database and are able to communicate seamlessly and securely using such information technology.
 - c. facilitate the use by service providers and consumers of the website of the Joint Competition Authority to communicate with the Joint Competition Authority.
 - d. The Joint Competition Authority shall create an internet platform and establish conditions for consumer and hazard reporting.
2. It shall, in coordination to AFRAA, AFCAC and other relevant institutions, ensure the compilation a central database of air transport activities including but not limited to statistics of air transport.
3. In giving effect to this Regulation the Joint Competition Authority shall be guided by openness, transparency and a willingness to publish relevant documentation to all interested parties, including the general public.
4. Without prejudice to paragraph 3 of this Article, measures for the dissemination

to interested parties of information shall be based on the need:

- a. to provide persons and organisations with the information they need to undertake their obligations under the Yamoussoukro Decision and the Competition Regulations;
 - b. to limit the dissemination of information to what is strictly required for the purpose of its users, in order to ensure appropriate confidentiality of that information.
5. Civil aviation authorities, regional economic communities and air transport service providers shall take necessary measures to ensure appropriate confidentiality of the information received by them in application of this Regulation and the Competition Regulations.
 6. The Joint Competition Authority shall have an official publication.

Article 16 Consultative Visits and Reviews

1. In supervising and managing the liberalisation of air transport in Tripartite Region, the Joint Competition Authority shall monitor the application of this Regulation, the Competition Regulation, the Yamoussoukro Decision and any implementing rules by conducting planned review visits and engaging in consultations with civil aviation authorities of Member States.
2. Subject to a written agreement with the Member State concerned, the Joint Competition Authority may conduct a review of competition policies, and practices including but not limited to subsidies. It shall only be entitled to conduct such review after exhausting the following:
 - a. Making a determination of non-compliance or persistent breaches of provisions of this Regulation, the Competition Regulation and/or its implementing rules and regulations.
 - b. Offering the Member State the opportunity to comply within a specified time period.
 - c. Taking a decision of non-compliance of its determination made under subparagraph a.
 - d. Seeking permission of the Member State concerned to undertake the review.
3. Officials of the Joint Competition Authority, regional economic communities, or of Member States shall be authorised to undertake such tasks for and on behalf of the Joint Competition Authority and are thus empowered in compliance with the legal provisions of the Member States concerned to:
 - a. examine statutes, rules, policies, statements, guidelines, relevant records,

- data, procedures and any other material relevant to the achievement of the objectives of the Decision in accordance with this Regulation and implementing rules and regulations;
- b. take copies of or extracts from such records statutes, rules, policies, statements, guidelines, relevant records, data, procedures and other material relevant;
 - c. request for oral interviews and explanation;
 - d. enter any relevant premises.
4. The officials of the Joint Competition Authority, COMESA, EAC, SADC and Member States authorised for the purpose of these investigations shall exercise their powers upon the production of an authorisation in writing specifying the subject matter, the purpose of the investigation and the date on which it is to begin. In good time before the inspection, the Joint Competition Authority shall agree with the Member State concerned the identity of the authorised officials.
5. Reports drawn up in application of this Article shall be made available in the official language of the Member State concerned.

Article 17

Inspections of air transport service providers

1. The Joint Competition Authority may itself conduct or allocate to the civil aviation authorities or qualified entities all necessary investigation of air transport service providers. Inspections shall be carried out in compliance with the legal provisions of Member States in which they are undertaken. To that end the persons authorised under this Regulation are empowered:
- a. To examine the relevant records, data, procedures and any other relevant material;
 - b. Take copies of or extracts from such records, data, procedures and other material;
 - c. Request for oral interviews and explanation;
 - d. To enter any relevant premises.
2. The persons authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing specifying the subject matter and the purpose of the investigation.
3. In good time before the investigation, the Joint Competition Authority shall inform the Member State concerned in whose territory the investigation is to be made, of the investigation and of the identity of the authorised persons. Officials of the Member States shall, at the request of the Joint Competition Authority assist the authorised persons in carrying out their duties.

Article 18
Imposition of Sanctions

1. The Joint Competition Authority may determine the appropriate sanctions to be imposed on air transport service providers and shall make recommendations for appropriate sanctions against national civil aviation authorities for breaches of this Regulation, the Competition Regulations and its implementing rules and regulations.
2. On the recommendation of the Council of Ministers, the Joint Competition Authority shall submit a list of possible sanctions to be imposed under the Yamoussoukro Decision and the Competition Regulations.
3. The draft regulation shall clearly stipulate:
 - a. detailed conditions under which the sanctions regulation will be implemented;
 - b. modality for the enforcement of imposed sanctions;
 - c. conditions for prior notification of intended sanction;
 - d. confidentiality in the period before the imposition of any intended sanction;
 - e. publication of any sanction imposed;
 - f. the right of subjects of any intended sanction to be permitted to rectify the cause of the intended sanction;
 - g. right of appeal against the sanction; and
 - h. liability of the Joint Competition Authority for wrongful imposition of a sanction.

Article 19
Procedures for Rulemaking and for taking enforcement decisions.

1. The Joint Competition Authority shall propose rules for adoption by the Council of Ministers.
2. Rules shall be proposed through the procedure of Notification of Proposed Rulemaking (NPR) provided for in Part Four of the Regulation

Article 20
Procedures for taking enforcement decisions

1. The Joint Competition Authority shall establish transparent procedures for taking decisions affecting Member States, air transport service providers, any legal or natural person.
2. Those procedures shall:
 - a. If they are intended to affect Member States, ensure that Member States have

been given reasonable time to remedy the cause of the proposed decision and that such an enforcement decision is based on a directive of the Council of Ministers.

- b. If they are intended to affect service providers, any legal or natural person, ensure a hearing of the service providers to be addressed in the decision and of any other party with a direct and individual interest;
- c. Provide for prior notification of a decision to the service provider or person concerned;
- d. Provide for information to the service provider or person in question to whom a decision is addressed, and any other parties to proceedings, of the legal remedies available to that service provider or person under this Regulation and the Competition Regulations;
- e. Ensure that the decision contains adequate reasons and a notification of a right of appeal.

Article 21

Structure of the Joint Competition Authority

- 1 The organs of the Joint Competition Authority shall be:
 - a. The Tripartite Summit of Heads of State and Government
 - b. The Tripartite Council of Ministers
 - c. The Tripartite Sector Ministerial Committee on Infrastructure
 - d. The Tripartite Committee of Senior Officials and Experts
 - e. A Tribunal constituted under Article 33 of this Regulation
 - f. The Board of the Joint Competition Authority
 - f. The Secretariat of the Joint Competition Authority
- 2 The functions of the Tripartite Summit, the Council of Ministers, the Sector Ministerial Committee and the Committee of Senior Officials and Experts shall be as prescribed by Article 6 of the Memorandum of Understanding on Inter Regional Cooperation and Integration Amongst Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC).
- 3 The Tripartite Sector Ministerial Committee on Infrastructure shall approve nominations to the Joint Competition Authority, adopt Rules recommended by the JCA as well as endorse the Recommendation of the Executive Director of the Joint Competition Authority.
- 4 The Board shall be responsible for the specific policy and operational direction of the Joint Competition Authority.

Article 22
Composition and Chair of the Board

1. The Board shall be composed of seven members as well as alternates drawn from Member States of the Tripartite.
2. Members shall be nominated from among the most senior officials at the level of Director General for Civil Aviation with proven expertise in Air Transport Economics, Law, Statistics, and or Corporate Planning.
3. Two members of the Board shall be drawn in a rotational manner from each regional economic community and the seventh member who shall serve as the Chair shall be drawn in a rotational manner from the regional economic community chairing the Tripartite Summit.
4. The tenure of the members of the Board shall be thirty-six months, provided that half the members shall be appointed for eighteen months when the body is first established.
5. Members of the Board shall be nominated by the regional competition authorities by the DCAAA of COMESA, the HCAAA of EAC and CAC of SADC and appointed by the Tripartite Committee of Ministers for Infrastructure.
6. The Board shall elect two Deputy Chairpersons from among its members who shall be denoted as First and Second Deputy Chairpersons.
7. The Chairperson and Deputy Chairpersons shall be drawn from different regional economic communities.
8. Subject to paragraph 3 of this Article, in the event of the nominated Chairperson being prevented from attending to his/her duties for a period of more than 30 days the functions of the Chairperson shall be assumed by the alternate until such time as the nominated Chairperson is able to resume his/her functions or the Alternate is confirmed in the position.
9. The First Deputy Chairperson shall replace the Chairperson in the event of his/her or his/her alternate being prevented from attending to their duties.
10. Member States nominating members of the Joint Competition Authority shall be encouraged to nominate advisers and or constitute a team of experts to assist the nominated member.

Article 23
Meetings

1. Meetings of the Joint Competition Authority shall be convened by its Chairperson.
2. The Board shall adopt its own Rules of Procedure.
3. The Executive Director of the Authority shall attend the meeting as an ex officio member of the Board.

4. The Board shall hold at least three ordinary meetings a year. It shall also meet in an extra ordinary session at the request of the Chairperson, a member of the Board and at the approval of two- thirds of its members.
5. The Joint Competition Authority may invite any person whose opinion can be of interest the Board to attend its meetings as an observer.
6. The members of the Board may, subject to the provisions of its Rules of Procedure, be assisted by advisers or experts.

Article 24 Voting

1. The Board shall take its decisions by a two-thirds majority of its members.
2. Each member shall have one vote.
3. The Executive Director of the Joint Competition Authority shall take part in the deliberations of the Board and shall have no right to vote in any matter whatsoever.
4. In the absence of a member, his/ her alternate shall be entitled to exercise his/her right to vote.

Article 25 Management of the Joint Competition Authority

1. The Board shall:
 - a. adopt the reports of the Joint Competition Authority in accordance with Article 10 and cause further action to be taken;
 - b. adopt the annual programme in accordance with Article 14
 - c. establish procedures for making decisions by the Executive Director;
 - d. carry out its functions relating to it's budget;
 - e. obtain permission of the Council to constitute and appoint the members of a Board or Boards of Appeal pursuant to Annex 1 to this Regulation;
 - f. make a recommendation on sanctions against a Member State to the Tripartite Council of Ministers
 - g. approve sanctions imposed by the Executive Director on service providers;
 - h. obtain Council of Ministers approval of Rules adopted pursuant to the NPR procedures in Annex 2 to this Regulation
2. The Board shall guide the Executive Director on any matter strictly related to strategic development of air transport liberalisation, including research as defined in Article 12.
3. The Board shall establish advisory bodies of interested parties, which it shall

consult from time to time. In particular, it shall cooperate closely with the DCAAA of COMESA, the HCAAA of EAC and CAC of SADC as well as the RSOOs and any other relevant institution.

Article 26

The Executive Director

1. The Secretariat of the Joint Competition Authority shall be managed by an Executive Director who shall be completely independent in the performance of his/her duties.
2. Without prejudice to the respective competencies of the Joint Competition Authority, the Executive Director shall neither seek nor take instructions from any government or from any other body except in accordance with the provisions of this Regulation.
3. The Secretariats of COMESA, EAC and SADC, the Council of Ministers or the Executing Agency may invite the Executive Director of the Joint Competition Authority to report on the carrying out of his/her tasks.

Article 27

Functions and Powers of the Executive Director

1. The Executive Director shall:
 - a. prepare and submit quarterly reports to the Board
 - b. liaise with the Secretariats of COMESA, EAC and SADC, the Executing Agency and other organs of the African Union to ensure the acceptance of harmonised rules necessary to ensure the liberalisation of air transport
 - c. decide on investigations and inspections as provided for in Articles 16 and 17;
 - d. represent the Secretariat of the Joint Competition Authority at meetings of the Board;
 - e. take all necessary steps, including the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Joint Competition Authority in accordance with the provisions of this Regulation;
 - f. prepare annual general reports and all other reports stipulated in Articles 13 and 13 and submit them to the Board;
 - g. draw up and submit estimates of the revenues and expenditure of the Joint Competition Authority to the Board pursuant to Article 29, and implement the approved budget pursuant to Article 30;
 - h. Obtain statements of commitments, declarations and notifications of Member

States pursuant to Article 34.

- i. Undertake studies.
2. In exercise of his/her powers, the Executive Director may delegate to any member of staff of the Joint Competition Authority.

Article 28 Staff

1. The Tripartite Council of Ministers shall, from time to time, determine the staff compliment of the Secretariat of the Joint Competition Authority.
2. The Joint Competition Authority Staff Rules and Regulations shall apply to the staff of the Joint Competition Authority.

Article 29 Budget

1. The revenues of the Joint Competition Authority shall consist of:
 - a. contribution from the regional economic communities and from each Tripartite country;
 - b. the fees paid by applicants for, and holders of, licenses, certificates and approvals issued by the Joint Competition Authority;
 - c. loans and grants approved by the Council of Ministers
 - d. charges for publications, training and any other services provided by the Joint Competition Authority.
2. The expenditure of the Joint Competition Authority shall include the staff, administrative, infrastructure and operational expenses.
3. The Executive Director shall draw up an estimate of the revenues and expenditure of the Joint Competition Authority including work programme for the following financial year and shall forward it to the Board for approval.
4. Revenue and expenditure shall be in balance.
5. The Board shall, by end of the third quarter of its accounting year, at the latest, adopt the draft estimates, including the approved or preliminary workplan, and forward them to the Council of Ministers.
6. The Council of Ministers of the Tripartite shall adopt the budget in accordance with its procedures.
7. Any modification to the budget shall follow the procedure referred to in paragraphs 3, 4, 5 and 6 of this Article.

Article 30
Implementation and control of the budget

1. The Executive Director shall implement the budget of the Joint Competition Authority.
2. The Financial Controller of SADC shall carry out control of commitment and payment of all expenditure and control of the existence and recovery of all revenue of the Joint Competition Authority.
3. The Executive Director shall submit to SADC Auditors the detailed accounts of all revenue and expenditure from the previous financial year.
4. The Council of Ministers shall give a discharge to the Executive Director of the Joint Competition Authority in respect of the implementation of the budget following its submission by the Auditors of SADC.

Article 31
Fees and charges

1. The Joint Competition Authority shall within 90 days of the entry of this Regulation submit a draft regulation on fees and charges to the Council of Ministers.
2. The fees and charges regulation shall determine in particular the matters for which fees and charges are due, the amount of the fees and charges and the way in which they are to be paid.
3. Fees and charges shall be levied for:
 - a. the provision of services;
 - b. the processing of appeals.

All fees and charges shall be expressed, and payable, in US Dollars and shall reflect the actual cost of each individual provision.

4. The amount of the fees and charges shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient to cover the full cost of the services delivered.

Article 32
Complaints and Dispute Settlement Procedure

1. Member States, air transport service providers, regional economic communities, legal and natural persons may raise complaints and settle all disputes in accordance with the provisions of Chapter Three of the Competition

Regulations and Part C of the Guidelines, Provisions and Procedures for the Implementation of the Regulations for Competition in Air Transport Services within the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community save that reference to the Courts and or Tribunals of the regional economic communities shall be deemed to mean the Appeals Tribunal established pursuant to Article 33 of this Regulation.

2. The Council may constitute a Board or Boards of Appeals against its own decisions where in its view such a Board may result in expedited complaints handling procedures. A Board of Boards of Appeal may be constituted and operate in accordance with Annex 1 to this Regulation.

Article 33 Appeals Tribunal

1. The Tripartite Summit shall establish an Appeals Tribunal to ensure the proper interpretation of this Regulation and the Competition Regulations.
2. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed by the Summit.
3. The decisions of the Appeals Tribunal shall be final and binding.

Article 34 Member States Obligations

1. Pursuant to Article 5(2)(b) of the COMESA Treaty, 8(1), 8(2)c and 8(4) of the EAC Treaty, and 6 (1) of the SADC Treaty, Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Regulation or resulting from action taken by the Authority under this Regulation.
2. Member States shall abstain from taking any measure which could jeopardise the attainment of the objectives of this Regulation.
3. Member States undertake to comply with all reasonable requests made by the Joint Competition Authority on notification and status of implementation of obligations of this Regulation.
4. Member States shall notify the Joint Competition Authority of the status of implementation of this Regulation including but not limited to difficulties encountered in implementing any particular provision or provisions of this Regulation, the Competition Regulations and the Yamoussoukro Decision.

- 5. Subject to Clause 4 of this Article, the Executive Director shall within 60 days of this Regulation submit to the Board procedures for declaration, expression of commitments and notifications in relation to provisions of this Regulation and the Competition Regulations.

Article 35
Amendments

- 1. Any Member State may propose an amendment to this Regulation.
- 2. Any proposal for amendment to this Regulation 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.
- 3. Any amendment to this Regulation shall come into force after approval by the Tripartite Summit.

Article 36
Entry into Force

This Regulation shall enter into force upon approval by the Tripartite Summit.

Article 37
Registration

This Agreement shall be registered with the Legal Department of the African Union and ICAO in compliance with Article 83 of the Convention on International Civil Aviation opened for signature at Chicago on 7 December 1944.

IN WITNESS WHEREOF, WE, the undersigned, being duly authorised representatives of our respective Governments, have signed this Regulation.

Done at.....thisday of.....2013 in three (3) original texts, in the English, French and Portuguese languages, all texts being equally authentic.

4 Annex 1: BOARDS OF APPEAL

Article 1 Appeals against decisions of JCA

1. Within the JCA, there shall be one or more Boards of Appeal.
2. The Board or Boards of Appeal shall be responsible for deciding on appeals against determinations and decisions of the Executive Director and the Board made pursuant to the enforcement of the Regulation establishing the JCA, the Yamoussoukro Decision, the Competition Regulations.
3. The Board or Boards of Appeal shall be convened as necessary.
4. The number of Boards of Appeal and their work allocation shall be determined by Board according to the procedure referred to in this Annex.
5. Parties appealing against decisions of the JCA shall have the right to appeal to the Board of Appeal established under this Annex or lodge a direct appeal before the Appeals Tribunal established pursuant to Article 33 of the Regulation establishing the JCA.
6. Member States may at their sole discretion submit to a Board of Appeal constituted under this Annex.

Article 2 The List of Candidates

1. The Executive Director shall draw up and maintain a list of qualified candidates to serve on the Board or Boards of Appeal of the JCA.
2. The qualifications required for the members and the list of candidates shall be approved by the Council of Ministers upon the recommendation of the Board.
3. Once approved, the members of the Boards of Appeal may not be removed either from office or from the list during their respective terms, unless there are serious grounds for such removal and the Board may recommend to the Council for the removal of a member.

Article 3

Composition of the Boards of Appeal

1. A Board of Appeal shall consist of a Chairperson and two other members.
2. The Chairperson and the two members shall have alternates who will represent them in their absence.
3. The Chairperson, the other members and their respective alternates shall be appointed by the Board, from the list of qualified candidates drawn up.
4. Where the Board of Appeal considers that the nature of the appeal so requires, it may call up to two further members from the aforesaid list for that case.

Article 4

Membership of the Boards of Appeal

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

Article 5

Exclusion and objection

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

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purposes of taking this decision, the member concerned shall be replaced on the Board of Appeal by his/her alternate.

Article 6

Decisions subject to appeal

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

Article 7

Persons entitled to appeal

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

Article 8

Time limit and form

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

Article 9

Revision of the original decision

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

Article 10

Examination of appeals

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

Article 11

Decisions on appeal

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

Article 12

Procedures to be applied and effect of outcome of appeals

1. In conducting its affairs, the Board of Appeal shall determine its own procedures, nature of its awards and costs.
2. The Board of Appeal may award costs against the JCA, any Member State or air transport service provider.

5 Annex 2: Rulemaking Procedure

Article 1

Programming of Rulemaking

1. The JCA shall establish a tri-annual rulemaking programme.
2. The rulemaking programme shall take account of:
 - i. the and basic principles set out in Article 4 of the Draft Regulation establishing the JCA;
 - ii. the object of implementing a liberalised air transport market in within the Tripartite Region;
 - iii. significant protection of the interest of the air transport consumer;
 - iv. the need to ensure a vibrant but safe, economically viable, efficient and healthy air transport sector; and
 - v. the objective of developing an efficient, transparent and responsive regulatory system.
3. Any person or organisation may propose the development of a new rule or an amendment thereto. The JCA shall consider such requests in the context of the drafting and revision of the rulemaking programme.
4. Proposals, including the identification of the proposer, the proposed text and the justification for the proposal, shall be sent to the JCA and shall be individually acknowledged.
5. The JCA shall provide the proposer with justification for his or her decision on whether to act on his or her proposal.
6. The rulemaking programme shall be supported by an analysis of the priority accorded to each task taking into account the resources at the disposal of the JCA and potential regional impact of the proposal.

7. The JCA shall adapt the rulemaking programme as appropriate in the light of unforeseen and urgent rulemaking demands. The Council of Ministers shall be informed of any such changes.
8. The adopted rulemaking programme shall be published in the JCA's official publication.
9. The JCA shall conduct regular reviews of the impact of the rules issued under this Regulation

Article 2

Initiation of Rulemaking Activities

1. Rulemaking activities shall be initiated in accordance with the rulemaking priorities set out in the annual rulemaking programme.
2. The Executive Director shall draw up terms of reference for each rulemaking task after consulting the Board. The terms of reference, which shall be published in the JCA's official publication, shall include the following:
 - i. a clear definition of the task;
 - ii. a timetable for completion of the task; and
 - iii. the format of the deliverable.

Where a drafting group is set up, whether by recourse to a standing Committee or an adhoc group, the terms of reference shall also include details of the composition of the group, its working methods and reporting requirements.

3. The Executive Director shall choose between the use of a drafting group, consultants or JCA resources for the fulfilment of each rulemaking task, taking into account the complexity of the task at hand and the need to draw upon the expertise of persons involved in the implementation of the rule envisaged. This decision shall be taken after consulting the Board.
4. When a drafting group is convened, the Executive Director shall determine its exact composition, which shall draw upon technical expertise available among national

authorities and, where necessary, air transport service providers other interested parties, as well as within the JCA itself.

5. The JCA shall provide drafting groups with the administrative and logistical support necessary for the fulfilment of their tasks, including the provision of standard operating procedures, to be adapted as necessary by the groups themselves according to their specific circumstances.

6. The JCA shall adopt standardised working methods for drafting groups, in particular the following:

- i. Chair/Secretary elections;
- ii. obtaining of consensus and resolution of conflicts; and
- iii. the preparation of minutes
- iv. access to the JCA website or online facilities to assist in drafting.

Article 3

Drafting of Rules

1. New rules or amendments thereto shall be drafted in accordance with the terms of reference referred to in Article 1 of this Annex.

2. The Executive Director may amend the terms of reference as appropriate in the light of progress with the rulemaking task.

3. The Executive Director shall inform the Board of any such changes.

4. Drafting of rules shall take into account the following:

- i. The Yamoussoukro Decision,
- ii. the Regulation establishing the JCA, including subsidiary rules and regulations
- iii. the Competition Regulations and ;
- iv. ICAO Standards and Recommended Practices;

- v. timely implementation of the proposed rules, taking into account translation delays;
 - vi. compatibility with existing rules and in particular rules adopted by the regional economic communities and the courts;
5. Upon completion of the drafting of the proposed rule, The Board shall verify that the rule satisfies the terms of reference established for the rulemaking task and shall publish a Notice of Proposed Rulemaking (NPR) in the JCA's official publication, including the following information:
- i. the proposed rule;
 - ii. an explanatory note describing the development process;
 - iii. full details of significant or contentious or interface issues identified during the drafting process;
 - iv. details of the situation with respect to the Yamoussoukro Decision and the Competition Regulations
 - v. the role of the member states, regional economic communities, the Executing Agency, the Monitoring Body and other organs of the African Union
6. As regards guidance material, it is sufficient that the Notice of Proposed Rulemaking contains a justification (including a paragraph showing that the material complies with the definition of guidance material) and the proposed new or amended guidance material.

Article 3

Consultation

1. All Member States, all air transport service providers and any person or organisation with an interest in the rule under development shall be entitled to comment on the basis of the published Notice of Proposed Rulemaking.
2. All consultation shall be treated in accordance with the rules on access to documents under relevant provisions of Regulation Establishing the JCA

3. Copies of all Notices of Proposed Rulemaking shall be transmitted to Member States, the partner regional economic communities and the Executing Agency of the Yamoussoukro Decision.
4. The consultation period shall be 4 months from the date of publication of the Notice of Proposed Rulemaking.
5. The Executive Director may, prior to the start of the consultation period, specify a shorter or longer consultation period to that specified in paragraph 4. This decision shall take account of the potential impact and complexity of the rules envisaged and the opinions of the Board. Notification of the length of this revised period shall be published at the same time as the Notice of Proposed Rulemaking in question.
4. During the consultation period, the Executive Director may, in exceptional and strictly justified circumstances, extend the consultation period specified in paragraphs 4 and 5 at the request of Member States, air transport service providers or interested parties. Such changes to the length of the consultation period shall be published in the official publication of the JCA.
5. Comments shall be forwarded to The JCA and shall contain the following elements:
 - i. Identification of the commentator.
 - ii. NPR reference code; and
 - iii. Position of the commentator, relative to the proposal (including justification for the position taken).

Article 4

Review of Comments

1. The JCA shall ensure that comments are reviewed by appropriately qualified experts not directly involved in the drafting of the proposed rule together with the JCA staff or drafting group tasked with the drafting of the rule in question.
2. Further consultation with consultees may be undertaken as necessary for the sole purpose of securing a better understanding of comments submitted.

3. The Executive Director shall review the comments received from consultees and publish a detailed Response to the Notice of Proposed Rulemaking in the JCA's official publication within 3 months of the expiry of the consultation period.
4. The Response to the Notice of Proposed Rulemaking shall include the following:
 - a. a summary of the original Notice of Proposed Rulemaking
 - b. publication and commentary dates
 - c. summary of key rules
 - d. a list of all parties commenting on the rule in question; and
 - e. a summary of comments received and the JCA's responses thereto.
5. If, based on the number of comments received the Executive Director is unable to publish the Response to the Notice of Proposed Rulemaking referred to in paragraph 4 by the deadline specified, he or she shall publish an amended timetable for the rulemaking process.
6. If the result of the review of comments is that the revised text differs significantly from that circulated at the start of the consultation process, the Executive Director shall consider a further consultation round in accordance with this Regulation.
7. If the comments received from Member States/civil aviation authorities indicate major objections to the proposed rule, the Executive Director shall consult a standing or adhoc Committee to discuss the rule further. In those cases where additional consultation results in continuing disagreement regarding the rule, the Executive Director shall include in the Response to NPR the results of this consultation and the impact and consequences of his/her decision regarding the issue at stake.

Article 5

Adoption and Publication

1. The Executive Director shall issue his/her decision in respect of the rule in question no earlier than 2 months following the date of publication of the Response to NPR in order to allow sufficient time for consultees to respond to its contents.

2. The draft Rules shall be approved by the Council of Ministers as rules issued by the JCA.
3. Rules issued by the JCA shall be published in the official publication of the JCA, together with an explanatory memorandum.

6 Memorandum on the Regulation Establishing the Joint Competition Authority

The terms of reference of this study required the Consultant to develop an appropriate legal instrument to provide for the establishment of the JCA in accordance with the Regulations for Competition in Air Transport Services, 2004. This section highlights key provisions of the legal instrument proposed.

To cure one typical identified earlier in this report, namely the lack of specific commitments on domestication and notification of obligations, this section (c) will conclude by listing all obligations that will require states or any relevant parties to commit and notify of special activities to the JCA and or any relevant institution.

6.1 The Proposed Legal Instrument and Proposed Mode of Adoption

The choice for a an appropriate legal instrument for the establishment of the JCA under the terms of the Competition Regulation and the Communique of 2008 is quite an interesting one that needs to be made with a view of the current situation regarding the legal framework of the 3 RECS, the Yamoussoukro Decision and the Abuja Treaty in mind while looking toward to a future under the proposed Free Trade Area of the Tripartite.

The legal instrument must be acceptable under the current regime and be able to be co-opted into any future regime. In other words, each of the regional economic communities must be able to adopt the instruments under draft instruments to suit a particular REC. This is particularly important in the case of the East African Community which has had to review the Competition Regulation in order to accommodate it within the framework of the Community. Admittedly, the form of the legal instrument did not appear to be the cause of the review as rather a potentially conflicting issue of mandate between the JCA and the EAC Competition Authority.

It is proposed that the Regulation as a legal instrument enables the regional economic communities to adopt it within their corpus.

6.2 Provisions of the Regulation

The draft Regulation has been completely revised in line with Comments received from the RECs and some member states. First the type of instrument has been changed from Charter to Regulation. This is similar to the instrument utilised to establish the primary document, the Competition Regulations 2004. Secondly, the draft Regulation has been split from the two issues of Appeals Board and the Rulemaking Procedure. These have been made Annexes to the draft Regulation.

The draft Regulation contains 37 Articles.

The following section identifies the Article and highlights the title in **bold type face**. Where necessary some comments are attached.

Article 1: Citation

Article 2: Definitions: This provision provides defines of key terms in the draft Regulation.

Article 3: Objective and Scope of Application: The draft Regulation has its scope the liberalisation of air transport in the Tripartite Region and the full implementation of the Yamoussoukro Decision. It applies to Member States and air transport service providers. The term air transport service providers is used in the draft Regulation to include airlines, air navigation service providers, airports, ground handling companies and all other service providers.

The regional **regulation** of the liberalisation of the air transport cover all relevant stakeholders. While the Yamoussoukro Decision focuses on airlines, it is quite essential that any full liberalisation involves the other players. Liberalisation does not only involve eligible carriers. Indeed air navigation service providers, airports and other service providers have key roles in changing the environment of market access. While airlines will be the key stakeholders other stakeholders such as airports and ground handling companies will have to be considered as essential partners in the liberalisation initiative.

In a previous draft, the Multilateral Air Services Agreement was brought within the Ambit of this draft instrument. Upon further reflection that reference has been removed pending agreement on the text of the MASA. The draft MASA however provides for a structure of JCA oversight anyway so its specific mention in this draft text prior to its acceptance is not needed, if at least to enable general acceptance of this draft Regulation while thinking on the MASA continues.

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Article 4: Basic Principles: Article 4 underscores the key principles underlying the liberalisation of air transportation within the region, namely: (a) achieving smooth, safe, comfortable, affordable and efficient intra-African travel; (b) conducting air transport in the interest of the consumer and whose interests shall be considered as protected; (c) encouraging air transport service providers to operate profitably preferably utilising all logical fifth freedom routes and identifying potentially attractive routes; (d) utilising airport slots and airports infrastructure and services to the maximum; (e) considering liberalised routes as a public good held for the use of and interest of the citizens; (f) operating consistently with the objectives of the Treaties of COMESA, EAC and SADC; JCA holding regular joint consultations with the Secretariats of the Tripartite RECs to review performance of programmes and projects and in particular with a view to eliminating duplication of efforts; and (g) recognising that national aviation authorities retain primary responsibility over the regulation of air transport within their territories. These principles are essentially to guide all activities of all parties involved in one way or the other with the liberalisation of air transport within the region and ensuring free movement of people and goods within the region.

Article 5: Establishment of the Joint Competition Authority: This Article establishes the JCA previously endorsed by the Tripartite Summit following the Competition Regulations. The JCA is an institution independent of Member States and the RECs but established to serve them.

The institution and its staff are granted immunity in the territory of the member states.

Article 6: Location of the Joint Competition Authority: In the previous text Article 4 located the JCA within the premises of the SADC Secretariat as previously agreed. Having reviewed comments of RECs and a number of member states, we have neutralised the location and left it to be determined by the Summit. This can for instance be declared at the time of the adoption of this instrument. It also leaves the JCA with the freedom to propose another member country as host.

Article 7: External Relations: Article 6 provides the Agency with powers in external relations. In order to effectively manage the liberalisation of air transport within the region, an external competence is necessary either to enable the JCA interact with the African Union, the Monitoring Body, the Executing Agency or other regional economic communities or their agents such as the JCA. Importantly the JCA is also accorded external relations powers to support and assist the Member States in their negotiations on air services agreements. The extent of the JCA's external relations is firstly dependent on the graces of the member state. It is hoped that external competence will be developed gradually.

Article 8: Liability: Article 8 provides for **contractual** liability of the JCA. In relation to employment rights of JCA staff this provision subjects the JCA to the Staff Rules.

Article 9: Functions of the Joint Competition Authority: Article 9 provides for the functions of the JCA.

The key to a successful Joint Competition Authority managing the regulation of the air transport sector within the Tripartite region is to understand the functioning of that institution.

To start with, the institution of the Joint Competition Authority is not in a supranational relation with the states. States have the primary regulatory responsibility under the Yamoussoukro Decision and that remains unchanged. In recognition of the primary role of the states, the JCA's role is to guide, administer, manage and supervise economic regulatory activities of the states into one homogeneous whole with the objective of regional integration.

In this vein, the JCA as an overseer of the full implementation of the Yamoussoukro Decision not merely assist the states but guide them and where necessary superintend their activities. The level of intrusion is nowhere near a supranational organisation.

From looking at the typical synonyms of the word oversee (*administer, administrate, carry on, control, direct, govern, guide, handle, keep, manage, operate, overlook, conduct, preside (over), regulate, run, steward, superintend, supervise*) one may observe the JCA as a co-regulator or a primus among regulators playing a more centralising role managing and shepherding the team of regulators.

From that perspective and given that it has no absolute power over the regulators, it has to manage the delicate balance through a recognition of the primary authority of the Member States and collaborating with other institutions to enable it achieve its objective of full implementation of the YD.

The JCA is assigned key functions necessary to manage the liberalisation and assist States implement the Yamoussoukro Decision. Given that the Board is being established to primarily implement the Competition Regulations and the Decision, Article 9 (1) provides that the JCA shall:

- a. Perform all functions assigned to it under Article 9 of the Competition Regulations and any functions directly related to the performance of such tasks;

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- b. Manage and supervise the full, equal and transparent implementation of the Yamoussoukro Decision within the Tripartite Region;
- c. Support States to improve their economic regulatory framework and assist them with their implementation of the Yamoussoukro Decision, the Competition Regulations and this Regulation;

Against this background specific functions are provided and include taking effective measures on tariff notification, frequency and capacity, designation and authorization of eligible airlines; developing and enforcing eligibility criteria for eligibility.

Additionally, the JCA is required to prepare and submit annual reports on the state of the industry, conduct studies and analysis among others into air transport economics, competition issues, and encourage the establishment of institutions of advanced studies into such matters; monitor and ensure the protection of consumers; design and facilitate the deployment of air transport related database; liaise with the RSOO's to ensure that air transport service providers meet ICAO safety and security standards; undertake such studies and propose actions, advice and support the Member States; define, set and monitor measurement criteria; implement measures to achieve enhanced convergence of interpretation and application of the relevant statutes.

Article 10: Powers of the Joint Competition Authority: Article 10 provides the JCA with sufficient powers to undertake the above functions. It provides among others for the power enforce relevant decisions, resolutions and regulations, formulate opinions, make decisions, adopt guidelines and guidance materials, apply to the Tribunal and Court, request and accept specific commitments, notifications and actions, including commitments on compliance, make recommendations to the Tripartite Council of Ministers, impose sanctions on air transport service providers etc.

The powers provided enable the Joint Competition Authority to perform all the functions imposed on it in the Competition Regulations, the Regulation and the draft Multilateral Air Services Agreement.

Article 11: Acts of the Joint Competition Authority: The JCA is required to make **recommendations**, issue **opinions** and take appropriate **decisions** for the application of this Regulation and the Competition Regulations. It is also empowered in this Article to issue guidelines to Member States and service providers.

Article 12: Training and Research: Article 12 empowers the JCA to encourage, develop, finance and undertake research in areas of its competence, maintain a

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database of training facilities and courses and establish measures for the funding of and organisation of sponsorship for training.

Article 13: Monitoring: Article 13 provides for the JCA to monitor the application of the Yamoussoukro Decision and the Competition Regulations by national aviation authorities and air transport service providers and submit annual reports on implementation of the Decision and the Competition Regulations and sanctions imposed on service providers to the Summit. The JCA is empowered to conduct regular investigations, carry out evaluations, request for and review national aviation regulations, publish comprehensive state report on each State every 3 years.

Article 14: Annual Planning: Article 14 provides that the JCA submits annual work plan and list of proposed regulatory activities within 6 months of entry into force of the Regulation.

Article 15: Database, Website, Privacy and Publication: Article 15 establishes the need for the JCA to utilise information communications technology to conduct its affairs and requires that the JCA and stakeholders exchange information among themselves using the most secure, expeditious, efficient and cost effective means of communication.

The Article also provides for the maintenance of a central database of air transport activities and maintenance of data integrity and privacy of stakeholders.

Article 16 Investigation of Member States: Article 16 provides for the JCA monitoring of the implementation of the Competition regulations and the YD by conducting planned review visits and engaging in consultations with civil aviation authorities of Member States. This provision subjects monitoring activities to the consent of the member states.

Article 17 Investigation of Air Transport Service Providers: This provision empowers the JCA to conduct inspections into the affairs of air transport service providers.

Article 18: Imposition of Sanctions: This provision empowers the JCA to impose appropriate sanctions and propose regulations and recommendations on sanctions against Member States on breach of the Regulation and Competition Regulations.

Procedures for development of opinions, procedures and plans: Article 19 provides that the JCA shall establish a procedure for consulting the Member States and other stakeholders when developing opinions, procedures, plans, specifications for endorsement of eligible air transport service providers, and guidance material. Rules according to this provision are to be adopted rules through the procedure of Notification of Proposed Rulemaking provided for in Part Four of the Regulation.

Article 20: Procedures for taking enforcement decisions: Article 20 provides that the JCA shall establish transparent procedures for taking decisions. The procedures are required to ensure that Member States have been given ample time to remedy the cause of the eventual decision and that such an enforcement decision is based on a directive of the Council of Ministers. If they are intended to affect service providers, such procedures are required to ensure a hearing of the service providers to be addressed in the decision and of any other party with a direct and individual interest provide for prior notification of a decision to the service provider and provide for information to the service provider in question to whom a decision is addressed.

Articles 21; 22; 23, 24 and 25: Structure, Composition, Meetings, Voting and Management of the Joint Competition Authority:

These provisions provide for the Structure of the Joint Competition Authority in Article 21, Composition and Chair, Meetings, Voting and Management of the Board in Articles 22, 23, 24 and 25 respectively.

The 7 member Board, constituted by representatives of the 3 regional economic communities is instituted here. The Sectoral Ministers are assigned the responsibility of approving the members of the Board. Article 22 provides for the members of the Board to be nominated by the DCA's of the RECs and encourages alternatives to be provided. It also contains provisions for Chair and deputy chairpersons from the different RECs.

Management functions for the Board in Article 25 includes among others adopting reports and annual procedures and approving notices for rulemaking procedures, appoint board of appeal, making recommendation for sanctions and approving sanctions imposed by the Executive Director.

Articles 26 and 27: The Executive Director; Functions and Powers of the Executive Director

These Articles provide for the Executive Director and provides for functions to be performed. The Executive Director is to prepare and submit quarterly reports to the Board, approve the measures of the Joint Competition Authority, liaise to ensure the

acceptance of harmonised rules necessary to ensure the liberalisation of air transport, decide on investigations and inspections; represent the Secretariat at meetings of the Board; adopt internal administrative instructions, prepare reports of the JCA; draw up and submit estimates of the revenues and expenditure and implement the approved budget.

Financial Provisions

Articles 29, 30 and 31: Budget; Implementation and Control of the budget; Fees and Charges:

Article 29 provides for the budget of the JCA and provides that the revenues shall consist of contribution from the regional economic communities and from each Tripartite country, the fees paid by applicants for, and holders of, licenses, certificates and approvals issued by the Joint Competition Authority, loans and grants approved by the Council of Ministers and charges for publications, training and any other services provided by the Joint Competition Authority.

Article 30 provides that the Executive Director shall implement the budget and whose accounts will be audited by the Auditors of SADC. Article 31 requires that the JCA provide within 90 days of the entry of this Regulation submit a draft regulation on fees and charges which shall determine in particular the matters for which fees and charges are due, the amount of the fees and charges and the way in which they are to be paid.

Complaints and Dispute Settlement

Article 32 and 33 - Complaints Procedure, Powers of the Courts,

Article 32 of the Regulation provides that Member States, air transport service providers, regional economic communities, legal and natural persons may raise complaints and settle disputes in accordance with the provisions of the Competition Regulations. Relevant provisions of Chapter of the Competition Regulations are:

- Article 10 Complaints
- Article 11 Investigation and Procedural Fairness
- Article 12 Hearing of the Parties Concerned
- Article 13 Outcome of Complaint
- Article 14 Provisional Measures
- Article 15 Cooperation with Member State Authorities and Access to Information

- Article 16 Penalties
- Article 17 Review by the Court of Justice and Tribunal
- Article 18 Dispute Settlement
- Article 19 Professional secrecy

Article 17 of the Competition Regulations refers to a review by a Court of Justice or Tribunal. This refers to the COMESA and EAC Court as well as the SADC Tribunal. Following a critical review of the draft and on the recommendation by Kenya and SADC Secretariat, a new provision has been introduced that refers to an Appeals Tribunal to be established under Article 33 of this Regulation. The reason for deferring to an Appeals Tribunal is to prevent forum shopping or to even prevent a situation where none of the Supreme Justices consider themselves competent to handle a matter by the mere fact that the one of the other party does not accept their jurisdiction.

It is anticipated that the Tribunal will solve this matter eventually. In anticipation, it has been proposed in Article 33 for the establishment for a Permanent Tribunal to be constituted from among Justices of the three Courts.

Article 32 (2) retains the idea of an internal Appeal to expedite dispute settlement. The details on how the Bard of Appeal will be constituted and operate are dealt with in Annex 1 to this Regulation.

Member States Obligations

Article 34 provides for Member States to take all appropriate measures to ensure fulfilment of their obligations. It requires Member States to abstain from taking any measure which could jeopardise the attainment of the objectives of this Regulation.

Article 34 also provides that the Executive Director shall within 60 days of this Regulation submit to the Board procedures for declaration, expression of commitments and notifications in relation to provisions of this this Regulation, the MASA, the Competition Regulations and any relevant instrument to be adopted under Part Four of this Regulation or as the Council may deem it fit to be adopted.

6.3 Annex 1: Boards of Appeal

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The draft Regulation as can be seen from Articles 32 and 33 reviewed above, provides different modes of dispute settlement based on the nature of the work to be undertaken by the JCA as well as the realities of the transport sector.

The options provided are:

- Appeals against the decisions of the JCA by recourse to Board of Appeals
- Recourse to the Appeals Panel

The following section will describe the proposed dispute resolution through the Board of Appeal of the JCA.

Complaints and Appeals to the Board of Appeal

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

6.4 Complaints Handling

Effective dispute settlement measures start from effective use of complaints handling measures. The JCA should develop an effective process of (a) taking complaints (b) acknowledging complaints (c) undertaking investigations, (d) organising hearings where necessary, and (e) making reasoned decisions. These are required under the Competition Regulations as in this Regulation. Figure 6 below depicts the process

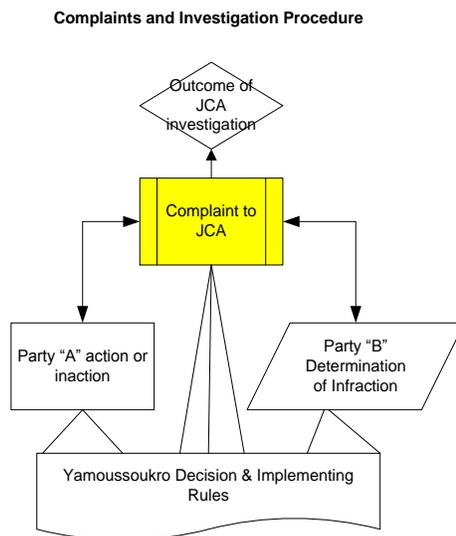


Figure 6: Complaints Handling Process

Article, 16, 17, and 18 of the Regulation are some of the major provisions obliging the JCA to take decisions or take certain actions that will impact on member states and air transport service providers. The Competition Regulations offer states, undertakings, natural and legal persons the right to complain against decisions or omissions of undertakings.

The JCA will have to, among others, make decisions on whether or not states and service providers are undertaking their obligations or in other words acting in breach of the Regulation, the MASA and the Competition Regulations and its implementing regulations.

Such decisions may have effect on either how a state is perceived and provide services under the Regulation and the Competition Regulations or how a service provider acts under the Decision. A typical example could be where a complaint has been raised and the JCA upon due investigation concludes that the complaint is unfounded. Such a decision is challengeable. We propose three alternative modes of challenging the decision.

The alternatives are (a) appeal to the Board of Appeals of the JCA or (b) appeal to the Appeals Tribunal of Article 33.

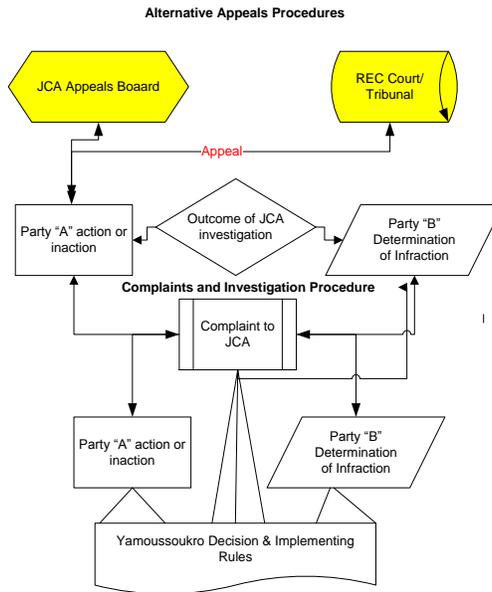


Figure 7: JCA Complaints (Appeal) Handling or Appeal to RECs Courts/Tribunal

Member States have the automatic right of applying to the Appeals Tribunal. Additionally parties appearing before the Boards of Appeal still have the right to appeal against the decisions of the Boards of Appeal to the Appeals Tribunal.

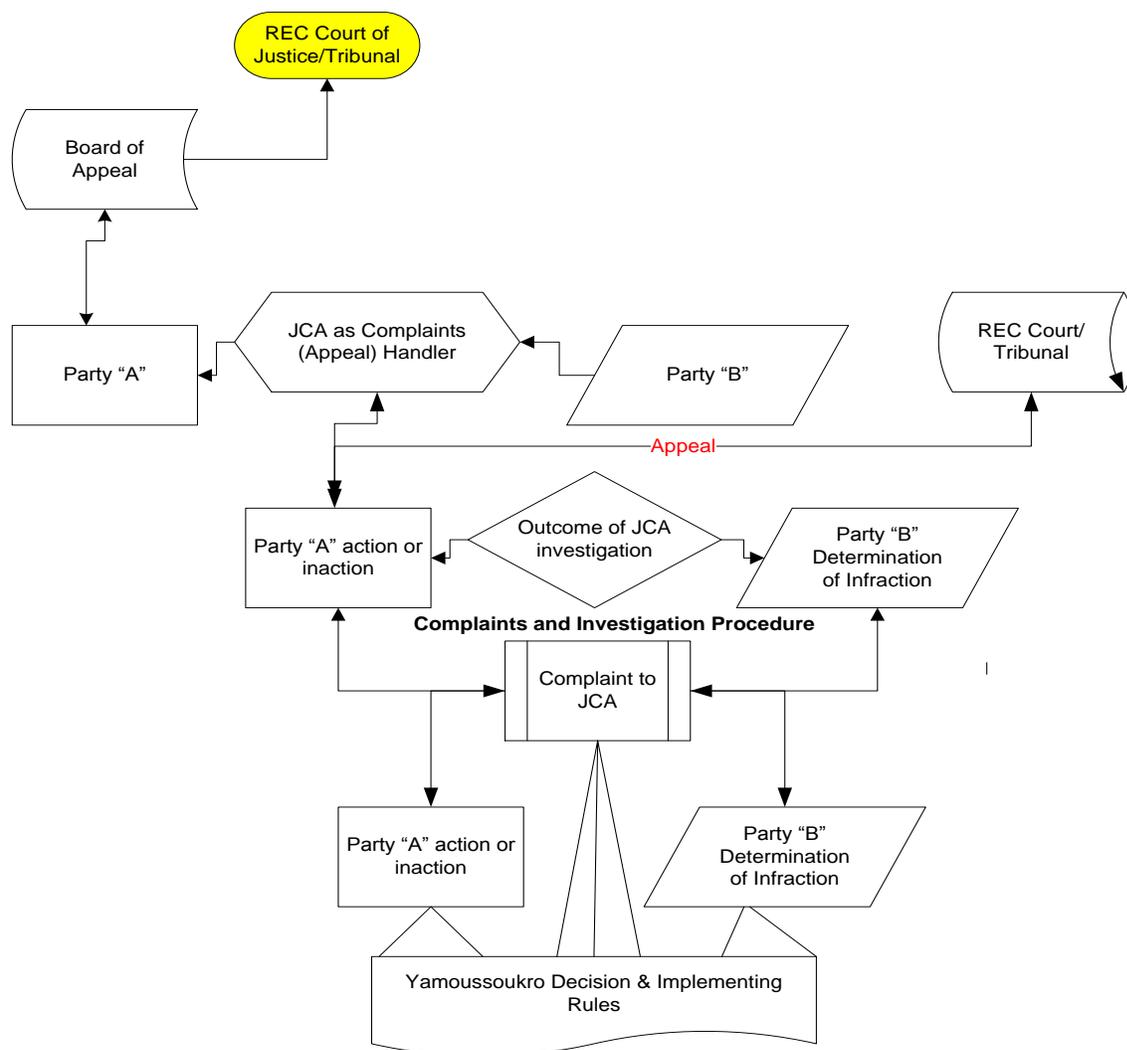


Figure 8: Appeals from JCA Board of Appeals to Appeals Tribunal

Annex 1 provides the establishment Boards of Appeal and provides that parties aggrieved of the decision of the JCA to apply to the Board of Appeal and ensures that aggrieved Member States apply to the Appeals Tribunal as of right.

Article 2 requires the Executive Director to draw up and maintain a list of qualified candidates to serve on the Board or Boards of Appeal of the JCA to be approved by the Council. A Board of Appeal, according to Article 2 shall consist of a Chairperson and

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two other members. Article 3 provides for membership of the Boards of Appeal while Article 4 prevents conflicts by requiring Members of the Boards of Appeal to not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal.

6.5 Annex 2 – Rulemaking Procedure

Article 19 of the draft Regulation provides a procedure for the JCA to consult the Member States, the regional economic communities, eligible air transport service providers and interested parties when proposing new rules. The procedure for rulemaking is provided for in Annex 2 to the Regulation.

Rulemaking pursuant to Annex 2 shall take account of the object and basic of the Regulation, implementing a liberalised air transport market protecting the interest of the air transport consumer; ensuring a vibrant but safe, economically viable, efficient and healthy air transport sector; and developing an efficient, transparent and responsive regulatory system (Article 1).

Article 2 provides for the initiation of rules and the establishment of drafting groups. It provides for the drafting of terms of reference for each consultation procedure and drafting. The Executive Director is required to manage the establishment of drafting groups and is required to among others work to adopt standardised working methods for drafting groups.

Articles 3 and 4 provide for drafting and consultation in the process of rulemaking.

===== **END OF REPORT** =====