



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**THE SIGNIFICANCE OF THE YAMOUSSOUKRO DECISION IN THE
RECOVERY OF THE CIVIL AVIATION MARKET IN AFRICA POST
THE COVID-19 PANDEMIC: A CONSIDERATION OF THE
MEANINGFUL IMPACT OF LIBERALISATION OF THE AFRICAN
AIRSPACE**

By

Itumeleng Mogashoa

Student No: 13273729

**A thesis submitted in partial fulfilment for the award for the degree
of Master of Laws (LLM) in International Air, Space and
Telecommunications Law**

**Faculty of Law
University of Pretoria**

Under the supervision of:

Prof. Dr. Dr. Stephan Hobe

October 2023

DECLARATION

I declare that this Dissertation which is hereby submitted for the award of Legum Magister (LLM) in International Law: Air, Space and Telecommunications at Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed



Itumeleng Mogashoa

[signed electronically]

PREFACE AND ACKNOWLEDGEMENTS

Subsequent to the completion of the first LLM in 2019, my interest in further study of air law became greatly piqued, desiring to gain more knowledge and understanding in this area of law in order to aid my competency as an aspiring aviation lawyer and break the gender and race barriers that are prevalent in the South African aviation industry, but also be able to meaningfully participate international aviation related conversations with knowledge and confidence. It was during 2020, the initial sweep of the COVID-19 pandemic, when I started to ponder on a possible topic, in consultation with my supervisor. Given the times of the day, and the dire impact of COVID-19 on the aviation sector, it was agreed that I explore this episodic occurrence on the African civil aviation sector, read with the continental framework policy of liberalisation, the Yamoussoukro Decision and the research undertaken has resulted in this work which reveals where Africa is insofar as the liberalisation of its air transport market is concerned and how crucial it is for recovery of the air transportation sector from the COVID-19 pandemic. Researching, reading, analysis, formulating views and drafting accordingly ensued and this study is the end-product of all that.

First, foremost, and importantly, I give all thanks and glory to God Almighty who has seen me through these studies and has given me the intellectual and physical strength to complete my studies. Thank you, Lord, for this gift of increased knowledge and may it be used to glorify your name.

To Prof. Dr. Dr. Stephan Hobe, my sincere and deep gratitude goes out to you, for your support, encouragement, guidance, and helpful academic interrogation of my work. The unwavering faith that you had in me, your constant display of positivity towards my work and just your humaneness was invaluable. Without knowing it, you were my pillar during the course of this study, and I could not have come this far without your support. I told you about my aspirations and you helped me to realise them and embraced the commitment and diligence in me. Thank you so much, Prof. Hobe.

Thank you to my twin sons, Lesedi and Lethabo, for your patience and understanding, once again, while I spent a great amount of time pouring over research and for your

intermittent words of encouragement as I worked. This work is dedicated to the memory of my beloved late ones: my grandfather and my parents; I hope that I have made you proud.

To the men and women in Africa who continue to work hard to better civil aviation in Africa and strive to liberalise African skies, we pay homage to you.

Contents

| | |
|---|----|
| LIST OF ACRONYMS..... | 6 |
| INTRODUCTION & SUMMARY..... | 7 |
| 1 Introductory overview of the study..... | 7 |
| 2 History of the adoption of the Yamoussoukro Decision..... | 9 |
| 2.1 Bilateral air services agreements..... | 9 |
| 2.2 Adoption of the OAU Charter..... | 10 |
| 2.3 Conference on Air Transport in Africa..... | 11 |
| 2.4 Launching of the United Nations Transport and Communication Decade for Africa I..... | 13 |
| 2.5 The Lagos Plan of Action..... | 13 |
| 2.6 The Treaty Establishing the African Economic Community..... | 15 |
| 2.7 Mbabane Conference on Freedoms of the Air..... | 17 |
| 3 Objectives of the study..... | 19 |
| 4 Methodology..... | 20 |
| 5 Issues for determination..... | 24 |
| 6 Literature Review..... | 24 |
| 7. Context of the research..... | 30 |
| CHAPTER TWO..... | 34 |
| The adoption of the Yamoussoukro Decision & the beginning of meaningful airspace liberalisation in Africa..... | 34 |
| 1 Introduction..... | 34 |
| 2 The Yamoussoukro Declaration..... | 35 |
| 2.1 A review of the Yamoussoukro Declaration at the Mauritius Conference..... | 38 |
| 3 The Abuja Treaty as the legal basis for the Yamoussoukro Decision..... | 40 |
| 4 The Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa – a consolidation of liberalisation initiatives in Africa..... | 42 |
| 4.1 The Preamble..... | 43 |
| 4.2 Scope of the Decision..... | 45 |
| 4.3 Traffic Rights..... | 46 |
| 4.4 Pricing and tariffs..... | 47 |
| 4.5 Capacity and frequency..... | 47 |
| 4.6 Designation and authorisation..... | 48 |
| 4.7 Monitoring mechanism..... | 49 |
| 5 An overview of organs responsible for the implementation of the Yamoussoukro Decision..... | 50 |
| 5.1 Economic Commission for Africa..... | 50 |
| 5.2 International Civil Aviation Organisation..... | 51 |
| 5.3 African Union..... | 51 |

| | |
|---|-----|
| 5.4 Regional Economic Communities | 52 |
| 5.6 African Civil Aviation Commission | 52 |
| 5.7 Civil aviation authorities at national level | 52 |
| 6. Conclusion | 53 |
| CHAPTER THREE | 54 |
| The deregulation and liberalisation of air transport services in the US and EU, respectively: why Africa had to catch up..... | 54 |
| 1 Introduction | 54 |
| 2 The ADA and Deregulation in the US | 55 |
| 2.1 Some pertinent provisions of the ADA | 56 |
| 2.2 The safeguarding of air safety under the ADA..... | 63 |
| 2.3 The challenges experienced soon after the implementation of the ADA and deregulation | 64 |
| 2.5 Conclusion | 68 |
| 3 Liberalisation in the EU | 69 |
| 3.1 The effect of deregulation in America on Europe | 70 |
| 3.2 The impact of liberalisation in the EU | 79 |
| 4 Conclusion | 81 |
| CHAPTER FOUR | 82 |
| The Regional Domestication of the Yamoussoukro Decision: The progress thus far | 82 |
| 1 Introduction | 82 |
| 2 The bodies responsible for the execution of the Yamoussoukro Decision | 84 |
| 2.1 Common Market for Eastern and Southern Africa | 88 |
| 2.1.1 Legal Notice No. 2 of 1999 | 93 |
| 2.1.3 Conclusion | 103 |
| 2.2 The East African Community | 103 |
| 2.2.1 Conclusion | 111 |
| 2.3 The Southern African Development Community | 112 |
| 2.3.2 The implementation of the Yamoussoukro Decision by South Africa | 121 |
| 2.3.3 Conclusion | 127 |
| 2.4.1 The ECOWAS Revised Treaty..... | 130 |
| 2.4.2 Conclusion | 146 |
| 2.4.3 The Banjul Accord Group..... | 148 |
| 2.4.4 The West African Economic and Monetary Union | 151 |
| 2.4.5 Conclusion | 155 |
| 2.5 The Central African Economic and Monetary Community..... | 155 |
| 2.5.2 Conclusion | 158 |
| 2.6 The League of Arab States | 158 |
| 2.6.2 Conclusion | 162 |
| CHAPTER FIVE | 164 |

| | |
|--|-----|
| The Impediments to Complete Implementation of the Yamoussoukro Decision and Liberalisation of the Intra-African Air Transport Services Market..... | 164 |
| 1 Introduction and overview of liberalisation of air services in Africa | 164 |
| 1.2 Conclusion | 169 |
| 2 The Impediments to implementation of the Yamoussoukro Decision..... | 171 |
| 2.1 Protectionist attitudes towards flag carriers and lack of political will | 171 |
| 2.2 The heterogenous African aviation industry and the legacy of colonisation..... | 174 |
| 2.4 Non-physical barriers | 181 |
| 2.5 Limited skilled personnel and safety oversight | 182 |
| 2.6 Aging aircraft and maintenance facilities | 187 |
| 2.8 Capacity of airport infrastructure | 190 |
| 2.8.1 Runway Design | 191 |
| 2.8.2 Air Traffic Control and Navigation | 192 |
| 2.8.3 Terminal Capacity | 193 |
| 2.8.4 High airport charges..... | 194 |
| 2.9 Legal harmonisation and convergence | 195 |
| 2.9.1 Diversity of national regulations | 195 |
| 2.9.2 Market access | 195 |
| 2.9.3 Cabotage..... | 196 |
| 2.9.4 Ownership and eligibility criteria | 196 |
| 2.9.5 Dispute resolution mechanism..... | 197 |
| 2.9.5 Protection of consumers | 197 |
| 2.10 Political instability and security | 198 |
| 2.11 Conclusion | 200 |
| CHAPTER SIX | 202 |
| Expediting air transportation liberalisation in Africa: The African Union launches the Single African Air Transport Market..... | 202 |
| 1 Introduction | 202 |
| 2 Background: AUAU Agenda 2063 and the SAATM Solemn Commitment | 204 |
| 2.1 Agenda 2063..... | 204 |
| 2.2 The establishment of the SAATM | 206 |
| 2.2.1 Regulatory Framework for the SAATM..... | 211 |
| 2.2.2 Aviation safety and security under the SAATM | 223 |
| 2.2.3 Other measures adopted for implementation of the SAATM..... | 225 |
| 2.3 The establishment of SAATM: Challenges and Progress..... | 231 |
| 2.4 Conclusion | 234 |
| CHAPTER SEVEN..... | 236 |
| The adoption of the African Continental Free Trade Area Agreement: A boost to the Yamoussoukro Decision and SAATM? | 236 |
| 1 Introduction | 236 |

| | |
|--|-----|
| 2 The GATS and Air Transport Services | 239 |
| 2.1 The Annex on Air Transport Services | 242 |
| 3 Broad overview of the AfCFTA Agreement | 249 |
| 3.1 The Protocol on Trade in Services | 251 |
| 4 Conclusion | 255 |
| CHAPTER EIGHT | 257 |
| The significance of the Yamoussoukro Decision in the recovery of the African civil aviation market post the era of the COVID-19 pandemic..... | 257 |
| 1 Introduction | 257 |
| 1.1 Direct impact | 259 |
| 1.2 Indirect impact | 259 |
| 1.3 Induced impact | 260 |
| 2 The socioeconomic effects of the COVID-19 virus in Africa | 261 |
| 2.1 Financial market reactions and the reduction of Chinese imports | 263 |
| 2.2 The impact on oil-dependent countries and the mining sector | 264 |
| 2.3 The closure of institutions of learning | 265 |
| 2.4 The impeding of the creation of a homogenous African society | 265 |
| 2.5 The impact on the air transport industry and consequent spillover into the tourism sector..... | 266 |
| 2.5.1 The impact of COVID-19 on commercial air operators | 270 |
| 2.5.2 The implications of COVID-19 for the air transportation market in Europe | 271 |
| 2.5.3 The effects of COVID-19 on ratings of US airline companies | 272 |
| 2.5.4 Job losses in the aviation sector | 272 |
| 3.1 Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis | 278 |
| 4 The AU High Level Task Force | 280 |
| 4.1 The Relationship of HLTF to the ICAO CART | 282 |
| 5 Conclusion | 285 |
| Conclusion: Summary, Key Findings, Recommendations and Perspectives | 287 |
| 1.1 Reflections | 287 |
| 1.1.1 The Abuja Treaty as the cornerstone of the integration of Africa | 287 |
| 1.1.2 The seats of power still reside in the regional formations within Africa | 289 |
| 1.1.3 The Yamoussoukro Decision remains the seminal policy framework for air transportation liberalisation in Africa and intra-Africa liberalisation is not yet complete | 289 |
| 1.1.4 The implementation of the Yamoussoukro Decision is critical for the attainment of the goals of the AfCFTA Agreement | 290 |
| 2.1 Key Findings and Recommendations | 291 |
| 2.1.1 There must a shift in the political mindset of African governments | 291 |
| 2.1.2 Improve aviation safety oversight | 292 |
| 2.1.3 Investment in airport infrastructure | 294 |
| 2.1.4 The management of flag carriers needs to be recalibrated | 294 |
| 2.1.5 Government support should be conditional | 298 |

| | |
|---|-----|
| 2.1.6 Let the liberalisation under the Yamoussoukro Decision continue on a bilateral basis..... | 298 |
| 3 Perspectives..... | 299 |
| Cases Cited..... | 302 |
| Agreements, Statutes and Policies Considered..... | 302 |
| Bibliography..... | 303 |

APPENDICES

| | |
|--|-----|
| 1. Abuja Treaty..... | 311 |
| 2. Yamoussoukro Declaration..... | 381 |
| 3. Yamoussoukro Decision..... | 390 |
| 4. Annex on Air Transport of the General Agreement on Trade in Services..... | 410 |
| 5. African Continental Free Trade Area Agreement..... | 412 |

LIST OF ACRONYMS

| | |
|---------|--|
| ADA | Airline Deregulation Act of 1978 |
| AEC | African Economic Community |
| AFRAA | African Airlines Association |
| AfCTA | African Continental Free Trade Area |
| AFCAC | African Civil Aviation Commission |
| AFCAP | African Civil Aviation Policy |
| AFRATC | African Air Tariff Conference |
| AU | African Union |
| AUC | African Union Commission |
| BAG | Banjul Accord Group |
| BASA | Bilateral Air Services Agreements |
| CAB | Civil Aeronautics Board |
| CEMAC | Central African Economic and Monetary Community |
| COMESA | Common Market for Eastern and Southern Africa |
| COSCAP | Continuing Airworthiness Project |
| EAC | East African Community |
| ECOWAS | Economic Community of West African States |
| EU | European Union |
| FAA | Federal Administration Agency |
| IATA | International Air Transport Association |
| ICAO | International Civil Aviation Organization |
| IASA | International Aviation Safety Assessment Audit |
| LAS | League of Arab States |
| MASA | Multilateral Air Services Agreement |
| OAU | Organization of African Unity |
| OECD | Organization for Economic Co-operation and Development |
| PTA | Preferential Trade Area |
| REC | Regional Economic Community |
| SAATM | Single African Air Transport Market |
| SACU | Southern African Customs Union |
| SADC | Southern African Development Community |
| SARP | Standards and Recommended Practices |
| UEMOA | Union Economique et Monétaire Ouest-Africaine |
| UMA | Union de Maghreb Arabe |
| UN | United Nations |
| UNECA | United Nations Economic and Social Council |
| UNTACDA | United Nations Transport and Communications Decade |
| USOAP | Universal Safety Oversight Audit Programme |
| WAEMU | West African Economic and Monetary Union |

INTRODUCTION & SUMMARY

1 Introductory overview of the study

The African continent is arguably the nexus of the globe. It possesses resources and commodities sufficient to supply to the continent, and by and large, the rest of the world. This sentiment is applicable to the African airspace, which too is a commodity, and capable of generating wealth, investment, employment, and tourism for the African continent – a substantive socio-economic package. This must have been the intention that underpinned the eventual drawing up, enactment and adoption of the Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa,¹ more commonly known as the Yamoussoukro Decision (Yamoussoukro Decision or the Decision). Africa is however, faced with challenges to the development of its civil aviation sector and occasioned by poor infrastructure, aging aircraft impacting on safety levels, the lack of personnel with aviation technical expertise, and the delayed market cooperation and integration. For purposes of context, the terms ‘liberalisation’ and ‘deregulation’ are used interchangeably in literature, but both simply refer to the removal of regulations or restrictions in a particular industry. Brown has however taken it further insofar as commercial aviation is concerned, to define it as ‘the simultaneous termination of a regulatory instrument and adoption of a non-regulatory form of intervention’.² This chapter, inclusive of presenting an introduction of the study, discusses the background leading up to the adoption of the Yamoussoukro Decision.

The Yamoussoukro Decision is an air transport framework agreement adopted by 54 African states in 1999 with one of its objectives being the achievement of the gradual yet full liberalisation of scheduled and non-scheduled air transport services on the African continent.³ The Yamoussoukro Decision was however not borne singularly from the Assembly of Heads of State that took place in Lomé, Togo from 10 until 12

¹ ECA/RCID/CM.CIVAV/99/RPT – Annex I.

² AE Brown ‘The Politics of Airline Deregulation’ (1988) 103 *Political Science Quarterly* 746 <https://academic.oup.com/psq/article-abstract/103/4/746/7135045> (accessed 15 November 2022).

³ Refer to para of 11 of the Preamble and art 2 to the Yamoussoukro Decision.

July 2000. Prior to the adoption of the Yamoussoukro Decision, the Organisation of African Unity (OAU), which is the current day African Union (AU), under the auspices of the Economic Commission for Africa of the United Nations Economic and Social Council (UNECA), adopted the Declaration of Yamoussoukro on A New African Air Transport Policy,⁴ (Yamoussoukro Declaration) in 1988 which are a set of measures designed to enable signatories thereto to exchange air traffic rights in a liberal manner,⁵ address the issue of under-development in the African air transport market⁶ and to achieve the integration of African airlines.⁷ These were collective measures, in the writer's view, to respond to and counter the socio-economic challenges faced by the continent, to be achieved through, at that particular juncture, the integration of African airlines within a period of eight years. This was the beginning of an attempt to liberalise the African airspace, albeit not explicitly expressed as such in the policy document. An expanded policy framework known as the Single African Air Transport Market (SAATM) was launched in Ethiopia as part of the continued efforts by the AU to expedite the liberalisation of the African continent air transportation market.

Between 1988 and 2000 when the Yamoussoukro Declaration and the Yamoussoukro Decision were adopted respectively, the enquiry that remains is whether there has been progress in the realisation of airspace liberalisation in Africa, which is a question which this study shall explore and endeavour to respond to. This question is considered within the context of the global circumstances of the coronavirus which placed an abrupt and wholly unprecedented cessation to air travel the world over, in circumstances where travel by air in Africa had not reached its full and true potential.

⁴ Economic Commission for Africa 'Declaration of Yamoussoukro on a New African Air Transport Policy' E/ECA/TRANS/77A, 17 October 1988 <https://repository.uneca.org/bitstream/handle/10855/13773/Bib-55144.pdf?sequence=1&isAllowed=y> (accessed 17 July 2020)

⁵ Para 2 of the Preamble to the Yamoussoukro Declaration.

⁶ Para 7 of the Preamble to the Yamoussoukro Declaration.

⁷ Art A of the Yamoussoukro Declaration.

2 History of the adoption of the Yamoussoukro Decision

2.1 Bilateral air services agreements

Much like other states, the civil aviation regulatory regime previously utilised in Africa, prior to the policy advancement of liberalisation, intra-continental commercial air services in Africa were still largely based on restrictive bilateral agreements.⁸ Unlike the international trade of goods and services that is regulated by the General Agreement on Trade and Tariffs and the associated General Agreement on Trade in Services under the custodianship of the World Trade Organisation, trading in international civil aviation enjoys its own special regulatory dispensation founded in Bilateral Air Services Agreements (BASAs).⁹ BASAs are agreements concluded by the governments who are a party to the agreement, which permits international commercial air services to take place between the two countries. A constant, almost unanimous criticism levelled at BASAs is that they are protectionist and actually hamper the growth of the air transport market and by consequence, the economy.¹⁰ Although the author agrees with these criticisms and they are not without merit, it is important to understand the historical context of BASAs: they served to protect state sovereignty and, to protect the profitability of national carriers – essentially a tool for control.

However, within the context of Africa, BASAs have been described as teetering on “parochial nationalism”¹¹ because of their overtly protectionist outlook. Everything in the value chain of air travel was restricted: traffic rights, frequency, capacity, type of aircraft to be operated, routes, volume of traffic, the number of designated carriers and

⁸ Economic Commission for Africa ‘Compendium of Air transport Integration and Cooperation Initiatives in Africa’ (2010) 10 https://www.icao.int/sustainability/Documents/Compendium_FairCompetition/Africa/ECA_Compendium-AirTransportIntegrationCooperationInitiatives_Africa_2005.pdf (accessed 5 September 2020).

⁹ DL Rhoades ‘Sustainable Development in African Civil Aviation: Problems and Policies’ (2004) 3 *International Journal of Technology Policy and Management* 10 https://www.researchgate.net/publication/249920685_Sustainable_development_in_African_civil_aviation_Problems_and_policies (accessed 15 May 2020).

¹⁰ n 9 above, 5.

¹¹ n 8 above, 10.

payment of royalty and other compensation.¹² With particular reference to traffic rights, the restrictiveness of the bilateral agreements placed limitations on the third, fourth and fifth freedoms of the air.¹³ Abate attempts to distinguish between ‘restrictive bilateral agreements’ and ‘liberalised bilateral agreements’ - perhaps the latter a somewhat oxymoronic term - and argues that the latter can be defined by three criteria: non-government interference in the choices of departure frequency and aircraft size, no restrictions on fifth freedoms of the air within Africa and to destinations beyond African and if the airfare can be invalidated by disapproval of both contracting parties.¹⁴ Nonetheless, a holistic economic assessment necessitated that the states on the continent reconsider this defeatist regulatory regime and gradually, albeit slowly, advance towards conceptualisation of the integration, cooperation and liberalisation of the air transport market through various progressive policy documents.

2.2 Adoption of the OAU Charter

During the early 1960s, Africa commenced with its initiatives of unifying states on the continent to drive economic development, inclusive of transportation, building intra-African solidarity and protecting the sovereignty and independence of African states.¹⁵ The first such initiative can be said to be the signature of the OAU Charter by 32

¹² as above.

¹³ TRANS/AIR/CONF/84/3 and 84/8 on facilitation issues in Africa. The third freedom of the air is the right or privilege, in relation to scheduled international air services, granted by one state to another state to put down, in the territory of the first state, traffic coming from the home state of the carrier. The fourth freedom of the air is the right or privilege, in relation to scheduled international air services, granted by one state to another state, to take on, in the territory of the first state, traffic destined for the home state of the carrier. The fifth freedom of the air is the right or privilege, in relation to scheduled international air services, granted by one state to another state, to put down and take on, in the territory of the first state, traffic coming from or destined to a third state.

¹⁴ M Abate “Economic Effects of Air Transport Market Liberalization in Africa” (2014) 23 Swedish National Road and Transport Research Institute, CTS Working Paper 10, www.cts.kth.se (accessed 11 May 2020). Abate argues that ‘restrictive bilateral agreements’ carry the criteria opposite to that of ‘liberalised bilateral agreements’

¹⁵ One of the statements to the Preamble of the OAU Charter reads,

“...Inspired by a common determination to promote understanding among our peoples and cooperation among our states in response to the aspirations of our peoples for brother-hood and solidarity, in a larger unity transcending ethnic and national differences,”

Art III of the OAU Charter provides –

“The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles:

1. The sovereign equality of all Member States.

3. Respect for sovereignty and territorial integrity of each state and for its inalienable right to independent existence.”

governments.¹⁶ The Charter, although lacking in exact specificities, was unequivocally adopted in the spirit of cooperation and integration by the signatories thereto and set the precedent and tone for future air transport policy initiatives in Africa. With specific reference to transport, the Charter simply states that,

2. To these ends, the Member States shall coordinate and harmonize their general policies, especially in the following fields:

...

- (b) Economic cooperation, including transportation and communications;¹⁷

It can be argued that, although member states could perhaps not have been able to clearly articulate the specific objectives at such juncture with regards to this economic cooperation in transportation as espoused in the OAU Charter, it is consistent with the later objectives of the Yamoussoukro Decision.

2.3 Conference on Air Transport in Africa

Pursuant to the adoption of the OAU Charter in 1963, the ECA, in collaboration with the International Civil Aviation Organization (ICAO), convened the first Conference on Air Transport in Africa in November 1964 in Addis Ababa, a seminal and important conference for the formulation of air transport initiatives in Africa. This is the conference that planted a seed for integration and cooperation efforts in the African air transport sector, with the purpose of critically considering the measures required to grow air transport within, coming into and outside of Africa to aid economic and social development on the continent.¹⁸ In summary, this Conference deliberated and agreed on the following courses of action:

- The undertaking of a study, as a preliminary step, of individual air transport requirements for each state, considering aspects such as routes, traffic rights, methods for the purchasing and financing of new aircraft.¹⁹

¹⁶ CE Schlumberger *Open Skies for Africa: Implementing the Yamoussoukro Decision* (2010) 16.

¹⁷ Art II (2)(b) of the OAU Charter.

¹⁸ n 8 above, 28.

¹⁹ n 19 above, 6.

- The establishment of major international airlines in the sub-regions and thereby, the absorption of existing national airlines. This suggestion, although welcomed as a move that would serve the socio-economic interests of the sub-regions to be formed, was considered with great care by the delegates. It was left to the delegates to consult and decide on which sub-region they wished to join, operations-related issues²⁰ and the most ideal manner to implement this suggestion going forward.²¹
- The establishment of a single Pan-African airline to operate all international air services within the continent and the rest of the world, was also mooted by the Conference. Although generally considered to be a premature suggestion by the Conference, it was agreed that the suggestion be pended for reconsideration at an appropriate future date.²²
- Lastly, the Conference recommended that, in the interest of development of air services in Africa and the fact that cooperation between African governments was a critical requirement for integration initiatives, a permanent African civil aviation organ, under the authority of the OAU, is established.²³ It is this recommendation that birthed what is known today as the AFCAC.

Although there was a 14-year lull period following this Conference, the Conference made strongly progressive recommendations to develop the African air services sector. In a highly politicised environment that is formerly and current day Africa, it is submitted that some of the recommendations of the Conference would require a greater deal of political will than mere cooperation, to find implementation.

²⁰ This refers to issues such as operating policies, traffic rights and the nature of routes to be served by the sub-regional airlines and fares and rates. In consideration of the absolute sovereignty of states, the Conference had to leave it to delegates to organise themselves into sub-regional groupings. It was a suggestion however that was consistent with the spirit of integration and ultimately, liberalisation.

²¹ n 8 above, 8.

²² n 8 above, 9.

²³ n 8 above, 12.

2.4 The launching of the United Nations Transport and Communication Decade for Africa I

Another initiative to support the growth of air services in Africa, the first decade (1978-1988) of the United Nations Transport and Communications Decade (UNTACDA I) was launched,²⁴ following the elapse of 14 years since the Conference of 1964. UNTACDA II (1991-1999) was declared by the United Nations General Assembly in 1991. Through these UNCTADA programmes, the African continent identified communication and transport as being instrumental for socioeconomic development of the continent. The UNTACDA decades resulted in the adoption of a policy framework for air transportation and a comprehensive action plan for the air transportation sub-sector²⁵, with a specific focus on the improvement of air transport infrastructure and technical assistance for the integration of air services.²⁶ It is trite that infrastructure is a most critical element of the development of air transportation and associated operations; in fact, it is a critical element for any mode of transport. Integration, and by implication, cooperation, is a recurring objective in the African air transport initiatives discussed thus far.

It is reported that the most significant achievement of the UNTACDA programme is its influence on future air transport policy on the continent, and on the Lagos Plan of Action.²⁷ The UNTACDA Programme remained a recurring influence on future policy frameworks that were adopted by African states.

2.5 The Lagos Plan of Action

Heads of states met again in Lagos on 28 to 29 April 1980, under the leadership of the OAU. The focus of this meeting was not to consider and discuss the pace of

²⁴ The UNTACDA Programme was launched based on the United Nations Resolution 32/160 (19 December 1977).

²⁵ n 8 above, 29.

²⁶ Schlumberger (n 16 above) 17. The UNTACDA Programmes envisaged that these objectives would be achieved by cooperation among states for improved utilisation of air transportation facilities and services by the conclusion bilateral and multilateral air services agreements; the integration of African airlines; and the harmonisation of intra-continental air travel.

²⁷ n 8 above, 15.

development and liberalisation of air transport in Africa *per se*, but rather it was a platform to undertake a broad assessment of the declining economic state of many member states. The meeting culminated in the adoption of the Lagos Plan of Action for the economic development of Africa 1980-2000²⁸ (Lagos Plan of Action), a 20 year plan of action and programme for the improvement of the economy of Africa.

The opening statement of the preamble to the Lagos Plan of Action is a lamentation of the under-development of the economy of the continent²⁹ and a reflection of self-critique by the contracting governments. The preamble repeatedly utilises the prefix “self”,³⁰ placing unequivocal emphasis on the efforts of self-determination and upliftment of African states, within this collective continental grouping.

Notwithstanding the fact that the Lagos Plan of Action addresses all areas of economic growth of member states ranging from agriculture,³¹ industrialisation,³² and science and technology³³ to name but a few, Chapter VI thereof is dedicated to the issues of transport and communication, in recognition of the fact that they are ‘...*important for the socio-economic integration of Africa, as well as the promotion of intra and extra-African trade*,³⁴ and correctly so, as trade is a highly significant output of socio-economic integration. The Lagos Plan of Action draws on the resolutions adopted under the UNTACDA Programmes, largely centred on the integration of air transportation services in Africa³⁵ and sets out a general strategy for the implementation thereof.³⁶ No specific mention is made in the Lagos Plan of Action regarding liberalisation of air transport on the continent, but it was, in the writer’s

²⁸ The OAU Lagos Plan of Action for the economic development of Africa, 1980-2000.

²⁹ Art 1 of the Preamble provides:

“The effect of unfulfilled promises of global development strategies has been more sharply felt in Africa than in the other continents of the world. Indeed, rather than result in an improvement in the economic situation of the continent, successive strategies have made it stagnate and become more susceptible than other regions to the economic and social crises suffered by the industrialised countries. Thus, Africa is unable to point to any significant growth rate, or satisfactory index of general well-being, in the past 20 years. Faced with this situation, and determined to undertake measures for the basic restructuring of the economic base of our continent, we resolved to adopt a far-reaching regional approach based primarily on collective self-reliance.”

³⁰ For example, refer to arts 2, 3, 3(i), 3(iii), 14(iii) & 14(iv).

³¹ Refer to ch I.

³² Refer to ch II.

³³ Refer to ch V.

³⁴ Refer to art 205.

³⁵ Refer to art 206.

³⁶ Refer to arts 207 to 222.

opinion, a more aggressive set of commitments³⁷ to forge stronger economic and cultural ties between member states which would inevitably result in a gradual upward trajectory of the liberalisation of air services.

2.6 The Treaty Establishing the African Economic Community

The adoption of the Treaty Establishing the African Economic Community (Abuja Treaty) in 1991 came about, *inter alia*, as a result of the consideration of the commitments made in the Lagos Plan of Action. It is stated in the Preamble of the Abuja Treaty that one of the considerations for the establishment of the African Economic Community (AEC) is –

...the Lagos Plan of Action and the Final Act of Lagos of April 1980 reaffirming our commitment to establish, by the year 2000, an African Economic Community in order to foster the economic, social and cultural integration of our Continent;³⁸

The establishment of the AEC was a firm and bold move on the part of the then OAU to respond to the economic challenges faced by member states and surpasses previous sweeping statements made in various policy frameworks; economic integration, promotion of economic, social and cultural development and the promotion of intra-African trade are the broad objectives of the Abuja Treaty. It is in essence, a consolidated plan of action of integration and cooperation, in the form a continental agreement by member states which carries the economic development aspirations of the AU member states. This study will later reveal the link between the Abuja Treaty and the Agreement Establishing the African Continental Free Trade Area.

With reference to air transportation, signatories to the Abuja Treaty commit to attain a harmonious, coordinated and integrated development of the continental transport and communications network³⁹ and undertake to:

³⁷ n 28 above, art 3(i) to (vi).

³⁸ n 28 above, para 4.

³⁹ n 28 above, art 61(I).

- (a) promote the integration of transport and communications infrastructure;
- (b) ...
- (c) harmonize progressively their rules and regulations relating to transport and communications;

2 (c) harmonize:

- (i) ...
- (ii) their air transport policies;
...
- (e) promote proper integration of air transport in Africa and coordinate flight schedules;
and
- (f) coordinate and harmonize their transport policies at regional and Community levels in order to eliminate non-physical barriers that hamper the free movement of goods, services and persons."⁴⁰

Read within the context of this study, Article 61(1)(c) of the Abuja Treaty makes provision for the progressive realisation of liberalisation of the rules and regulations pertaining to air services. The provisions referenced above repeatedly mention the 'harmonization' of transport policies and specifically make mention of 'air transport policies'. In simple terms, to harmonise means to 'form a pleasing or consistent whole'.⁴¹ In other words, it is the intention of this Treaty that the member states should consolidate their air transportation policies in an economically consistent manner so that all member states will benefit economically from the continent's civil aviation market. This is an intention which, it is submitted, is very much consistent with the spirit and purport of liberalisation of the airspace.

It is common cause that the effectiveness of any legal instrument and/or agreement is underscored by its legal status or punitive measures that shall be meted out to

⁴⁰ n 28 above, ch X, art 61, 1(a) to (c) & 2(c)(ii), 2(e) to (f).

⁴¹ Definition extracted from the Concise Oxford Dictionary, Ninth Edition (1995), Clarendon Press, Oxford, 620.

signatories for failure to adhere to the terms and conditions contained therein. Article 10 paragraph 2 of the Abuja Treaty provides –

Without prejudice to the provisions of paragraph (5) of Article 18, decisions shall be binding on Member States and organs of the Community, as well as regional economic communities.

Article 99 of the Abuja Treaty makes the Treaty and its Protocols an integral part of the OAU Charter,⁴² which renders the Treaty equivalent to a founding document of the OAU. Article 98, paragraph 1 of the Treaty provides that the Community forms an integral part of the OAU. The relevance of these provisions is that it will be argued later in this study that these provisions related to the legal status of the Abuja Treaty, more in particular Article 10, makes the implementation of the Yamoussoukro Decision a mandatory obligation on the part of member states and their governments, and not a discretionary one.

The AEC afforded itself a cumulative period not exceeding 40 years to implement the objectives and provisions of the Abuja Treaty⁴³, by way of a six-stage implementation plan,⁴⁴ from the date of the Treaty coming into force. The Abuja Treaty entered into force on 12 May 1994, making the implementation deadline 2034. This elaborate period of implementation of this Treaty may be to accommodate the financial challenges faced by member states, but it is trite that in civil aviation, there are ongoing and at times, rapid technological developments and Africa finds itself unfortunately having to play catch up.

2.7 Mbabane Conference on Freedoms of the Air

With the implementation of deregulation measures in the US, the external pressures for change in civil aviation relations slowly started seeping into the African continent. The inception of the African Air Tariff Conference (AFRATC) can be said to be one

⁴² Art 99 provides -

“This Treaty and the Protocols shall form an integral part of the OAU Charter”.

⁴³ Art 6, para 5 provides –

“Notwithstanding the provisions of the preceding paragraph, the cumulative transitional period shall not exceed forty (40) years from the date of entry into force of this Treaty.”

⁴⁴ Refer to art 6 of the Abuja Treaty.

such response to the said pressure.⁴⁵ The main objective of the AFRATC was to establish a mechanism for regional air tariff coordination and negotiation.⁴⁶ This Convention was however never ratified nor implemented and thus never gained traction, but such was the appreciation of liberalising air fares and rates on the part of the African continent.

As civil aviation liberalisation efforts gained momentum internationally, and in light of the anomalous challenge of African states battling to obtain traffic rights in other African states⁴⁷, it was decided by the UNECA to host a conference in November in 1984 in Mbabane, Kingdom of Eswatini, known as the Mbabane Conference on the Freedoms of the Air. This conference formed part on the ongoing initiatives adopted under the UNTACDA Programmes.⁴⁸ This was the first ever occasion where African Ministers of Transport, Communication and Planning⁴⁹ and representatives of African airlines converged to discuss in depth, the critical issue of air traffic rights. It is trite that air traffic rights are axiomatic to liberalisation of the airspace. The conference significantly identified national carrier protectionism as one of the obstacles to the exchange of traffic rights, economic integration and development of the civil aviation market in Africa⁵⁰ and it is common cause that protectionism is really a posture of national sovereignty. The conference adjourned with the adoption of the Declaration of Mbabane on the Freedoms of the Air, which in the main, called for the establishment of a technical committee to develop a “common African approach on the free exchange of third and fourth freedom traffic rights” and “encourage the exchange of fifth freedom rights”.⁵¹ This Declaration additionally proposed that the technical committee explore possibilities of enhanced technical and commercial cooperation between African air carriers,⁵² a recurring call by African states in preceding policy documents.

⁴⁵ n 8 above, 31.

⁴⁶ n 8 above, 32.

⁴⁷ Resolution ECA/UNCTADA/RES. 79/6.

⁴⁸ n 8 above, 32.

⁴⁹ In attendance at the conference were representatives from the following states: Benin, Cameroon, Chad, Congo, Côte d'Ivoire, Egypt, Ethiopia, Eswatini, Ghana, Gabon, Malawi, Kenya, Nigeria, Niger, Mauritius, Tanzania, Zaire, Zambia and Zimbabwe.

⁵⁰ See: TRANS/AIR/CONF/84/2 – activities of the ECA; TRANS/AIR/CONF/84/4/a and TRANS/AIR/CONF/84/4/b on the shortcomings of the African air transport network; TRANS/AIR/CONF/84/5/a and TRANS/AIR/CONF/84/5/b on the impact of the 5th freedom.

⁵¹ n 8 above, 1.

⁵² as above.

The Mbabane Conference and the accompanying Declaration is a reflection of the attitude of the African continent with regards to the development and advancement of intra-African air transport, this time with a specific focus on the exchange of air traffic rights. It is in effect, an acknowledgement of the need for liberalisation on the continent and it is a strong indication that Africa has been alive to global air transport market trends. The main themes of concern throughout the history leading up to the adoption of the Yamoussoukro Decision are traffic rights, technical and commercial cooperation among African states, integration of domestic airlines and the coordination of sub-regional aviation policy.

3 Objectives of the study

This thesis will:

- Discuss the concept of air transportation liberalisation in general and in Africa, being the continent that is the focus of this study.
- Identify the elements of influence that informed the adoption of the Yamoussoukro Decision by the AU.
- Critically analyse the provisions of the Yamoussoukro Decision and its effectiveness in the liberalisation of the African airspace and argue that it is still capable of implementation, where the political will exists to do so.
- Appraise the opening of the skies in the US and the liberalisation of the aviation market in the EU, to the extent that it has been proven to be an effective aviation policy and/or strategy.
- Explore how the complete implementation of the Yamoussoukro Decision can potentially have a positive effect on the African economy and recovery thereof within the context of the current global pandemic, being COVID-19.
- Argue that the Agreement Establishing the African Continental Free Trade Area (AfCTA) and the Single African Air Transport Market (SAATM) will aid the liberalisation objectives enshrined in the Yamoussoukro Decision.

- Propose recommendations to take the implementation of the Yamoussoukro Decision forward in order to assist the economic recovery of the African continent.

4 Methodology

The pace and progress of airspace liberalisation on the African continent is comparatively assessed and discussed firstly from an international perspective in this thesis, in consideration of the pursuit and achievement of open skies and liberalisation in the US and in the EU, respectively. In doing so, the political will of governments woven into the issue of sovereignty and the colonial background of African states cannot be ignored.

It is common cause that the US and EU are the global forerunners in lessons concerning the liberalisation of the air transportation sector, and related policies, and are the pioneers of this model of air services. A comparative methodology has been adopted in this thesis to the extent of illustrating and analysing the progression of liberalisation in Africa within the context of the Yamoussoukro Decision. The main approach in the thesis is descriptive, analytical, historically analytical, deductive, critical, prescriptive and suggestive.⁵³ In order to conduct a proper assessment and evaluation of the subject matter generally, a comparative international law and policy method is utilised. As already mentioned, lessons in liberalisation of air transportation are drawn from the US and EU, regarded as the global pioneers of the concept and a high-level consideration of the benefits that have been reaped in those markets thus far, form part of the discussion. The thesis then proceeds to employ a critically analytical method to examine the provisions of the Yamoussoukro Decision read with the relevant provisions of other preceding treaties, the progress of its implementation regionally and identification of the impediments to its full implementation. Part of this

⁵³ The research involves literature review of various sources; therefore, an analytical, critical and descriptive approach is utilised. The descriptive, analytical, historically analytical and critical approach is utilised to examine the various policy instruments leading up to and including the Yamoussoukro Decision. The prescriptive and suggestive approaches are employed to proffer recommendations, suggestions, and proposals.

analysis includes a further comparison between the various African regional groupings.

The topic of the thesis has an element related to the current global health crisis, the coronavirus, that has devastated the aviation economy globally and other aviation-related economies; however, within the context of Africa, it can be viewed as an opportunity to aid the recovery of the air services sector in the continent by arguing for the complete implementation of Yamoussoukro Decision. In this regard and bearing in mind that it is not a medical science thesis, the thesis enlists a descriptive approach in the analysis of the coronavirus *vis-à-vis* the complete implementation of the Yamoussoukro Decision in the African air transport market.

Literature review is also a methodology approach that is utilised in the thesis to critique the Yamoussoukro Decision, determine the pace of implementation across the regional groupings of the African continent and to share the scholarly contributions made by different authors on the subject-matter. This review will assume an analytical and descriptive approach and, in this regard, the treaty itself, journal articles, other relevant and related treaties and bilateral air transport agreements are critically analysed to determine the extent of liberalisation, and by extension, the implementation of the Yamoussoukro Decision.

It is to be noted that the source materials utilised to pen the thesis were obtained from primary and secondary sources. The primary sources comprised of treaties and policies drawn up under the auspices of international and continental organisations. These primary sources include policies, frameworks and other guiding instruments on cooperation and collaboration on either specifically the air transport services sector or broadly on the African economy and unlocking it for the betterment of the lives of African peoples. The UN and AU are the instrumental organisations in this regard and other regional bodies such as for example, the Southern African Development Community (SADC) or the Economic Community of West African States (ECOWAS). The secondary sources that are utilised are books, journal articles, newspaper articles and sources from the internet.

As indicated earlier, various methods are utilised in the compilation of this thesis. The deductive and critical approach is employed to, pursuant to an interrogation of the source materials, advance arguments in the thesis. The question is no longer whether Africa is alive to the liberalisation of its civil aviation market because there is a treaty in place responding to that. The question is around the impediments to the implementation of the treaty, causing a substantial delay and the potential benefits to Africa in the wake of the coronavirus, once fully implemented.

On the other hand, the prescriptive and suggestive approaches serve to proffer recommendations, proposals and recommendations at the end of the thesis. These approaches also aid to consolidate the lessons learnt and conclusions drawn from the research material, in a comprehensive manner.

The Convention on Civil Aviation of 1944 (Chicago Convention) is the cornerstone international treaty on upon which the civil aviation regulatory framework is built, and in line with the time of its adoption, it recognises a bilateral contractual system of exchange of traffic rights in civil aviation. Airspace liberalisation or 'open skies' simply denotes the relaxation of regulatory rules regarding *inter alia*, capacity, traffic, frequency, and market access interstate as opposed to the traditional bilateral agreement model wherein these areas of operation were predetermined⁵⁴ between contracting governments. It is a business model that fosters competitive pricing in the air transportation sector and as the aviation economy feeds other economic activities, it is an operational model and policy that yields positive output for both state and passenger. Liberalisation of the African air transportation market can be said that it is no longer simply a nice-to-have but is rather an imperative for the continental economy and its other markets that drive the development and growth of the African economy.

The Report of the Ministerial Meeting of the Ministerial Working Group on Establishment of a Single African Air Transport Market noted the comments made by the African Union Commission (AUC) Commissioner that:⁵⁵

⁵⁴ R Doganis *The Airline Business in the 21st Century* (2001) 19.

⁵⁵ Report of the Ministerial Meeting on the Second Meeting of the Ministerial Working Group on Establishment of a Single African Air Transport Market, 20 October (2016) Specialized Technical Committee on Transport, Intercontinental and Interregional Infrastructure, Energy and Tourism document, 1 https://afcac.org/en/images/Air_Transport/2.3.3-MM.pdf (accessed 3 July 2020).

...the successful implementation of the Yamoussoukro Decision on the Liberalisation of Access to Air Transport Markets in Africa, 1999, has always been the major strategy adopted by our leaders for building a formidable air transport industry in Africa. The Decision was adopted during the period when African was focusing on building a common economic space leading to deeper continental integration through the Treaty establishing the African Economic Community (AEC) popularly known as the Abuja Treaty.

The Report further records the comments of the Chairperson of the Ministerial Working Group that:⁵⁶

While many air markets between Africa and countries outside of Africa have been liberalized to a significant extent, most intra-African aviation markets remain largely closed, subject to restrictive bilateral agreements which limit the growth and development of air services. This has limited the potential for aviation to be an engine of growth and development.

Although the sentiments are not directly related to the implementation of the Yamoussoukro Decision but rather to coronavirus pandemic, Chaytor and Ogo aptly comment that:⁵⁷

...the current situation shows that there is potential for Africa's industries, whether public or private to respond to demand. Thus, liberalisation of markets alongside the removal of barriers such as licensing requirements through measures such as mutual recognition systems, will serve as useful incentives for production by domestic industries.

Admittedly, Africa has emerged from a colonial past for some time now and enjoys independence. However, the vestiges of the impact of colonialism on the continent subtly remain and somehow impede on its total economic integration. Support for this argument is found in the regional blocs that currently exist and somewhat demonstrate perhaps the underlying political hesitation. The delayed implementation of the Yamoussoukro Decision and consequently, the liberalisation of the African skies cannot necessarily be attributed to aero-politics but it is submitted that it is the

⁵⁶ n 55 above, 3.

⁵⁷ B Chaytor & I Ogo 'Recovery from the Economic Impacts of the COVID-19 Pandemic in Africa: What Role for Trade?' (07 April 2020) 3 <https://www.tralac.org/blog/article/14491-recovery-from-economic-impacts-of-the-covid-19-pandemic-in-africa-what-role-for-trade.html> (accessed 4 June 2020).

apprehension of the creation of a competitive aviation market that stifles the political will of governments. Can the competitive market that will be fostered by the implementation of the Yamoussoukro Decision aid the recovery of Africa's air transport sector from the impact of the coronavirus? This is one of the questions that this study attempts to answer.

5 Research Questions

The issues for determination in this thesis include, *inter alia*:

- (1) Whether or not the liberalisation of the air transportation market in Africa, considering the successes enjoyed by the EU and the US from embarking on similar efforts, requires the adoption of any more policies or treaties;
- (2) Whether or not the implementation of the Yamoussoukro Decision is optional in light of the coming into effect of AfCTA;
- (3) Whether or not the AU and its implementing agency, AFCAC, need to do more to complete the implementation of the Yamoussoukro Decision;
- (4) Whether or not there currently exist any legal impediments to the complete implementation of Yamoussoukro Decision;
- (5) Whether or not African states and signatories to the Yamoussoukro Decision have implemented its provisions and if so, to what extent.

6 Literature Review

Since its adoption in 1999, and given the elapse of time since then, much has been written about the Yamoussoukro Decision and the pace of liberalisation of the air transportation services in Africa, largely in the form of scholarly articles.⁵⁸ Drawing from the Yamoussoukro Decision itself, Article 2 thereof reads that –

⁵⁸ See for example CE Schlumberger (n 16 above); DL Rhoades (n 9 above); M Abate (n 14 above); SN Bwire 'Assessing the Yamoussoukro Decision: Accounting for Determinants of Air Transport Liberalization in Africa' LLM thesis, United States International University-Africa, 2018; S Surovitskikh & B Lubbe 'Measuring Progress in Air Services Liberalisation in South Africa's Aviation Policy in Africa' (2014) *International Conference: Tourism and the New Global Economy*; O Mhanga & JN Steyn 'Liberalisation initiatives of the airline industry in southern Africa: Progress achieved and hindrances to

This Decision establishes the arrangement among State Parties for the gradual liberalization of scheduled and non-scheduled intra-African air transport services. This Decision has precedence over any multilateral or bilateral agreements on air services between State Parties which are incompatible with this Decision. The provisions which are included in these agreements and which are not compatible with this Decision remain valid and are supplementary to the Decision;

This provision unequivocally states that the Yamoussoukro Decision has precedence over any air services agreements, be it bilateral or multilateral, which are inconsistent with the spirit of liberalisation. It therefore can no longer be brought into question whether the Yamoussoukro Decision sufficiently articulates the matter of open skies for Africa.

Schlumberger, one of the prominent authors on the topic of open skies in Africa⁵⁹ in his insightful book writes that:

In Africa, where poor road, port, and railway infrastructure often constrain the rapid and efficient transportation of both goods earmarked for export and passengers, air transport offers potential for growth and for economic development by fostering trade and foreign investment.⁶⁰

Notwithstanding his pointed criticism at the delayed implementation of the Yamoussoukro Decision, Schlumberger asserts this of the treaty:

...the full liberalization of air services would facilitate the inclusion of remote countries or regions in international trade, including the possibility of becoming low-cost manufacturing sites. This would not only support economic development, but in large countries also facilitate social integration on regional and national levels.⁶¹

Surovitskikh and Lubbe succinctly explain liberalisation as the strict and highly regulated regime of international air transport services that has gradually evolved to

implementation' (2018) 7(1) *African Journal of Hospitality, Tourism and Leisure* https://www.ajhtl.com/uploads/7/1/6/3/7163688/article_25_vol_7_1_2018.pdf to name but a few.

⁵⁹ Schlumberger (n 16 above).

⁶⁰ Schlumberger (n 16 above) 1.

⁶¹ Schlumberger (n 16 above) 170.

new liberal trading agreements, facilitated through reformed transport policies, as seen in the US, European Common Aviation Area and the EU-US 'Open Skies'.⁶² Pursuant to these developments, other regions such as South America, the South-East region, the Caribbean Community, the Middle East and the Trans-Tasman market followed suit.⁶³ The authors highlight the significance of the Decision thus:⁶⁴

The YD remains the single most important air transport reform policy initiative by the African governments to date.

In order to assess the value of the Yamoussoukro Decision in aiding the recovery of the air transportation market in Africa, the status and progress of implementation is an important factor to consider. Mhlanga and Steyn advance a view on the posture of Southern African states in relation to the implementation of the Decision, arguing that African states in the Southern region of the continent oppose liberalisation on grounds of sovereignty and that the delayed implementation of the Yamoussoukro Decision in these states is due to their protectionist approach.⁶⁵ Njoya similarly argues that little progress has been made in the Southern African Development Community (SADC) regional bloc with regards to implementation of the Yamoussoukro Decision.⁶⁶

Drawing from a number of empirical studies that have been conducted in the past, Njoya also argues that the implementation of the Decision could stimulate the growth of economies of Africa,⁶⁷ as is generally the effects of open skies on the economy of

⁶² S Surovitskikh & B Lubbe 'Measuring Progress in Air Services Liberalisation in South Africa's Aviation Policy in Africa' (2014) *International Conference: Tourism and the New Global Economy* https://www.researchgate.net/publication/270567017_Measuring_the_progress_in_air_services_liberalisation_in_South_Africa's_aviation_policy_in_Africa, 296 (accessed 25 April 2020).

⁶³ B Ssamula 'Strategies to design a cost-effective hub network for sparse air travel demand in Africa' (2008) Unpublished doctoral thesis. University of Pretoria, 13.

⁶⁴ Surovitskikh & Lubbe (n 62 above) 296.

⁶⁵ O Mhlanga, JN Steyn, 'Liberalisation initiatives in southern Africa: Progress & hindrances to implementation' (2018) *African Journal of Hospitality, Tourism and Leisure* 1 <https://www.ajhtl.com> (accessed 25 April 2020).

⁶⁶ TE Njoya 'Africa's single aviation market: The progress so far' (2016) 12 *Journal of Transport Geography* 3 <http://eprints.hud.ac.uk/id/eprint/31717/> (accessed 25 June 2020).

⁶⁷ n 66 above, 13. Njoya relies on the studies conducted by Myburgh *et al.*, 'Clear Skies over Southern Africa' (2006), Woodmead, South Africa: ComMark Trust; Velia *et al.*, 'Mozambican Air Transport Liberalisation Report', a discussion document (2008), TPS Working Paper Series, <http://www.commark.org/files/>; E Chingosho *African Airlines in the era of Liberalisation* (2009), second ed. Nairobi; F Dobruszkes, & V Mondou, 'Aviation Liberalization as a means to promote international tourism: The EU-Morocco case' (2013) 29 *Journal of Air Transport Management* 23-24; InterVISTA, 'Transforming Intra African Air Connectivity: The Economic Benefits of Implementing the Yamoussoukro

a country. Whilst this study shall not tread on a scholarly economic analysis of the impact of the complete implementation of the Decision on the economy of the continent, it is submitted that this argument augurs well for the recovery of the current state that Africa and the rest of the world is faced with, being the socioeconomic effects of the coronavirus pandemic on the air transport services sector and other related sectors such as, *inter alia*, tourism, hospitality, investment and employment.

Abate, in conducting an analysis of the economic effects of air transportation liberalisation in Africa, laments the delayed implementation of the Decision. Abate reasons that, the reasons for the delayed implementation of the Decision in its entirety are.⁶⁸

On the one hand, there is a group of countries that resist liberalization policies, arguing that it may lead to abuse of market dominance by big Africa airlines. On the other hand, there are countries (usually those with big airlines) and multilateral institutions (UNECA, African Union, World Bank) that promote the full implementation of liberalization policies such as the Yamoussoukro Decision. They argue that more competition in the market improves quality and decreases high fare levels.

Although there may be the perception among some African states that a complete implementation of the Yamoussoukro Decision may lead to an abuse of dominance by larger airline operators, the AfCTA has changed the intra-African trading landscape to create a common African market area such that, liberalisation of Africa's air transport services becomes necessary and inevitable.

Notwithstanding the succinct scholarly views raised above, the spread of the coronavirus, response, and management thereof by governments the world over, has since caused there to be an abrupt cessation to economic activity and a devastating

Decision', Prepared for IATA in partnership with AFCAC & AFRAA by InterVISTAS Consulting LTD (2014); CE Schlumberger, 2010; MA Abate 'Economic Effects of Air Transport Liberalization in Africa', Paper presented at the African Economic Conference, Johannesburg South Africa, October 28-30 (2013), <http://www.afdb.org/>; Ismaila *et al* 'The impact of Air Service Agreement liberalisation: The case of Nigeria' (2014) 37 *Journal of Air Transport Management* 69-75; A Daramola, C Jaja, 'Liberalization & changing spatial configuration in Nigeria's domestic air transport network' (2011) 19(6) *Journal of Transport Geography* 1198-1209.

⁶⁸ M Abate (n 14 above) 14.

impact on employment. One of the initial measures adopted by governments to curb the spread of this virus was to decree that people remain at home, cease going to work and travelling was also prohibited. The abrupt prohibition on travelling and the continued restrictions placed on travelling has had a critical, if not dire, impact on air transport services, particularly international air transportation. It is within this context that this study finds a place of importance and relevance on the topic of liberalisation of the airspace in Africa as it relates to the Yamoussoukro Decision.

The writer opines that the breakout of the coronavirus has compounded the delayed implementation of the Decision and the pre-existing poor state of the civil aviation market in some parts of Africa and has impeded its growth and development in other parts. Coronavirus, at the height of the outbreak and spread, was a moving target and therefore limited the ability of governments to govern with firm plans in place. This study shall not delve into a scientific or medical discussion of the coronavirus but simply provide an elementary explanation of the virus insofar as its impact on aviation is concerned and the opportunity to use the Decision to aid the recovery of aviation activity.

There is currently limited literature on this specific aspect of liberalisation of the African skies; however, there are some scholars who have expressed views on the significance of the coronavirus pandemic on the African air transport market. Constantinos is one such author who considers the economic impact of the pandemic on African airlines, using SAATM and Ethiopian Airlines as the central points of his arguments⁶⁹ and remarks that:

Covid-19 has now affected almost all African countries. So far, the coronavirus has been slow to spread across Africa, but there are several factors unique to the continent that could make it difficult to reduce the rate of infections and make the pandemic more deadly for Africa. The main challenge of airlines in Africa is the fact that most have not been operational for some time.⁷⁰

⁶⁹ CB Constantinos “The Single African Air Transport Market: The Covid-19 Economic onslaught on African Airlines & Strategic Lessons for an Emergent African Airline – Case Study – Ethiopian Airlines”, *Respublica Literaria, Public Lecture* RL Vol XIII No. 652 MMXX, <https://addisababa.academia.edu/CostyConstantinos> (accessed 15 October 2020).

⁷⁰ n 69 above, 1.

Constantinos explains that what is envisaged by the AU with the founding of the SAATM is –

With the full implementation of the Yamoussoukro Decision, ultimately, the single market will evolve into a common area calling for the abolition of bilateral air service agreement between Member States for intra-Africa traffic with airlines able to fly any intra-Africa routes...⁷¹

Although the economic carnage in figures continues to be counted and analysed by economists, it is a matter of public knowledge that the spread of the coronavirus had an unprecedented and catastrophic effect on air travel, due to the fact that it was established that the virus spreads through the movement of people. Ozili and Arun⁷² illustrate the reality thus:

At the height of the coronavirus pandemic, most airplanes flew almost empty due to mass passenger cancellations. The travel restrictions imposed by governments subsequently led to the reduction in demand for all forms of travel which forced some airlines to temporarily suspend operations...Such travel restrictions cost the tourism industry alone a loss of over \$200 billion globally, excluding other loss of revenue for tourism travel, and were forecast to cost the aviation industry a total loss of \$113 billion according to (IATA).⁷³

In conclusion, the texts that have been consulted overwhelmingly recognise the Yamoussoukro Decision as the treaty that will enable Africa to liberalise her skies and empower the economies of the African states, although mindful of the delayed implementation of the Decision. A reconciliation of these views with the literature on the impact of coronavirus on the aviation economy, points to the fact that Africa has the potential to grow exponentially.

⁷¹ M Abate (n 14 above) 3.

⁷² P Ozili & T Arun, 'Spillover of COVID-19: impact on the Global Economy' (2020) *SSRN Electronic Journal* <https://www.researchgate.net> (accessed on 22 March 2020).

⁷³ n 72 above, 6.

7 Context of the research

The specific objectives of this study have been articulated above and they shall not be repeated in this section of the study. However, in the course of writing of this thesis, every effort will be made to bring novel views on the subject-matter. To this end, the provisions of the AfCFTA will also be evaluated to determine whether it can advance the liberalisation efforts in Africa through the establishment of a continental free trade area. In order to achieve the objectives set out, the study is structured as explained below.

Having discussed the historical events leading up to the adoption of the Yamoussoukro Decision, chapter two deals with the actual adoption of the Decision, which encompasses the preceding Yamoussoukro Declaration (the Declaration) of 1988, followed by the Decision. The focus of the Declaration was the co-operation and eventual integration of airlines on the continent, co-operation and integration are recurring objectives in the history of policymaking for air transportation in Africa. Although the Declaration does not explicitly, in its text, utilise the word ‘liberalisation’, a holistic reading of the Declaration carries the spirit of greater co-operation among African airlines to a point where integration can be achieved within a period of eight years.⁷⁴ This assertion finds support in Article A(f) which speaks about the airlines of signatories to the Declaration gaining common access. The Declaration sets the tone for the Yamoussoukro Decision, which broadens the scope of application to the market to be ‘gradual liberalization of scheduled and non-scheduled intra-African air transport services’⁷⁵ The provisions of the treaties are discussed and comprehensively analysed.

Chapter three discusses this concept of liberalisation within the air transportation services industry, effectively the creation of a free aviation market. International scheduled air services is an area of the international economy and trade whereby historically rights were strictly exchanged by way of BASAs, which restricted frequency, routes and capacity and traffic rights founded on the firmly entrenched right

⁷⁴ See art A of the Declaration.

⁷⁵ See art 2 of the Decision.

and recognition of sovereignty of contracting states in the Chicago Convention.⁷⁶ Article 6 of the Chicago Convention provides that scheduled international services may operate only with the written permission of the receiving State and in accordance with the terms of such permission.⁷⁷ Therefore, these bilateral agreements were in most cases concluded between two states and factors such as ownership and control of the airline⁷⁸ were conditions precedent for a bilateral agreement. To overcome these restrictions and expand operations, one of the measures adopted in some jurisdictions such as the US embarked on what it refers to as deregulation in the 1970s and the European Community followed suit. This chapter analyses the legal and policy measures taken in these two jurisdictions to achieve a liberal aviation market and the lessons that Africa can draw therefrom in its continuing efforts liberalise its aviation market.

African states gained independence at varying intervals of timelines of history. However, due to its colonial past, African states still have political and economic regional blocs in place based on the fraternity of language and/or location. For example, the SADC is a regional bloc for the African states located in the southern end of the continent. The nexus of all the regional blocs is the AU. Chapter four critically evaluates to the extent to which each of the existing regional blocs have domesticated the Yamoussoukro Decision, to be determined by examining the relevant air transport policies. This evaluation will entail a comparison and contrasting of the various air transport policies and any air services agreements, which may then reveal the parts of the continent in which opening of the aviation markets is taking its course. It is the view of the writer that there may exist other political considerations within the regional blocs themselves and *inter se* the blocs which may not form part of this evaluation, keeping in mind that the principle of state sovereignty is entrenched and absolute.

⁷⁶ Art 1 of the Chicago Convention provides that:

“The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”

⁷⁷ Art 6 provides:

“No scheduled international air service may be operated over or into a territory of a contracting State, except with the special permission or other authorization of that State, & in accordance with the terms of such permission or authorization.”

⁷⁸ Traditionally, international air services bilateral agreements permitted operations of airlines where the substantial ownership and effective control of the airline vested in the party to whom the rights were being designated & in the nationals of such party.

The Yamoussoukro Decision has encountered delays in implementation and chapter five seeks to identify such hindrances. It is important to have an appreciation of the factors and challenges that pose an impediment to the completion of the liberalisation of the African civil aviation market and reformation of the intra-African air services. The discussion may not capture all existing impediments but those in the main, come under scrutiny.

Chapter six discusses the subsequent measures adopted by the AU to expedite and intensify the liberalisation of intra-African air services, when in 2015, the Assembly of the Head of States and Government adopted the Declaration on the Establishment of a Single African Air Transport Market.⁷⁹ This chapter will discuss the significance of this declaration which carries the objective to immediately implement the Yamoussoukro Decision towards the establishment of a single sky, the SAATM. The creation of a single air transportation market will be discussed *vis-à-vis* the Yamoussoukro Decision and determine the extent to which it takes the liberalisation of the aviation market in Africa agenda further or enhances the provisions of the Yamoussoukro Decision. This momentous decision by the AU to effectively create a common air transport market in Africa represents a pivotal turning point and development in the history of the African aviation industry.

Chapter seven is a consideration of the impact of the AfCFTA on the creation of a common aviation market in Africa. The AfCFTA is a progressive treaty pioneered under the auspices of the AU whose objectives, although much broader in scope as it is a continental trade agreement for all areas of the economy, are much aligned to that of the Yamoussoukro Decision. For example, Article 3 provides, that the general objectives of the AfCFTA are, *inter alia*, to:

- (a) create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan Africa Vision of “An integrated, prosperous and peaceful Africa” enshrined in 2063;⁸⁰

⁷⁹ Doc. Assembly/AU/Decl. 1 (XXIV).

⁸⁰ See art 3(a).

- (b) create a liberalised market for goods and services through successive rounds of negotiations;⁸¹

Chapter eight analyses the effect of coronavirus on the liberalisation of intra-African air transportation services, given that the continent is already lagging behind some years in comparison with other jurisdictions. Whilst mindful that the aviation economy haemorrhaged significantly with the abrupt cessation of travel of passengers, this chapter explores how the continued and complete implementation of the Yamoussoukro Decision can aid the recovery of the civil aviation market and by extension, other markets linked thereto. This chapter also identifies the significant role of the AU to achieve complete liberalisation on the continent.

Chapter nine concludes the thesis. It reflects on the analyses and arguments advanced in the preceding chapters. The chapter consolidates the current position of Africa in opening its internal aviation market, led by the AU and its implementing agency, and what is still required to be done to create a common aviation market. In doing so, this chapter reflects on lessons learned from other international jurisdictions, the overall regulatory and legal framework that is at the disposal of the AU and contracting states and in the final analyses, perspectives are shared. This chapter will draw conclusions and make potentially useful suggestions and proposals targeted at illuminating the benefits of a complete implementation of the Decision for Africa and her people, at a time when it needs to overcome the socio-economic effects of the coronavirus because of the tangible impact of the aviation market on other sectors of the economy.

⁸¹ See art 3(b).

CHAPTER TWO

The adoption of the Yamoussoukro Decision & the beginning of meaningful airspace liberalisation in Africa

1 Introduction

The substantial foundational work undertaken by various organs such as UNECA and AU to progressively liberalise the air transportation sector in Africa is illustrated in the preceding chapter and underpinned the subsequent adoption of the Yamoussoukro documents. Admittedly, the earlier policy initiatives by the African continent did not explicitly make reference to liberalisation. However, it was apparent that more needed to be done and stronger legal instruments be put in place to achieve meaningful liberalisation of the African skies, it being a fairly novel concept and business model to African governments and thus commenced the Yamoussoukro initiatives. It is also to be expected that any government, in the absence of proper understanding and appreciation, is inclined to protect the profits derived from its national carrier and airspace. Schlumberger correctly asserts that governments were prone to treat the expansion of regional air services as secondary to other national priorities, especially when faced with the maintenance of domestic networks.⁸² In other words, it did not feature as a prominent national priority. However, as Africa gradually, albeit slowly, embraced and conceptualised the integration of its air transport services, the US had commenced with its deregulation in the 1980s and Europe was to follow suit with liberalisation in the 1990s,⁸³ which had a highly weighty effect on the aviation industry and the further conduct of business in the industry at large so much so that, a part of the Preamble to the Yamoussoukro Decision gives cognisance to these developments.⁸⁴

⁸² Schlumberger (n 16 above) (2010) 2.

⁸³ The deregulation and liberalisation of air transport services in the US and EU, respectively, are further discussed in chapter 3 of this study.

⁸⁴ Para 6 of the Declaration reads that:

“...Convinced that due to the international nature of air transport, measures taken in one part of the world are likely to have an impact on developing countries in general and on Africa in particular,”

The Yamoussoukro period is characterised by the adoption of an increased level of clearly targeted treaty commitments by African states, commencing with the Yamoussoukro Declaration in October 1988 and then the Yamoussoukro Decision later in 1998. Whilst the Declaration was primarily concerned with the co-operation and integration of African airlines, it can be seen as having been a catalyst for the adoption of the Decision which later clearly states its objective as that being of ‘gradual liberalization’⁸⁵ and codified its scope, so to speak, informed by the provisions of the Declaration, as that of liberalisation. The significance of the pursuit of African Open Skies or liberalisation of the African skies and absurdity of not implementing the Yamoussoukro Decision, may be best illustrated through this practical example:

Currently, complicated and convoluted air service are commonplace across Africa. A flight from Algeria to Cameroon would require a passenger to board an aircraft and leave North Africa heading east to Istanbul, Turkey, then return to West Africa. Because there is no direct flight, the fastest route takes 24 hours. A direct flight would take 3.5 hours, the distance as going from Atlanta, Georgia to Phoenix, Arizona, or a trip from London, England to Athens, Greece. One would expect to take a direct flight, but if not a direct flight, then certainly a passenger would not expect to go from Atlanta to Europe to double-back to Phoenix, or to travel from London to Athens via Moscow!⁸⁶

In this chapter, the adoption of the Declaration and the Decision will be analysed, with the intention of demonstrating that, through these two instruments, Africa had set and escalated its agenda of air services liberalisation to a higher level. This chapter will further attempt to identify the hindrances causing the delayed implementation of the Decision, to date.

2 The Yamoussoukro Declaration

Prior to gaining independence, most African states relied on relationships, agreements and route networks forged during colonial times by European states for air transport

⁸⁵ See art 2 of the Yamoussoukro Decision.

⁸⁶ V Brown ‘The Road to Yamoussoukro’ (2017) 1 *Journal of Comparative Urban Law & Policy* 234 <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1016&context=jculp> (accessed 11 March 2021).

services.⁸⁷ Political independence came with self-governance and the meeting of governments to build new relationships. On 17 October 1988, the ministers charged with the responsibility of overseeing civil aviation from 40 African states⁸⁸ met in Yamoussoukro, Côte d'Ivoire, announced the adoption of the Declaration of Yamoussoukro on A New African Air Transport Policy, commonly referred to as the Yamoussoukro Declaration, which was strongly influenced by the proposals adopted in the Mbabane Declaration.⁸⁹ African states recognised the opportunity presented by the air transportation sector to cultivate social and economic growth and cohesion in Africa.⁹⁰ It being a statement of commitment on a new African air transport policy, it could be argued that the Declaration was non-binding on member states, but it was nonetheless understood to be a collective commitment to achieve, in the main, cooperation among and the integration of airlines in Africa, which would have an effect on the exchange of air traffic rights. To this end, Article A of the Declaration provides

—

We commit ourselves, individually and collectively, to make all the necessary efforts to achieve the integration of our airlines within a period of eight years. This integration should be done through the strengthening of existing co-operative structures and the creation of new entities either on a sub-regional basis, on the basis of economic groupings or on the basis of affinity. To this end, studies and consultations will be carried out immediately. The process towards the total integration of our airlines could be carried out in phases as indicated hereunder, it being understood that in certain cases it may not be necessary to go through all the phases.

The foregoing shows that the African governments had set a timeframe of eight years by when to achieve the integration of African airlines divided into three phases as follows:⁹¹

⁸⁷ JN Steyn & O Mhlanga 'The impact of International Air Transport Agreements on Airline Operations in southern Africa' (2016) 5 *African Journal of Hospitality, Tourism and Leisure* 9 <http://www.ajhtl.com> (accessed 10 February 2022).

⁸⁸ The following states were represented: Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Cape-Verde, Congo, Chad, Côte d'Ivoire, Equatorial Guinea, Egypt, Ethiopia, The Gambia, Gabon, Guinea, Ghana, Guinea Bissau, Kenya, Libya, Liberia, Madagascar, Morocco, Mali, Mauritius, Mauritania, Niger, Nigeria, Senegal, Rwanda, Sierra Leone, Swaziland, Somalia, Tanzania, Togo, Tunisia, Uganda, Congo and Zimbabwe.

⁸⁹ Refer to para 2.6 in Chapter 1 on the Mbabane Conference on Freedoms of the Air.

⁹⁰ See para 5 of the Preamble to the Yamoussoukro Declaration.

⁹¹ Refer to art A of the Declaration.

- Phase I - states were to exchange information related to their aircraft, such as aircraft maintenance, training and capacity, initiate actions for the optimum use of any available aircraft capacity and look into opening up gateway airports to increase the traffic of airlines to improve their profitability. Lastly, as part of Phase I, states were going to promote co-operation between their national carriers with a view to amalgamating them into larger, competitive more efficient air services entities.⁹² This phase was to run for a period of two years.
- Phase II – this phase committed the airlines of the signatory states to the joint operation of compatible and international routes and undertaking certain aspects of airline operations jointly in specific operational areas such as computerised reservation systems, aircraft maintenance and joint insurance, amongst many others.⁹³ This phase was to run for a period of 3 years.
- Phase III – in this last and final phase of implementation of the Declaration, states envisaged the achievement of the complete integration of airlines according to three types of business models: (i) consortium; (ii) jointly owned airlines and (iii) mergers.⁹⁴ This phase was to run for period of 3 years.

The Declaration sets out further measures, initiatives and timeframes to achieve this commitment.⁹⁵ Provisions from the Declaration, amongst others, that point to the need to liberalise the air transportation sector in Africa, agreed to by the governments, provide –

...promote cooperation between their national airlines with a view to amalgamating them into larger, more efficient and competitive entities.⁹⁶

Common access to the market and granting traffic rights;⁹⁷

⁹² See art A(a) – (c).

⁹³ See art A(a) to (l).

⁹⁴ See art A(a) to (c).

⁹⁵ See A(a) to (c), A(a) to (l), A(a) to (c) and also see the arts on Improvement of Management, Financing of Air Transport Activities and Product Distribution System.

⁹⁶ See art A(c) under Phase I of the Declaration.

⁹⁷ See art A(f) under Phase II of the Declaration.

During the implementation of the programme for the integration of our airlines the need to exchange traffic rights will be gradually eliminated.⁹⁸

The Yamoussoukro Declaration was a focused initiative on the unification and integration of African airlines and the gradual creation of a common aviation market for intra-African air travel (i.e. common levels of access to the market and gradually increased flexibility in the granting of air traffic rights) and an efficient air transport for Africans, evidenced by the need to pool air carriers together for matters such as maintenance, training and granting of traffic rights.

2.1 A review of the Yamoussoukro Declaration at the Mauritius Conference

Six years after its adoption in 1988, African ministers charged with the responsibility of civil aviation met in Mauritius in 1994, under the leadership of the UNECA, to evaluate the level of implementation of the Declaration, while in the rest of the world, fundamental and accelerated reformations were taking shape in the aviation industry, for example, more and more countries were following the lead of the US towards a less regulated domestic aviation environment and the privatisation of airlines was gaining momentum;⁹⁹ such developments could simply not be ignored. At this meeting, the delegates considered the report prepared by the ECA and received reports from experts on the progress of implementation of the Declaration, with the period under review from March 1995 to June 1997.¹⁰⁰ On the whole, this report lamented the delayed implementation of the Declaration¹⁰¹ and the lack of meaningful participation

⁹⁸ See art B.

⁹⁹ n 8 above, 38.

¹⁰⁰ Economic Commission for Africa 'Progress Report on the Implementation of the Yamoussoukro Declaration on a New African Air Transport Policy' - Meeting of Experts Preparatory to the Eleventh Conference of African Ministers of Transport & Communication, 22-24 November, Cairo, Egypt, ECA/TPTCOM/EXP/97/1, 10 October 1997.

¹⁰¹ n 100 above, para 27, 6.

by coordinating ministers from some states¹⁰² and other political and operational challenges were well-recorded in this report.¹⁰³

However, on a positive note, several achievements in implementation of the Declaration were reported, such as: (1) the measures taken by the states in Western and Eastern Africa to integrate the provisions of the Declaration into their national air transport policies;¹⁰⁴ (2) the decreased involvement by governments in the running of airlines and airport authorities and the promotion of participation of the private sector in the air transportation industry;¹⁰⁵ (3) the slight improvement of the intra-African air network by virtue of increased flexibility in the allocation of traffic rights;¹⁰⁶ and (4) the establishment of Air Maghreb involving the states of Algeria, Libya, Mauritania, Morocco and Tunisia. In essence, some parts of Phases I and II of the Declaration had been implemented but the complete integration of African airlines had not been achieved.

Considering the low levels of implementation of the Declaration, it was the UNECA that initiated another conference in November 1999, which led to the drafting and adoption of the Yamoussoukro Decision to liberalise intra-African air transportation services.

Admittedly, the Yamoussoukro Declaration may have been a somewhat overly ambitious initiative considering that African states still had unresolved issues or hesitancy with a material operational facet such as the exchange of air traffic rights. It was, however, an appreciation and acknowledgement of the regulatory and operational reformations that were taking place in the international civil aviation markets¹⁰⁷ and the need for Africa to be on par with the rest of the world.

¹⁰² n 100 above, para 25, 5.

¹⁰³ n 100 above, paras 28 to 33, 6 where the challenges to implementation of the Declaration are identified. These problems are listed as lack of initiative & trust inter se African partners; restructuring of airlines & operations; the political and economic situation that African states were faced with; the lack of commitment and fears on the part of airline management and misinterpretation of the Declaration.

¹⁰⁴ n 100 above, para 26(a), 5.

¹⁰⁵ n 100 above, para 26(e), 6.

¹⁰⁶ n 100 above, para 26(i), 6.

¹⁰⁷ This is a reference to the deregulation & liberalisation of the civil aviation industries in the US & Europe, respectively.

3 The Abuja Treaty as the legal basis for the Yamoussoukro Decision

As discussed in Chapter 1, the Abuja Treaty of 1991 is founded on the common objective of African regions integrating the economic, cultural and social activities of signatory states for the betterment of the lives of African peoples, and that the economy of Africa benefits its people. It was ratified by 44 African countries. Schlumberger¹⁰⁸ and the report of the UNECA¹⁰⁹ assert that the Yamoussoukro Decision came into force and is binding on signatories thereto by virtue of Article 10(2) of the Abuja Treaty which provides that –

Without prejudice to the provisions of paragraph (5) Article 18,¹¹⁰ decisions shall be binding on Member States and organs of the Community, as well as regional economic communities.

This view is fortified by the provisions of Article 12.1.1 of the Yamoussoukro Decision which stipulate that –

In accordance with Article 10 of the Abuja Treaty, this Decision shall automatically enter into force thirty (30) days after the date of its signature by the Chairman of the Assembly of Heads of State and Government at which this Decision was adopted.

The writer agrees with this assertion as will be illustrated in this discussion that this provision can be reconciled with one of the statements contained in the preamble of the Yamoussoukro Decision and points to the unequivocal intention of the African states, represented by African ministers in charge of civil aviation, that this Decision be legally binding on member states which ratified the Abuja Treaty. It is important to see through this argument to its comprehensive conclusion by unpacking some of the relevant terms of Article 10 insofar as decision-making is concerned.

¹⁰⁸ Schlumberger (n 16 above) 20.

¹⁰⁹ n 8 above, 43.

¹¹⁰ Art 18, par 5 of the Abuja Treaty is consistent with the accepted and universal doctrine of the separation of powers. It ensures that the judicial arm of the African Economic Community is independent when undertaking its functions. The Article provides that:

“The Court of Justice shall carry out the functions assigned to it independent of the Member States and other organs of the Community.”

In terms of Article 8 of the Abuja Treaty, it provides that the composition and powers of the AEC are as follows –

- I. The Assembly shall be the supreme organ of the Community.¹¹¹
2. The Assembly shall be responsible for implementing the objectives of the Community.
3. To this end, it shall:
 - a) determine the general policy and major guidelines of the Community, and give directives, coordinate and harmonize the economic, scientific, technical, cultural and social policies of the Member States;
 - b) take any action, under this Treaty, to attain the objectives of the Community;
 - c) oversee the functioning of the Community organs as well as the follow-up of the implementation of its objectives;

Accordingly, the provisions above indicate that the highest and supreme decision-making structure for purposes of the Abuja Treaty is the Assembly, comprised of Heads of State and Government, which is empowered to, amongst others, according to Article 8(3)(b), take any action required to fulfil the objectives of the Community. As already indicated in Chapter 1, the integration of air transportation services in Africa is contained in Article 61 of the Abuja Treaty; accordingly, the Yamoussoukro Decision is a focused, defined and narrowed legal intervention to fulfil the provisions of Article 61 of the Abuja Treaty.

However, the Abuja Treaty is not to be regarded as merely a declaration or recordal of the economic integration aspirations by the African nations; it carries punitive powers too in the event that a contracting state fails to abide by the decisions of the Community. Article 3, paragraph 3 empowers the Community with discretionary powers to penalise non-abiding states, such as the suspension of rights and privileges of membership of the Community.¹¹²

¹¹¹ In art 7, para 1(a), the Assembly is defined as defined as ‘the Assembly of Heads of State & Government’;

¹¹² Art 3, para 5 provides:

4 The Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa – a consolidation of liberalisation initiatives in Africa

Against the background of accelerated changes in international civil aviation and the acknowledgment of the slow pace of implementation of the Yamoussoukro Declaration, it was agreed by attendees of the Mauritius conference that a special meeting of African ministers charged with the responsibility of civil aviation be convened to review the implementation of the Yamoussoukro Declaration. The conference further requested that the UNECA establish a Preparatory Committee, in preparation for this special meeting, comprising of the AU, African Civil Aviation Commission (AFCAC) and the African Airlines Association (AFRAA) to conduct a thorough review of the state of affairs insofar as the Declaration is concerned.¹¹³

Accordingly, on 13 and 14 November 1999, African ministers responsible for civil aviation from 40 African states,¹¹⁴ convened in Yamoussoukro in Côte d'Ivoire to discuss the liberalisation of air transportation services in Africa which culminated in the preparation and adoption of the seminal Yamoussoukro Decision, a framework agreement, to effectively accelerate the execution of the Yamoussoukro Declaration, albeit, with a markedly altered objective, taking it beyond just the co-operation and integration of African airlines. The Decision was later formally adopted during a

“Any Member States which persistently fail to honour its general undertakings under this Treaty or fails to abide by the decision or regulations of the Community may be subjected to sanctions by the Assembly upon the recommendation of the Council. Such sanctions may include the suspension of the rights and privileges of membership and may be lifted by the Assembly upon the recommendation of the Council.”

¹¹³ The findings and recommendations of this Working Group were submitted to the conference of the African ministers. The Working Group recommended that a legal and binding framework be adopted for the gradual liberalisation of the air transport market.

¹¹⁴ The states represented at the meeting were: Algeria, Angola, Benin, Botswana, Burundi, Burkina Faso, Central African Republic, Cape Verde, Comoros, Chad, Democratic Republic of Congo, Côte d'Ivoire, Congo, Egypt, Eritrea, Equatorial Guinea, the Gambia, Guinea, Gabon, Guinea-Bissau, Kenya, Liberia, Lesotho, Libya, Liberia, Madagascar, Mali, Malawi, Morocco, Mauritius, Mauritania, Mozambique, Niger, Namibia, Nigeria, Uganda, Tanzania, Rwanda, Sao Principe, Seychelles, Senegal, Sierra Leone, the Sudan, Republic of South Africa, Eswatini, Togo, Zambia & Zimbabwe.

meeting of the Assembly of Heads of State in Lomé, Togo, from 10-12 July 2000,¹¹⁵ in line with the provisions of Article 8 and 10 of the Abuja Treaty.

Having argued that the Yamoussoukro Decision, on paper, presented a complete transformation and overhauling of the African air transport sector, it is therefore critical to consider those provisions of the Decision which elevated Africa from a very narrow aspect of liberalisation, being that of integration and co-operation of African airlines, to the pursuit of a broader air services liberalisation and complete integration of the intra-African air services network, akin to the emerging global trends in international aviation of the time.

4.1 The Preamble

Although a preamble may not contain express or legal directives, in any document where it is utilised, it is written in such a manner that succinctly and emotively records and contextualises the intention of the parties to any agreement and in so doing, aptly captures the objective the parties aspire to achieve through such a document. It informs the provisions to follow in the document. Similarly, same is applicable to the Preamble of the Decision. The opening paragraph aptly captures the preceding discussions in this study that the Abuja Treaty underlies the adoption of the Yamoussoukro Decision and renders it legally binding on member states of the Abuja Treaty. It reads that:

Considering the Treaty Establishing the African Economic Community, (hereinafter referred to as the Abuja Treaty), in particular Article 61 relating to the integration of air transport and Article 10 relating to the authority of the Assembly of Heads of State and Government to adopt decisions;

¹¹⁵ The Yamoussoukro Decision came into force and effect on 12 August 2000, in line with the provisions of Article 10, paragraph 3 of the Abuja Treaty which provides that decisions become automatically binding 30 days after date of signature by the chairman of the Assembly and shall be published in the official journal of the African Economic Community.

The Preamble, in some parts, further records that –

Recognizing the relevance of the objective of the Yamoussoukro Declaration on a new African civil aviation policy adopted on 7 October 1988 whose primary purpose was to create a conducive environment for the development of intra-African and international air services;¹¹⁶

...

Considering the need to harmonize air transport policies in order to eliminate non-physical barriers that hamper the sustainable development of air transport services in Africa;¹¹⁷

...

Further mindful of the globalization of the world economy and the need to create a conducive environment for the development and provision of safe, reliable and affordable air transport services necessary for the free movement of persons, goods and services in Africa;¹¹⁸

Recognizing the necessity to adopt measures with the aim of progressively establishing a liberalized intra-African aviation market concerning, among other things, traffic rights, capacity, frequency and pricing;¹¹⁹

...

Convinced that, given the different levels of air transport development in Africa it is necessary to adopt for special and transitional provisions in order to achieve full liberalization of air transport in Africa;¹²⁰

These introductory remarks of the Preamble to the Decision tender insight that member states appreciated the need to harmonise the movement of persons and goods by air within Africa and that, in order for Africa to be at par with international global industry operating standards, full liberalisation of the entire African air transportation value chain was necessary. The liberalisation of intra-African air

¹¹⁶ Refer to para 3 of the Preamble.

¹¹⁷ Refer to para 5 of the Preamble.

¹¹⁸ Refer to para 8 of the Preamble.

¹¹⁹ Refer to para 9 of the Preamble.

¹²⁰ Refer to para 11 of the Preamble.

services had become a documented continental imperative, as opposed to a continuous point of discussion at conferences and meetings.

4.2 Scope of the Decision

Whereas the scope of the Yamoussoukro Declaration was essentially a commitment by the signatories and limited to the integration of African airlines,¹²¹ the Decision is a legally binding agreement on State Parties, and reliance for this perspective is placed on the earlier arguments made in this study regarding the provisions of Article 10 of the Abuja Treaty and Article 12.1.1 of the Decision; the supreme level of authority at which it was adopted, by the Assembly of Heads of States is indicative of the gravitas which the State Parties wished to accord to the Decision. Article 10(2) of the Abuja Treaty explicitly states that decisions shall be binding on member states. The Yamoussoukro Decision is in itself, a decision reduced to an agreement, adopted by member states to accelerate the pace of liberalisation of the African air services market. This perspective also finds support in the principles espoused by member states in Article 3(e) of the Abuja Treaty which is a solemn affirmation and declaration to observe the legal system of the AEC, and it follows that, agreements such as the Yamoussoukro Decision form part of the legal system of the Community, accompanied by sanctions to membership and privileges if the decision and regulations of the Community are not adhered to. It is therefore trite that the obligation to adhere to the provisions of the Decision cannot be understood in isolation from the legal obligations in the Abuja Treaty.

Article 2 of the Decision unequivocally provides that the Decision is for the gradual liberalisation of scheduled and non-scheduled intra-African air services. Article 2 moreover provides that the Decision takes precedence over any bilateral or multilateral air services agreements that are inconsistent with it¹²² with the proviso that terms and

¹²¹ Refer to art A of the Yamoussoukro Declaration.

¹²² Art 2 provides:

“This Decision establishes the arrangement among State Parties for the gradual liberalization of scheduled and non-scheduled intra-African air transport services. This Decision has precedence over any multilateral or bilateral agreements on air services between State Parties which are incompatible with this Decision.

conditions in such agreements that are compatible with the Decision shall remain valid and are supplementary to the Decision.

The use of the word ‘gradual’ in this Article points to the consensus among member states that liberalisation is to come into effect over a reasonable, albeit unspecified, length of time, that States Parties are cognisant of the prevailing political dynamics *inter se* the various regional communities and that the progress or degree of liberalisation of the air services market is at varying stages amongst African states.

Although Schlumberger suggests that the Yamoussoukro Decision liberalises international air services only,¹²³ the writer respectfully disagrees with this suggestion in that: the text of Article also specifies that the targeted liberalisation is for ‘scheduled and non-scheduled intra-Africa air transport services’, for and within the African continent and it is an unequivocal demonstration that African states are pursuing a common aviation market where persons and goods can move with ease within Africa.

4.3 Traffic Rights

According to Article 3 of the Decision, as a point of departure, parties to the Yamoussoukro Decision enjoy unconditional freedoms of the air, from the first to the fifth,¹²⁴ which is a substantial package of traffic rights and properly accords with the opening up of intra-African air services. This clarity of granted traffic rights *ab initio* is good, in that it creates a level of uniformity and equality for operators and negates the need to negotiate traffic rights. It is assumed that, it being silent the other traffic rights beyond the fifth freedom, such traffic rights are subject to bilateral negotiations between governments.

The provisions which are included in these agreements & which are not incompatible with this Decision remain valid and are supplementary to the Decision.

¹²³ Schlumberger (n 16 above), 11.

¹²⁴ Art 3.1 provides:

“State Parties grant to each other the free exercise of the rights of the first, second, third, fourth and fifth freedoms of the air on scheduled and non-scheduled passenger, cargo and/or mail flights performed by an Eligible Airline to/from their respective territories.”

4.4 Pricing and tariffs

In the case of price increase in tariffs, the Decision provides that no approval from the aviation authorities is required, removing the traditional involvement and oversight by government. Airlines are merely required to file these tariff increases with the relevant and competent authorities 30 days before the tariffs take effect.¹²⁵ Conversely, in the case of tariff decreases, the Decision provides that such will come into effect immediately according to the desires of the airline. The Decision therefore promotes full liberalisation of air tariffs.¹²⁶

4.5 Capacity and frequency

Similar to the principles applicable to tariffs, Article 5 of the Decision stipulates that there shall be no limitation on capacity and frequency linking any city pair combination between the state parties and removes the involvement and oversight thereof by government.¹²⁷ However, the Decision does place a limitation on these unlimited privileges, on grounds of environmental, safety, technical and other special considerations,¹²⁸ which correctly caters for instances of air safety and security.¹²⁹ In effect and in essence, it is not entirely an unfettered right.

Article 5 further grants State Parties the right to limit capacity and frequency if it will result in the violation of fair competition stipulated in Article 7,¹³⁰ which too is a fair limitation as all State Parties must benefit from the liberalisation of the African airspace. However, a sharp criticism of the Decision insofar as ‘fair competition’ is

¹²⁵ Art 4.1 provides:

“In the case of tariff increase, there shall be no approval required by aeronautical authorities of State Parties concerned for tariff to be charged by the designated airline of State Parties for the carriage of passenger, cargo and mail. The airlines shall in this case file such tariffs before competent authorities 30 working days before they enter into effect.”

¹²⁶ See art 4.2.

¹²⁷ See art 5.1.

¹²⁸ The writer views the exception of “special considerations” as being rather broad & may be susceptible to being misused in its application for State Parties who still maintain a protectionist outlook on the air travel market.

¹²⁹ These exceptions are also standard clauses and practices in traditional air services agreements, for example, refer to the 1997 Air Transport Agreement between the United States & Singapore.

¹³⁰ See art 5.2.

concerned is that it is not a defined concept or term in the treaty thus it has the potential to significantly dilute the efficacy of the provisions of Article 5.2 and Article 7.

4.6 Designation and authorisation

This article is a guiding principle regarding the practicalities of designation and approval of airlines to operate in the airspace of another State Party.¹³¹ The Decision grants state parties the right to designate at least one airline to render intra-African air transportation services, subject to satisfaction of the eligibility criteria set out in Article 6.9 by an operator. The Decision also accommodates state parties which may not have the capacity to operate air services to designate an eligible airline from another State Party to do so on its behalf.¹³² The designating State Party shall give written notice to the other State Party which is required to expedite the process of authorisation and licensing in accordance with its national laws, which should be granted within 30 days. The 30 days turnaround time stipulated in some provisions of the Decision makes liberalisation a priority in the national governments of State Parties.

Of importance in the eligibility conditions, Article 6.9(f) stipulates that a designated airline must demonstrate the ability to maintain standards equal to those set by the ICAO,¹³³ ensuring that airlines providing intra-African air services operate according to uniform global safety and security civil aviation standards which is the correct approach and will ensure that intra-African air services conform to international safety and security standards. In terms of the provisions of the Decision, failure to meet these international standards may result in a designating State Party withdrawing its designation approval of an airline.¹³⁴ A further point to this eligibility criteria is that, as signatories to the Chicago Convention, State Parties have a continuous obligation to

¹³¹ See art 6.

¹³² See art 6.2.

¹³³ Art 6.9(f) provides that to be eligible, an airline should:

“be capable of demonstrating its ability to maintain standards at least equal to those set by ICAO and to respond to any query from any State to which it provides air services;”

¹³⁴ Art 6.10 provides that:

“A State Party may revoke, suspend or limit the operating authorization of a designated airline of the other State Party when the airline fails to meet the criteria of eligibility”.

adhere to the standards and recommended practices of the ICAO; this provision of the Yamoussoukro Decision is therefore effectively a reinforcement of the said obligation in the Chicago Convention to State Parties.

4.7 Monitoring mechanism

The Decision establishes different bodies which are responsible for different areas related to the Decision, in line with provisions of paragraph 4 of Article 25 of the Abuja Treaty¹³⁵ which has been argued as the legal basis for the coming into effect and binding nature of the Decision. The Abuja Treaty establishes a Committee on Transport, Communications and Tourism¹³⁶ in terms of which Article 9.1 of the Decision establishes a Sub-Committee on Transport which is responsible for the supervision, tracking and implementation of the Decision. Therefore, the responsibility for the implementation of the Decision is expressly that of the Air Transport Sub-Committee which is part of the broader Committee of the Abuja Treaty, and it is common cause that the implementation of the Decision has progressed at a very slow pace. The Decision goes as far as to encourage subregional and regional organisations to strengthen their endeavours to implement the Decision.¹³⁷ This Air Transport Sub-Committee is further empowered to review the Decision every two years or earlier, if requested to do so by a two thirds majority and in so doing, it shall propose measures to gradually eliminate existing restrictions.¹³⁸

Furthermore, for purposes of successful implementation, the Decision establishes an African Air Transport Executing Agency, to supervise and manage Africa's liberalised air transport industry.¹³⁹ This, the writer would argue, is something that state parties envisaged is a somewhat continental air services and competition regulator, as it is

¹³⁵ Art 25 of the Abuja Treaty lists the specialised technical committees tasked with the implementation of the Abuja Treaty & provides –

“Each Committee may, as it deems it necessary, set up subsidiary committees to assist the Committee in carrying out its work. It shall determine the composition of any subsidiary Committee.”

¹³⁶ Refer to art 25, para 1(e) of the Abuja Treaty.

¹³⁷ Art 12.2 provides:

“Sub-regional & regional organizations are encouraged to pursue & intensify their efforts in the implementation of this Decision.”

¹³⁸ Refer to art 11.5.

¹³⁹ Refer to art 9.4.

also accorded competition regulatory powers in the Decision.¹⁴⁰ As already critiqued, the Decision does not articulate itself on what constitutes ‘fair competition’ nor the inverse.

The Sub-Committee responsible for implementation of the Decision is assisted by a Monitoring Body composed of the ECA, AU, AFCAC and AFRAA to conduct the follow-ups on the implementation of the Decision¹⁴¹ – effectively a body to provide oversight on the progress of implementation of the Decision.

5 An overview of organs responsible for the implementation of the Yamoussoukro Decision

In the preceding discussions and analyses, this study has referred to the involvement of various organs within and outside of Africa in the pursuit of the liberalisation of Africa’s air transportation services. For example, UNECA, a United Nations (UN) body, was intimately involved in the UNTACDA Programmes undertaken by the AU between 1978 and 1991. In this segment of the study, a brief overview of the organs involved in the implementation of the Decision or those which are aiding its implementation, is provided. These organs, in their hierarchy, are as follows:

5.1 Economic Commission for Africa

The ECA is a specialised agency of the UN tasked with overseeing trade, fostering regional integration within Africa and encouraging the adoption of progressive trade policies and it has been an important and helpful organ in the liberalisation initiatives of Africa. Its mandate is to support the developmental agenda of Africa and with regards to civil aviation, it monitors the progress of implementation of the Decision within Africa and provides reports thereon. In executing its mandate, the ECA conducts

¹⁴⁰ Art 9.5 provides that –

“The Executing Agency shall have sufficient powers to formulate & enforce appropriate rules and regulations that give fair and equal opportunities to all players and promote healthy competition.”

¹⁴¹ See art 9.2 of the Yamoussoukro Decision.

studies which it has done for the aviation industry of Africa. Studies undertaken by the ECA are undertaken on issues such as the legal framework for the integration of the Decision at a national level; an air transport policy for Africa and the progress of integration in Africa through the implementation of the Decision; and drawing up a blue-print bilateral and multilateral agreement for the establishment of a multinational airline.¹⁴² The ECA is also responsible for financing the seminars, technical assistance and workshops that are required to clarify the provisions of the Decision to state parties and stakeholders.¹⁴³

5.2 International Civil Aviation Organisation

The role of the ICAO is to formulate, standardise and regulate international civil aviation standards. In so doing, the ICAO issues what is known as the standards and recommended practices (SARPS) for incorporation into the national law by member states. It is these SARPS which inform the safety and security requirements for civil aviation, and which are, in terms of the Decision, one of the requirements for eligibility for the designation and authorisation of an airline of a member state.¹⁴⁴

5.3 African Union

The formation of the AU was preceded by the existence of the OAU, which was formed in terms of the OAU Charter. In later years, specifically in the year 2000, the Constitutive Act of the AU was adopted in terms of which the AU is established, and it is the organ established to unify the African continent and her people and is responsible for the integration of all 54 member states on the continent. The Abuja Treaty is an example of a treaty drawn from the objectives of the OAU Charter, with a

¹⁴² B Ssamula & C Venter “The Way Forward in Liberalising the African Skies” (2005), Proceedings of the 24th Southern African Transport Conference, 11-13 July 2005, 278 <http://respository.up.ac.za/bitstream/handle/2263/6334/033.pdf?sequence=1> (accessed 10 February 2022).

¹⁴³ as above.

¹⁴⁴ Refer to art 6.9(f).

focus on economic integration. The role of the AU is also to lead the collective of the state parties that are signatories to the Decision.

5.4 Regional Economic Communities

RECs are formed in the various subregions on the African continent to promote the social and economic development and growth in the subregions. RECs are principal contributors in the politics of Africa and the shaping of regional economies. RECs, in a sense, give African states an identity and belonging because they are predominantly formed along geographical and language lines. The Decision encourages RECs, given the critical roles they play on the continent, to pursue and intensify the implementation of the Decision.¹⁴⁵

In Southern and Eastern Africa, the main RECs are COMESA, SADC, and EAC. In Central and Western Africa, the REC formations are ECOWAS, CEMAC and the Banjul Accord. Lastly, in Northern Africa, there is the UMA. The initiatives independently undertaken by some of these RECs, insofar as the implementation of this Decision is concerned, will be considered elsewhere in this study.

5.6 African Civil Aviation Commission

The AFCAC is the counterpart of the ICAO within the AU. It is responsible for liaising, coordinating and negotiating with the ICAO for the civil aviation needs of Africa. The mandate of the AFCAC is to ensure that the air transportation industry of Africa meets the minimum safety and security requirements as recommended by the ICAO, so that Africa competes at a global level, according to global standards.

5.7 Civil aviation authorities at national level

The last level responsible for the implementation of the Decision are the various aeronautical regulators at country level, which play a critical role for the licensing of

¹⁴⁵ Refer to art 12.2.

airlines and authorising operations and domesticating the SARPS as set by the ICAO and the terms of the Yamoussoukro Decision, in national legislation.

6 Conclusion

Notwithstanding the various historical initiatives undertaken by the African continent to liberalise air traffic in Africa and promote the relaxed movement of persons and cargo between African states, the Yamoussoukro Decision is the seminal and founding agreement for the liberalisation of intra-African air services and which is explicitly concerned with the gradual liberalisation of the African skies. It has both a legal and economic effect, if fully implemented; the gravitas of the Decision is its legal and binding effect founded in the Abuja Treaty. In the main, the Decision is articulate bar the provisions on fair competition. The preceding discussions illustrate that there are various organs established to aid the implementation of the Decision because its implementation that becomes of utmost importance at regional and subregional level, in order to achieve the objectives of both the Decision and the Abuja Treaty, both aimed at integration of Africa and her people.

The Decision is an agreement that came into effect in 2000 and it is common cause that 22 years have since elapsed and to date, it has not been fully implemented. It is therefore necessary to consider the factors that impede the full implementation of the Decision. It has, however, been stated in this study that prior developments in other jurisdictions such as the EU and the US that were unfolding in the air transportation markets bore heavily on the African continent and the rest of the world and ushered significant reformations in the air transportation industry. These developments simply could not be ignored, and they will be discussed in the chapter to follow.

CHAPTER THREE

The deregulation and liberalisation of air transport services in the US and EU, respectively: why Africa had to catch up

1 Introduction

Elsewhere in the world, in the US and EU, far much earlier than the adoption of the Yamoussoukro Decision, the aviation market was being opened up by way of relaxation of the regulatory regime. It is such developments which prompted Africa to follow suit so as to be able to remain on par with the operational and regulatory reformations in international air services, which reformations could simply not be ignored. The US effected deregulation of its air transport market swiftly through legislation, whilst the EU did so gradually in three phases, referred to as the three liberalisation packages. This *laissez-faire* approach to the aviation market yielded, in the main, positive results for market access, air fares and competition, amongst other things.

The deregulation of the air services market was first conceptualised and took form in the US in the 1970s. In 1978, President Jimmy Carter of the US signed into law the Airline Deregulation Act of 1978¹⁴⁶ (ADA) which effectively restricted the powers of the Civil Aeronautics Board, a body that was historically vested with authority for economic and legal regulation of civil aviation. K Kawagoe remarks that the deregulation of the American air transport sector was -

...immediate with discount fares emerging, new carriers entering the market, and many services being offered. In this sense, changes came to EU air transport and it came in several ways.¹⁴⁷

¹⁴⁶ Airline Deregulation Act of 1978, Pub. L. No. 95-504 § 4(a), 92 Stat. 1707 (1978) (to be codified in 49 USC §§ 1301-1542). The US also passed the Air Cargo Deregulation Act of 1977 prior to the ADA.

¹⁴⁷ K Kawagoe "Air Transport Deregulation in the EU: Study from the Europeanization Perspective" (2009) Paper for Presentation at the IPSA RC-3 Symposium on "European Integration between the Past and the Present", Hokkaido University, Sapporo, Japan, 6 September 2008, 167 lex.juris.hokodai.ac.jp/qcoe/journal/LPG_vol2/2_8.pdf (accessed 20 June 2022).

In the mid-1980s, the EU followed suit with the liberalisation of its air transportation to create a single European market for air transport services amongst its member states, in a market that was traditionally fragmented, protected by the governments and strongly regulated. This it did in three phases, as already mentioned, known as the first, second and third packages. This process of gradual liberalisation adopted by the EU contrasted with the sweeping legislative measures enacted by the US in the ADA, possibly because the EU is a community comprised of independent member states which may have required extended persuasion and negotiations.

This chapter will discuss and give an appraisal of deregulation and liberalisation of the air transportation services in the US and EU, respectively, with a view to create an understanding of why Africa appreciated the need to produce a framework agreement such as the Yamoussoukro Decision. The deregulation posture adopted by the US influenced other jurisdictions, other than the EU, to follow suit. Although it must be lauded as an economically progressive move, deregulation, like any economic reform, came with some disadvantages which cannot outweigh the benefits that were yielded, and these disadvantages will find discussion in this chapter too.

2 The ADA and Deregulation in the US

One of the hallmarks of the economic policy of the Reagan Administration has been its unrelenting pursuit of privatisation of some of the industries of the US, one of which was the air transportation services market. Historically, the air transportation market was regulated by the Civil Aeronautics Board (CAB), a state agency, empowered by the Civil Aeronautics Act of 1938.¹⁴⁸ The CAB enjoyed powers to regulate air fares, route management, award subsidies and regulate mergers and inter-carrier agreements¹⁴⁹ – in essence, it was empowered with the economic regulation of the market. In air law writings, there is wide consensus that this form of economic regulation served to protect national carriers and by extension, national interests.

¹⁴⁸ Pub. L. No. 75-706, 54 Stat. 1977

¹⁴⁹ AR Goetz & PS Dempsey 'Airline Deregulation Ten Years After: Something Foul in the Air' (1989) 54 *J. Air L & COM* 929 <https://scholar.smu.edu/jalc/vol54/iss4/3> (accessed 17 May 2022).

However, US economists such as Caves¹⁵⁰ and Keyes¹⁵¹ started to question the desirability of continued economic regulation of the airline industry; the concern raised was that economic regulation had the effect of distorting efficiencies of the carrier and restricted the creation of price competition.¹⁵² All these things considered and the undesirability of economic regulation, with political support, led to the passage of the Air Cargo Deregulation Act of 1977, followed by the ADA of 1978. The introduction of the ADA aptly captures the objective of the legislation thus:

To amend the Federal Aviation Act of 1958, to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services, and for other purposes.¹⁵³

The ADA amended the Federal Aviation Act of 1958,¹⁵⁴ and essentially removed critical economic regulatory powers from the CAB¹⁵⁵, an entity of the state and placed them in the market forces and this influenced the alteration of criteria for access to the market; and related administrative processes of the Board. An examination of some of the pertinent legislative provisions of the ADA which enabled the liberalisation of the American domestic air transport market is accordingly called for in this regard.

2.1 Some pertinent provisions of the ADA

As stated above, the CAB was historically responsible, on behalf of the state, for the regulation of air transportation services in the US. In one of its reports on the implementation of the ADA to Congress, the CAB presents a highly restrictive picture of the way it used to regulate the air transport industry thus:

¹⁵⁰ See RE Caves *Air Transport and Its Regulators: An Industry Study* (1962) 49. Caves argued that economists would not conclude and decide in the same manner as the CAB with regards to the degree of necessary airline profit and the management of routes.

¹⁵¹ LS Keyes *Federal Control of Entry & Exit into Air Transportation* (1951) 46. It was the theory of Keyes that the regulatory policy of the CAB of protecting the profits of established carriers impeded the best adjustment of output distribution amongst airlines and offerings. She therefore recommended that the protective methods of regulation that conflicted with a rational subsidy policy, be abandoned.

¹⁵² Goetz & Dempsey (n 149 above) 930.

¹⁵³ See the para directly below the heading "An Act" in the ADA.

¹⁵⁴ 49 USC.

¹⁵⁵ The CAB itself was to be dissolved on 31 December 1984.

As a rule, the CAB considered entry into the airline industry in the context of the carrier selection phase of route proceedings. The Board typically did not consider the broad issues relating to the benefits of permitting new competitors; instead, carrier selection focused on the relative merits of the applicants for the specific route (or routes) to be awarded. A non-operating airline could provide only promises of good service and lower fares. An established airline, on the other hand, had a proven track record, as well as an existing route network that offered numerous opportunities for single-plane and single-carrier connecting services to beyond points. Hence, the incumbent had a significant advantage in pressing its case for new routes – so significant in fact that the Board never awarded a major route to a new entrant.¹⁵⁶

If anything can be gleaned from the above extract, it is that the attitude of the CAB was not conducive to the creation of a competitive air transportation services sector, and it displayed overt bias towards established carriers. Through the provisions of the ADA, Congress established an economic deregulation programme of the domestic US airline industry. For example, in section 3(a), the ADA robustly and expressly prescribes a competitive air transportation market thus:

“Factors for interstate and overseas air transportation”

Sec. 102. (a) In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

...

(3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions.

(4) The placement of maximum reliance on competitive market forces and actual and potential competition (A) to prove the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital.

...

(7) The prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation, and the avoidance of –

(A) unreasonable industry concentration, excessive market domination, and monopoly power; and

¹⁵⁶ Civil Aeronautics Board Report to Congress “Implementation of the Provisions of the Airline Deregulation Act of 1978, As Required by Sections 1601(c), (d), and (e) of the Airline Deregulation Act of 1978” January 31 1984, 7, <https://books.google.com> (accessed on 12 April 2022).

(B) other conditions; that would tend to allow one or more carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

...

(9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.

(10) The encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional air transportation markets by existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airline industry.

The provisions above encapsulate an economic trajectory that is unambiguously in favour of a competitive air transportation market and one in which prices are determined, not by the CAB, but rather by the variety of services that are available in the market. The provisions also place emphasis on market access by new entrants into the air transportation industry and encouraging existing air carriers to expand into other markets, in order to ameliorate the past practices of the CAB that favoured existing and established operators which caused a skewed market. Furthermore, in terms of section 3(a), the economic criteria or test for the provision of air transportation services for consideration by the CAB is determined by the public interest, public convenience and necessity – projecting the ADA as a statute that is centred on the needs of the travelling public and not the subjective preferences of the Board. Section 3(a) is really the founding and instructive text of the ADA which dictates on the implementation of deregulation.

The legislative provisions of the ADA also unequivocally remove the involvement of the state from the setting and regulation of the air fares, routes or services of an air carrier that is authorised to provide interstate air transportation. Section 4(a) of the ADA provides:

Section 105. (a) (1) Except as provided in paragraph (2) of the subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide interstate air transportation.

Freeman¹⁵⁷ explains the rationale for this provision as being that Congress wished to end dual economic regulation of air carriers by the federal governments and the state at large and prevent inconsistent regulations and conflicts,¹⁵⁸ which is a sensible approach given the federal governance system of the US. The direct inclusion and use of the word 'political' with its associated negated obligations is clearly targeted at deterring any potentially covert state interference in the determination of routes, air fares and any other related services and ultimately undermine deregulation.

The ADA also contains provisions that safeguard the continuity of air transportation services and the validity of previously issued authorisations, with a view to avoid interruption to services in the implementation of the ADA, because change may bring about unintended interruptions. Section 4(c) provides –

(c) When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under title IV of this Act, until modified, suspended, amended, or terminated as provided under such title.

Prior to deregulation, the process for route applications under the authority of the CAB tended to be quasi-judicial and placed the burden of proof on an applicant. An applicant applying for a route bore the obligation to show that such route was required by public convenience and necessity, culminating in formal public hearing proceedings, and resulting in lengthy and costly administrative processes. Section 7 (a) of the ADA provides for alternatives to a public hearing and prescribes turnaround timeframes for applications. It provides that-

(c) (1) Upon the filing of any application pursuant to subsection (b) of this section, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the Secretary of the Board and to such other persons as the Board may by regulation determine.

The Board shall-

(A) set such application for a public hearing;

¹⁵⁷ JW Freeman 'State Regulation of Airlines and the Airline Deregulation Act of 1978' (1979) 44 *J. Air L & Com.* 747 <https://scholar.smu.edu/jalc/vol44/iss4/3> (accessed 17 May 2022).

¹⁵⁸ Freeman (n 157 above) 755. See also H.R. REP No. 1211, 95th Cong. 2d Sess. 16 (1978).

- (B) begin to make such determination with respect to such application under the simplified procedures established by the Board in regulations pursuant to subsection (p); or
- (C) dismiss such application on the merits; not later than ninety days after the date of application is filed with the Board. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance the certificate requested by such application.

This provision places the burden of proof on the party opposed to or in support of a route application and makes provision for deciding the application on the papers, without the need for a hearing, and requires a decision on an application be made within ninety days. The observation of the Board in this regard was that the liberalisation of air routes consequent to the coming into effect of the ADA created great changes in the profile of the domestic air transportation industry of the US and the route network, with the determination of safety levels by the Board and the Federal Aviation Administration (FAA) being the only the state impediment to new carriers.¹⁵⁹

The ADA also makes allowance for cooperative working agreements between air carriers in section 28(c)(1)¹⁶⁰ thereof, to cater for new entrants with a lesser marketplace presence or to enable carriers to expand into other routes. The ADA further stipulates that the grounds upon which the Board may not approve such a contract or working arrangement are:

- (i) the Board may not approve or, after periodic review, continue its approval of any such contract, agreement, or request, or any modification or cancellation thereof, which substantially reduces or eliminates competition, unless it finds that the contract, agreement, or request is necessary to meet a serious transportation need or to secure important public benefits and it does not find that such need can be met or such benefits can be secured by reasonably, available alternative means having materially less anticompetitive effects;
- ...
- (iii) the Board may not approve any such contract or agreement, or any modification or cancellation thereof, that limits the level of capacity among air carriers in markets in which they

¹⁵⁹ n 156 above, 28.

¹⁶⁰ Section 28(a) provides:

“Any air carrier may file with the Board a true copy, or, if oral, a true and complete memorandum, of any contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise), or a request for authority to discuss possible cooperative working arrangements, affecting interstate or overseas air transportation and in force on the effective date of this subsection, or thereafter entered into, or any modification or cancellation thereof, between such carrier & any other air carrier, foreign air carrier, or other carrier.”

compete, that fixes rates, fares, or charges between them or among carriers (except for joint rates, fares, or charges).¹⁶¹

These provisions place emphasis on the non-reduction of competition and capacity in circumstances where air carriers enter into working agreements, unless such an agreement is necessary to satisfy and secure a serious public benefit and no other anti-competitive alternative is available. The Board is empowered to grant anti-trust immunity in terms of section 30(a)¹⁶² if such an agreement is approved.

In exercising its powers to determine rates, fares and charges, the provisions of the ADA direct the Board to take into consideration the following factors-

- (1) the criteria set forth in section 102 of this Act;
- (2) the need for adequate and efficient transportation of persons and property at the lowest cost consistent with the furnishing of such service;
- (3) the effect of prices upon the movement of traffic;
- (4) the desirability of a variety of price and service options such as peak and off-peak pricing or other pricing mechanisms to improve economic efficiency and provide low-cost air service; and
- (5) the desirability of allowing an air carrier to determine prices in response to particular competitive market conditions on the basis of such air carrier's individual costs.¹⁶³

This provision strives to strike a balance between low cost, adequate and efficient air services and granting an air operator the latitude to determine its own prices in response to the prevailing market forces. In circumstances where there is opposition to an air services fare or charge on the basis that it is too low, the ADA places the obligation of proving that the rate or charge is too low on the opposing party.¹⁶⁴ As

¹⁶¹ See sections 28(2)(A)(i) & (iii) of the ADA.

¹⁶² Section 30 (a) provides-

"Section 414. In any order made under section 408, 409, or 412 of this Act, the Board may , as part of such order, exempt any person affected by such order from the operations of the 'antitrust laws' set forth in subsection (a) of the first section of the Clayton Act (15 USC. 12) to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest."

¹⁶³ See section 37 of the ADA.

¹⁶⁴ as above, Section 37(a)(5) provides:

Katz reflects, fare wars between new low-cost carriers and incumbent carriers ensued, in order to divert traffic from established air carriers and in response, the major carriers created “frequent flyer” programmes to retain the existing clientele¹⁶⁵ - indeed a sign of increased and fierce competition. However, Katz notes that drastically reduced fares as a result of deregulation, although beneficial to the passengers, nonetheless attracted some challenges within some parts of the industry such as the smaller air transportation markets which suffered termination of services altogether or the need to greatly increase fare levels to offset the monetary losses suffered on the more competitive routes.¹⁶⁶

Insofar as international air transportation is concerned, the ADA is a statute for the US domestic market and makes it clear that foreign air transportation remains the prerogative of the state President and in present-day, it is subject to bilateral or multilateral air services agreements. Section 34 thereof provides:

The issuance, denial, transfer, amendment, cancellation, suspension or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in foreign air transportation, or any permit issuable to any foreign air carrier under section 402 of this Act, shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such certificates or permits solely upon the basis of foreign relations or national defense considerations which are within the President’s jurisdiction, but not upon the basis of economic or carrier selection considerations.

International air services are regulated, and the president does not enjoy unfettered prerogative; it is limited to considerations of foreign relations or national security.

“In any Board proceeding under para (1) of this subsection with respect to interstate or overseas air transportation of persons, the party opposing any fare or charge on the basis that it is too low shall have the burden of proving that the fare or charge is too low.”

¹⁶⁵ MA Katz ‘The American Experience Under the Airline Deregulation Act of 1978 – An Airline Perspective’ (1988) 6 *Hofstra Labour & Employment Journal* 94 <http://scholarlycommons.law.hofstra.edu/hlelj/vol6/iss1/3> (accessed 17 May 2022).

¹⁶⁶ as above.

2.2 The safeguarding of air safety under the ADA

In air transportation services, air safety and safe operations are a prerequisite and prime priority. Even though the ADA brought about radical economic transformation of the domestic US air services sector, safety was not ignored. In order to safeguard safety and separate the economic regulation from the safety regulation, in terms of the ADA, the management safety oversight is assigned to the Secretary of Transportation and in current day, it is the responsibility of the FAA. Section 3(a) provides-

- (1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 107 of this Act.
- (2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

During the deregulation deliberations, concerns were expressed about the impact it would potentially have on air safety, imagining scenarios where the pressure associated with increased competition would entice carriers to “cut corners” on safety in order to save to money and time.¹⁶⁷

The criticism from Dempsey et al regarding deregulation is the strain it initially placed on the air traffic control system, caused by the increase in airspace congestion due to the high demand,¹⁶⁸ with reference to reports of rising incidents of near mid-air collisions and potentially serious errors by air traffic controllers between 1985 and 1987.¹⁶⁹ However, on the whole, the relaxation of airline economic regulation in the US has not compromised safety levels as that, in itself, forms part of the assessment of gaining entry into the air transportation services market.

¹⁶⁷ MA Brenner, JO Leet & E Schott *Airline Deregulation* (1985) 125.

¹⁶⁸ R Goetz & PS Dempsey (n 149 above) 967.

¹⁶⁹ R Goetz & PS Dempsey (n 149 above) 956.

2.3 The challenges experienced soon after the implementation of the ADA and deregulation

Airline deregulation in the US had a major impact on the market: it reduced air fares, increased competition among carriers, created greater access to the market and forced operators to be innovative about service and product offerings. Alfred Khan, dubbed “The Father of Airline Deregulation”, attributes credit to airline deregulation for the ability to subsequently deregulate other modes of transport in the US¹⁷⁰ It uprooted the established carriers from their ‘comfort zones’ in the market and lifted the protection they enjoyed under a regulated environment under the auspices of the CAB. The hallmark of deregulation is the freedom of airlines to enter and exit the commercial markets. Rose¹⁷¹ similarly heaps praise on deregulation thus:

Deregulation dramatically transformed the airline industry. The post deregulation US airline industry generated lower average fares; greater numbers of flights, nonstop destinations, and passengers; dramatically different network structures; and increased productivity.¹⁷²

Notwithstanding same, deregulation of the air transportation market was not without its flaws in other associated areas and hereunder a broad overview of the challenges that consequently befell the industry, are proffered.

2.3.1 Air service frequency

In a regulated US air services market, air carriers were obliged to satisfy the “public convenience and necessity” criteria in order to be awarded a certificate to operate by the Board, for every route served, following lengthy administrative hearings of the Board. Under the ADA, the enquiry of the Board in the issuance of a certificate to conduct operations is whether the applicant is “fit, willing and able to perform such

¹⁷⁰ AE Khan ‘Deregulatory Schizophrenia’ (1988) 75 *California Law Review* 22. Kahn states that, “Without airline deregulation, we probably would not have been able...to deregulate trucking, railroads, and buses, or continue along the same path with other major industries.”

¹⁷¹ NL Rose ‘After Airline Deregulation & Alfred E. Kahn’ (2012) 102 *American Economic Review* 376 <http://hdl.handle.net/1721.1/82880> (accessed 17 May 2022).

¹⁷² as above.

transportation properly and conform to the provisions of this Act...”¹⁷³, factoring in its decision considerations of “public interest, public convenience and necessity”.¹⁷⁴ In essence, the threshold under the ADA is whether the applicant can provide the air transportation services and this, Goetz et al argue, caused the development of hub-and-spoke route networks to cater for the increased traffic volumes from expanded city-pairs.¹⁷⁵ This in turn caused an imbalance to service frequency in that, the cities with established hub-and-spoke operations received a high concentration of passengers and flight frequencies.

However, the one area that was most affected by deregulation is the air service sector of small communities (non-hubs) that did not fall within the hub routes network; this segment of the travelling public was affected. The nature of a competitive market is such that, carriers will compete where passengers are highly concentrated to draw as much profit as possible. In the small communities however, air services declined and, in some instances, completely withdrew considering the freedom to enter and exit the market. One of the marked changes that befell the small communities is the type of aircraft used to ferry them: from jet aircraft to smaller commuter aircraft.¹⁷⁶ This too was the observation of the Board in its report to Congress.¹⁷⁷ On the more competitive routes, operators drastically increased fares to ameliorate the loss.¹⁷⁸ However, the freedom of carriers to terminate its services to small communities was not entirely unfettered: the small communities were protected by the provisions of section 19(a) of the ADA which provides:

- (j) (1) No air carrier holding a certificate issued under this section shall-
 - (A) terminate or suspend all air transportation which it is providing to a point under such certificate: or
 - (B) reduce any such air transportation below that which the Board has determined to be essential air transportation for such point; unless such carrier has first given the Board, any community affected, and the State Agency of the State in which such community is located, at least 90 days’ notice of its intent to so

¹⁷³ See section 401(1)(d) of the Federal Aviation Act of 1958, as amended.

¹⁷⁴ See section 3(a) of the ADA.

¹⁷⁵ R Goetz & PS Dempsey (n 149 above) 944.

¹⁷⁶ as above, 946.

¹⁷⁷ n 156 above, 78.

¹⁷⁸ Katz (n 165 above) 94.

terminate, suspend, or reduce such air transportation. The Board may, by regulation or otherwise, authorize such temporary suspension of services as may be in the public interest.

- (2) If an air carrier holding a certificate issued pursuant to section 401 of this Act proposes to terminate or suspend nonstop or single-plane air transportation between two points being provided by such air carrier under such certificate, and such air carrier is the only air carrier certificated pursuant to such section 401 providing nonstop or single-plane transportation between such points, at least sixty days before such proposed termination or suspension, such air carrier shall file with the Board and serve upon each community to be directly affected notice of such termination or suspension.

Section 19(a) must be read with section 33(a) of the ADA which reinforces the rule of services being provided pursuant to a certificate issued under section 401 to eligible points within the US may not be terminated without prior notice to the Board, the relevant state agency and the affected community.¹⁷⁹ Notwithstanding this statutory protection, the deregulation rush may have prompted many a carrier to terminate its services to the small communities on the less competitive routes.

2.3.2 The impact on labour

Whilst deregulation may have been beneficial to the travelling public, the effect on labour, in its inaugural years, specifically at airlines, was adverse as the market expanded dramatically and some carriers had to find ways to remain in the market and profitable at the same time. In doing so, other business areas undoubtedly had to bear the brunt of a reformed competitive market and labour has been identified as one such area which suffered. Airline unions registered their opposition to deregulation, citing fears of instability, reduction in earnings and consequent job losses for its members, a fear which materialised. Katz paints a bleak picture of the effects on labour after the deregulation came into effect thus-

Thus, if the pre-regulation carriers were going to survive, they would have to make drastic efforts to reduce their [labour] costs. Some such as TWA, resorted to down-sizing, which

¹⁷⁹ See section 419(3) of the ADA.

resulted in the loss though layoffs of nearly 13,000 jobs, from nearly 40,000, in the mid-70's to 27,000 in 1984. Other carriers also reduced their operations and carried out major reductions in force. In addition, airlines sought concessionary agreements from their union, asking for freezes in pay increases, outright wage reductions, sometimes in the form or accompanied by "B-scales", under which wage reductions would affect only newly hired employees, or "snap-backs," under which wages would be reduced but return to their original levels at the end of the contract term or at some other specified time.¹⁸⁰

The scenario above illustrates an unequal and hostile collective bargaining environment for labour unions and its members. New entrants to the market probably barred the formation of unions to maximise on profits. Khan similarly concedes that deregulation caused labour unrest, instability and increased unemployment for a few years post-deregulation.¹⁸¹ From a consumer's perspective, a leaner wage bill of the air carrier means that air fares were reduced and need not be absorbed by the passenger's air ticket. Notwithstanding same, it could not have been the intention of the legislator that labour should suffer; protection is offered to labour in section 43 (a)¹⁸² which provides for monthly payments to an employee in the event of termination of employment or an adverse impact on employee's compensation. Whilst business requires innovation and adaptability to the ever-changing markets, it is important that a careful balance with human capital be struck.

2.3.3 On-time performance

Under a regulated environment, with a relatively fixed number of carriers providing air transportation services, schedules were adhered to, and flights operated punctually. With the onset of deregulation, hub-and-spoke route structures took form to accommodate the high concentration levels of passengers at certain service points.

¹⁸⁰ Katz (n 165 above) 95.

¹⁸¹ AE Khan 'Surprises of Airline Deregulation' (1988) 78(2) *The American Economic Review* 317 <https://www.jstor.org/stable/1818143> (accessed 22 January 2022). See also Goetz and Dempsey in this regard (n 149 above) 943.

¹⁸² Section 43(a) provides:

"(1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds, upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who on account of a disqualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation."

Consequently, congestion and delays beset the air services market, more so at the largest hub airports.¹⁸³ Deregulation offered a polar service effect to consumers: for consumers who enjoyed the low air fares, delayed flights were a trade-off for the low fares and sometimes low quality of in-flight services, whereas for the more polished and frequent traveller, it was an intolerable change. In the same vein, the airport infrastructure was not adequately prepared to receive the number and frequency of flights that ensued after deregulation. In response to the growing complaints from the travelling public about on-time performance, the US Department of Transport, in late 1987, began to compel airlines to publicly disclose their on-time records so that consumers could be well-informed when choosing an airline.¹⁸⁴

2.5 Conclusion

It is common cause that the passage of the ADA reformed the US domestic air service market profoundly, much to the benefit of consumers. Its benefits are well-recorded and widely acknowledged, all with the aim of creating a more competitive market structure than what existed under regulation. Perhaps under regulation, the impediment was more the outlook of the CAB, than regulation itself. Carriers which found favour with the CAB, based on track-record and length of years in service, were granted authorisation to undertake air transportation services. The ADA places the needs of the travelling public at its centre, with the provisions repeatedly making reference to ‘public interest’ and ‘public convenience’ – it is not legislation that is driven by profit margins to the carriers. Of critical importance about deregulation is that air safety remained a top priority – safety was not relaxed, emphasising that a deregulated air services environment must not diminish safety levels and in any case, you cannot unilaterally relax global aviation safety standards as that will cause an exclusion from the international markets. Admittedly, in its inaugural years, the flaws of deregulation, some of which are outlined above, emerged but the proponents of deregulation counter that deregulation was not introduced to create a perfect market but a

¹⁸³ R Goetz & PS Dempsey (n 149 above) 953.

¹⁸⁴ R Goetz & PS Dempsey (n 149 above) 964.

competitive one. The deregulation that took place in the US influenced the EU which followed suit, which discussion follows hereafter.

3 Liberalisation in the EU

Pursuant to the deregulation of air transportation services in the US, brought into effect by the ADA, the impact reverberated in the European Community air transport sector, although the completion of liberalisation took a bit of time in the EU. Moreover, the composition of the EU and the US are different, in that: the EU is supranational community, comprised of various independent European states whereas in the US, it is simply one country made up of states. Hence, there was no difficulty decreeing the ADA. Liberalisation in the EU would have undoubtedly required political will and consensus to achieve same, to integrate varying national laws into one Community Law and it took a bit of time too.¹⁸⁵

Historically, like other air transportation services markets, aviation markets in Europe were fragmented, protected, and highly regulated,¹⁸⁶ especially to the benefit of flag carriers. The EU member states had their own approach and laws for aviation regulation. The intra-European air services network was based on bilateral air services agreements concluded between contracting states, which, on the face of it, appeared to be a favourable monopolistic environment, but was actually limited to the markets as determined by the bilateral air services agreements.¹⁸⁷ As with all flag carriers, the receipt of state bailouts secured the survival of state airlines to the detriment of privately owned airlines and with all these things considered, market access was severely restricted in the EU market prior to liberalisation.

¹⁸⁵ R Espérou 'The liberalisation of the air transport in Europe' (1997) *Regards Sur L'Actualité* 7.

¹⁸⁶ M Kawagoe "Air Transport Deregulation in the EU: Study from the Europeanization Perspective" Paper for Presentation at the IPSA RC-3 Symposium on "European Integration between the Past the Present", Hokka University, Sapporo, Japan, 6 September 2008, lex.jurishokudai.ac.jp/gcoe/journal/LPG_vol2/s_8.pdf (accessed on 03 May 2022).

¹⁸⁷ G Burghouwt, P Mendes De Leon & J De Wit "EU Air Transport Liberalisation Process, Impacts and Future Considerations" OECD International Transport Forum, Discussion Paper No. 2015-04, January 2015, 7, www.internationaltransportforum.org/jtrc/DiscussionPapers/jtrc.papers.html (accessed on 21 June 2022).

Unlike in the US, liberalisation of the air transportation sector in Europe occurred in three phases, commonly known as the Three Packages. The founding of a single air transportation market or common aviation area, effectively deregulation on a community-wide basis, was made possible by the establishment of a single European market through the enactment of the Single European Act,¹⁸⁸ by member states in 1986. Similar to the Abuja Treaty, *albeit* with differing time frames, the chief objective of the Single European Act was to create an internal European market by the end of 1992,¹⁸⁹ and which later led to the establishment of the European Economic Community.

In this section of the study, the impact of deregulation in the American air transportation sector on Europe will be deliberated, as it played a formidable role in the move of the EU moves towards liberalisation, followed by an analysis of the Three Packages of gradual liberalisation implemented by the Community, and an appraisal of the consequent effects of liberalisation on the European market.

3.1 The effect of deregulation in America on Europe

Historically, the regulatory framework in the EU was fragmented and there existed different regulatory standards for important matters of consideration in aviation such as market access, air fares, air traffic management and conditions of operations. Europe utilised a strict regime of regulation in air services: single airline designation, restrictive agreements on capacity and airfares fixed by the International Air Transport Association (IATA);¹⁹⁰ a typical operational environment characterised by bilateral agreements and a protectionist stance in favour of state-owned airlines. This economic regime obviously resulted in high airfares for passengers. When deregulation commenced in America, Europe was immediately impacted upon; lower airfares emerged, and new carriers entered the air transportation services market.

¹⁸⁸ Single European Act, O.J.L 169/1, 2 C.M.L.R. 741 (1987).

¹⁸⁹ KJ Button & S Dennis 'Transatlantic lessons in aviation deregulation: EEC & US experiences' (1992) 37 *Antitrust Bull* 233.

¹⁹⁰ M Kawagoe (n 186 above) 167.

Scholars do not seem to suggest that the EU air services market was in a poor financial state prior to liberalisation, but the deregulation in the US certainly enabled it to reflect on the prevailing structural weaknesses at the time, *vis-à-vis* the economic philosophy that underpins deregulation, and remodel its air transportation services market. Armstrong *et al* summarise these structural weaknesses thus:¹⁹¹

- Member states licensed airlines owned and controlled by their nationals.
- Member states licensed international air services bilaterally.
- Only one airline from each state was permitted to fly each international route.
- Capacity was unusually split on as close to a 50/50 basis as the two airline fleets permitted.
- There was a 50/50 revenue split between the two airlines regardless of the pattern of revenue receipts.
- Fares were decided on a bilateral basis by the airlines, subject only to ratification by the national regulatory authorities.
- Normally, designated airlines were particularly or wholly under state ownership.
- State-owned airlines were in many cases in receipt of state subsidies of various types and/or had their operating losses written off.
- Bilateral agreements between states authorized non-scheduled flights catering for the tourist trade.

As aforementioned, the EU is a supranational community founded on common economic, political, and social objectives. One of the objectives of the Treaty on the European Union (EC Treaty), Article B thereof, provides –

-to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;

The EC Treaty further records in Article 3 that its activities include, *inter alia* –

- (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;¹⁹²

....

¹⁹¹ KA Armstrong & SJ Bulmer *The Governance of the Single European Market* (1998) 173.

¹⁹² Art 3(c) of the Treaty.

(f) a common policy in the sphere of transport;¹⁹³

The two important provisions relating to the area of transport in the Community are laid out in Article 80 thus:

- (1) The provision of this title shall apply to transport by rail, road and inland waterways.
- (2) The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

The omission of air transport from Article 80(1) is glaring and, *ex facie*, this treaty provision leaves the application of the common objectives of the EC Treaty to the discretion of the Council. Consequently, this omission created uncertainty as to whether sea and air transport were covered by the EC Treaty at all. However, a succession of judgments¹⁹⁴ handed down by the European Court of Justice between 1974 and 1986 settled the uncertainty and ruled that the common rules of competition in the EC Treaty do apply to air transportation, and this it clarified more so in the seminal *Nouvelles Frontières*¹⁹⁵ decision in which the court ruled that EU competition

¹⁹³ Art 3(f) of the Treaty.

¹⁹⁴ *Commission of the European Communities v French Republic*, Case 167/73, 1974 E.C.R. 359 [1974] (The ECJ held that the obligation under Art 2 of the EC Treaty to establish a common market refers to the economic activities in the Community in their entirety; Joined Cases 209-213/84, *Ministre Public v Asjes*, 1986 E.C.R. 1425 [1986] (The Court held that civil aviation, including the air tariff system decided upon by IATA, is subject to Articles 85 and 86 (now Articles 81 and 82), the competition rules of the EC Treaty.

¹⁹⁵ Joined cases 209 to 23/84, *Ministère public v Lucas Asjes and Others, Andrew Gray and Others, Andrew Gray and Others, Jacques Maillot and Others and Léo Ludwig and Others*, *European Court Report (ECR)*, 1986, 1425-1473.

laws, Articles 81¹⁹⁶ and 82¹⁹⁷ of the EC Treaty are applicable to air transport and this decision must be understood within the context of the provisions cited above, thus bringing transportation by air into the ambit of application of the EC Treaty.

The process of liberalisation of the intra-European airspace commenced gradually and progressively from 1 January 1988, 1 November and 1 January 1993, in the form of Three Packages which are analysed hereunder. Each Package addressed an operations-related aspect of international air services within the Community until the process of liberalisation was completed in 1993, informed by the broader framework of the EC Treaty.

3.1.1 The First Package

In an environment characterised by high volumes of BASAs, the EU Council, the primary legislative arm of the EU government, had to adopt statutes to gradually harmonise the fragmented regulatory environment of the Community. The First Package, adopted by the EU on 14 December 1987 and which became effective on 1

¹⁹⁶ Art 81 provides-

- “1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decision prohibited pursuant to this article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.” The Article does make provision for grounds of exemption from the provisions of the competition rules are contained in sub-paragraph 3 of the Article.”

¹⁹⁷ Art 82 provides:

“Any abuse by one or more undertakings or a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.”

January 1988, was the first step of the EU in the liberalisation of the internal EU air services market, which was achieved through four Council Regulations aimed at introducing and promoting competition in the EU aviation sector and addressing the issue of air fares, capacity and market access.

Council Regulation No. 3975/87¹⁹⁸ essentially reaffirms and codifies the judgments of the European Court of Justice (ECJ) in so far as the applicability of the common provisions on competition on the air transportation sector, are concerned.¹⁹⁹ The Regulation further grants wide powers to the EU Commission to undertake investigations,²⁰⁰ be it on its own accord or by way or receipt of a complaint related to the violation of Article 81 of the EC Treaty, subpoena documents²⁰¹ and impose fines,²⁰² if a violation is established. Consistent with the broad exceptions to the competition provisions arranged in Article 81(3) of the EC Treaty, Article 2 of the Regulation provides for exceptions for certain technical agreements, whose “*sole object and effect is to achieve technical improvements or cooperation. This list is not exhaustive*”. The list referred to is contained in Annex 2 to the Regulation.

Still on the aspect of competition, Council Regulation No. 3976/87²⁰³ stipulates the grounds under which an exemption to the competition rules may be granted, in respect of agreements, decisions or concerted practices. The import of this Regulation, in the First Package, is to create room for exceptions to the applicability of the competition rules in the EC Treaty by way of regulation,²⁰⁴ amplify the grounds of exemption²⁰⁵ laid

¹⁹⁸ Council Regulation 3975/87, 1987 O.J. (L 374) 1, & later repealed by Council Regulation No 411/2004, 2004 O.J. (L 68) 1.

¹⁹⁹ The Preamble of the Regulation reads:

“Whereas the rules on competition from part of the Treaty’s general provisions which also apply to air transport; whereas the rules for applying these provisions are either specified in the Chapter on competition or fall to be determined by the procedures laid down therein;”

Art 1 of the Regulation further provides:

“This Regulation lays down detailed rules for the application of Arts 85 & 86 of the Treaty to air transport services.”

²⁰⁰ Refer to art 11 of the Regulation.

²⁰¹ Refer to art 9 of the Regulation.

²⁰² Refer to art 12 of the Regulation.

²⁰³ Council Regulation 3976/87, 1987 O.J. (L 374) 9.

²⁰⁴ Art 2 of the Regulation provides:

“1. Without prejudice to the application of Regulation (EEC) No 3975/87 and in accordance with Article 85 (3) of the Treaty, the Commission may by regulation declare that Article 85 (1) shall not apply to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices.”

²⁰⁵ Refer to art 2 of the Regulation, para 2.

out in Annex 2 to Regulation 3975/87 and the manner of adopting such regulations by the Commission.²⁰⁶

Council Directive 87/601²⁰⁷ on air fares for scheduled services between member states was adopted as the first step of the Community to gradually liberalise air fares.²⁰⁸ Article 1 of Directive provides –

This Directive shall apply to criteria and procedures to be applied to the establishment of scheduled air fares charged on any route between an airport in one Member State and an airport in another Member State.

The Directive also prescribed criteria,²⁰⁹ procedures²¹⁰ and timeframes²¹¹ for the setting of air tariffs by national regulators and validity thereof²¹² and does not preclude Member States from concluding agreements on air tariffs which are more flexible than provisions of the Directive.²¹³ This Directive, given the fragmented nature of air services at the time amongst Member States, established uniformity regarding air tariffs and administrative decisions.

The last decision that makes up the First Package is Council Decision 87/602²¹⁴ the objective of which was to increase market access²¹⁵ as a means to stimulate the EU air transport sector and eliminate restrictions to capacity amongst Member States.²¹⁶

²⁰⁶ Refer to arts 2(3) to rt 6 of the Regulation.

²⁰⁷ Council Directive 87/601, 1987 O.J. (L 374) 12.

²⁰⁸ Para 11 of the Preamble to the Directive reads:

“Whereas the Heads of State and Government, at their meeting in June 1986, agreed that the internal market in air transport should be completed by 1992 in pursuance of Community actions leading to the strengthening of its economic and social cohesion; whereas the provisions of this Directive on fares are a first step in this direction and the Council will therefore, in order to meet the objective set by the Heads of State and Government, adopt further measures of liberalization in respect of air fares at the end of the three year initial period,”

²⁰⁹ Refer to art 3 of the Directive.

²¹⁰ Refer to art 4 of the Directive.

²¹¹ Refer to art 4(2) of the Directive.

²¹² Refer to art 4 (3) of the Directive.

²¹³ Refer to art 6 of the Directive.

²¹⁴ Council Decision 87/602, 1987 O.J. (L 374) 19.

²¹⁵ Para 8 of the Preamble to the Decision states that:

“Whereas increased market access will stimulate the development of the Community air transport sector and give rise to improved services for users...”

²¹⁶ Refer to arts 3, 5 & 6 of the Council Decision.

Although the effects of the First Package were not immediate, and had some shortcomings, it did ease the tight market restrictions associated with the bilateral agreements system between Member States. The EU adopted another set of measures in the Second Package in 1990, to further liberalise the decisions and directives of the First Package and open the internal EU air services market.

3.1.2 The Second Package

As indicated, the Second Package served to amplify the regulations of the First Package and address the shortcomings, related to market access, capacity and the applicability of the rules of competition to certain agreements and concerted practices and gradually undo the restraints associated with the bilateral agreement system.

The Second Package was approved on 24 July 1990 and came into effect on 1 November 1990.

Council Regulation 2343/90²¹⁷ addressed the issue of access and capacity and significantly granted Member State carriers unlimited third and fourth air traffic privileges,²¹⁸ whereas in the earlier Regulation, it was silent on this aspect. The Regulation also granted carriers the opportunity to carry fifth freedom traffic,²¹⁹ albeit subject to the conditions set in out in Article 8;²²⁰ in comparison with the fourth and fifth air traffic rights, this privilege was limited. Notwithstanding the substantial relaxation on the criteria for capacity and market access, the Regulation prescribed that the exercise of any traffic rights was subject to national, regional and local rules

²¹⁷ 2343/90, 1990 O.J. (L 217) 8. The validity of this Regulation lapsed on 31/10/2008.

²¹⁸ Art 4 of the Regulation provides:

“Subject to this Regulation, Community air carriers shall be permitted to exercise third-and-fourth freedom air services between airports or airport systems in one Member State and airports and airport systems in another Member State when these airports or airport systems are open for traffic between Member States or for international services.”

²¹⁹ Art 8 of the Regulation provides –

“Community air carriers shall, in accordance with this Article, be permitted to exercise fifth-freedom traffic rights between combined points in two different Member States on the following conditions:...”

²²⁰ Refer to art 8(a) & (b) of the Regulation. The conditions precedent were that the scheduled service must be an extension of the air service or a preliminary service to the scheduled service, from the state of registry, and the air carrier cannot utilise more than 50% of its seasonal capacity that it uses for its fourth and fifth freedom services.

pertaining to the safety and protection of the environment, the availability of parking slots at airports and functional navigational aids.²²¹

Council Regulation 2342/90²²² on air fares which significantly expanded the “zones of flexibility” within the Community, which created a normal fare economy zone, a discount zone and a deep-discount zone,²²³ with each category carrying a percentage by which air fares could be reduced, bringing a marked change from the regulation in the First Package.

Scharpensel argues that the expansion of the “zones of flexibility” and consequent freedom of price adopted by the EU was shaped by what he refers to as the “zones of reasonableness”, characteristic of the early days of deregulation in the US.²²⁴

Council Regulation 2344/90²²⁵ regarding the application of the competition provisions in the EC Treaty did not really introduce substantive changes to the earlier Regulation, and instead amended the dates of the earlier Regulation²²⁶ to accommodate the exemption granted under Regulation 2344/90.

It is evident that the focus of the Second Package was on air fares, market access and capacity and as a result, new carriers took advantage of the liberalised environment and emerged to compete with flag carriers. The observation of the Organisation for Economic Co-operation and Development (OECD) of this phase is that the monopoly and duopoly that was enjoyed by the flag carriers decreased during this second phase of liberalisation.²²⁷

²²¹ Refer to art 10(1) of the Regulation.

²²² Council Regulation 2342/90, 1990 OJ (L 217) 1. The validity of this Regulation lapsed on 01/01/1993 & was repealed by 392R2409.

²²³ Refer to art 4(3) of the Regulation.

²²⁴ F Scharpenseel & F Moritz ‘Consequences of EU Airline Deregulation in the Context of the Global Aviation Market’ (2001) 22 *Northwestern Journal of International Law & Business* 103 <http://scholarlycommons.law.northwestern.edu/njilb> (accessed 21 June 2022).

²²⁵ Council Regulation 2344/90, 1990 OJ (L217) 15.

²²⁶ Refer to art 1 of the Regulation.

²²⁷ G Burghouwt *et al* (n 187 above) 13.

3.1.3 The Third Package

Finally, the Third Package to complete the process of liberalisation of the internal air transportation services market of the EU was adopted on 23 July 1992 and became effective on 1 January 1993. It comprised of three Council Regulations dealing with the licensing of air operators,²²⁸ market access,²²⁹ and air fares and rates.²³⁰

The significance of this last phase of liberalisation is that the EU Council enacted and implemented a set of common regulatory rules for the licensing of air operators under the hand of the national aviation authorities of the member states, thereby creating uniform conditions for licensing.²³¹ The standards include: the establishment of the air carrier in the licensing member state, the majority control of the airline by the nationals of member states, the financial viability of the company, adequate insurance to meet liability claims in the event of accidents, and an air operator's certificate to demonstrate the safety and airworthiness fitness²³² of the aircraft. Safety remains a prime consideration in the licensing of air operator's, irrespective of the relaxation of market access. Effectively, with the setting of common regulatory standards, the Regulation replaced the system of bilateral agreements between Member States and created an internal multilateral system of air transport regulation.

The Council Regulation on market access further lowered entry barriers to the market on interregional networks and compelled Member States to accept multiple designations for airlines. Importantly, the Regulation terminated capacity sharing altogether and gradually introduced fifth-freedom air traffic rights within the EU.²³³ As a result of these measures, most barriers to market access were removed and EU airlines gained access to the entire air routes network, including unrestricted cabotage

²²⁸ Council Regulation 2407/92, 1992 O.J. (L 2401) 1.

²²⁹ Council Regulation 2408/92, 1992 O.J. (L 240) 8.

²³⁰ Council Regulation 2409/92, 1992 O.J. (L 240) 15.

²³¹ R Polley 'Defense Strategies of National Carriers' *Fordham International Law Journal* (2000) 23 173 <https://ir.lawnet.fordham.edu/ilj/vol23/iss6/15/> (accessed 24 June 2022).

²³² Council Regulation 2407/92 (n 228 above) arts 4, 5, 7 & 9.

²³³ Council Regulation 2408/92 (n 229 above) art 8.

rights,²³⁴ what can be regarded as the pinnacle of a truly liberalised air services market.

In summary, the Third Package removed all entry, capacity and air fare-setting barriers, and created uniform rules for the licensing of air carriers within the EU Community.

3.2 The impact of liberalisation in the EU

Similar to the experience of the US, liberalisation brought growth to the air transport market and benefits for consumers, *albeit* not on a scale as dramatic as that of the US,²³⁵ and that was probably due to the aeropolitics at play in the EU as compared to the US. Notwithstanding same, the number of routes operated in the EU saw an increase, from 490 in 1992, to 520 in 1996²³⁶ and there was an increase in the establishment of new airlines, especially low-cost carriers entering the market under the favourable conditions created by liberalisation. With the right to cabotage, the OECD remarks that these low-cost carriers took full advantage of the domestic markets of Member States.²³⁷ However beneficial to the consumer and new entrants to the market, reformations of this nature, more so done at a multi-state level, come with challenges and some of these challenges are illuminated in the discourse that follows.

3.2.1 National rulemaking

The EU is a supranational government, made up of European states each possessing sovereignty and autonomy. This is a founding principle and pronouncement in the Chicago Convention.²³⁸ Each Member State had its own flag carrier and so, the

²³⁴ This privilege came into effect as of 1 April 1997.

²³⁵ F Scharpenseel & F Moritz (n 224 above) 105.

²³⁶ Polley (n 231 above) 175.

²³⁷ Burghouwt *et al* (n 187 above) 14.

²³⁸ Art 1 of the Convention provides:

“The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”

process of gradual liberalisation and the creation of a common aviation market, necessitated that member states, to a certain extent, transfer individual rulemaking powers to the EU. This is evident in the creation of common conditions for licensing of air operators in the Third Package and the later establishment of the European Union Aviation Safety Agency,²³⁹ a development which Kawagoe refers to as 'Europeanization' and a re-regulation of sorts.²⁴⁰ This kind of legislative integration en masse would have required political will and cooperation, on the understanding that the effective cession of national law-making powers to an EU government worked to the benefit of all Member States and a competitive air transport market. Polley reflects that, this was not always the case and that in the earlier years of liberalisation, there was some resistance from individual member states to implement the liberalisation measures, by delaying the granting of operating licences to non-state-owned carriers.²⁴¹

3.2.2 Airport congestion

The termination of market access restrictions enabled the emergence and growth of new air carriers, especially low-cost carriers and the resultant increase in air traffic caused airport slot challenges on the high-density routes. Flag carriers, under the bilateral system, enjoyed superior access to airport facilities and indirectly, caused a barrier to market entry for new entrants because, absent the access to airport infrastructure, an air services operator cannot run an air transport service. It is worth noting that the EU Regulations, whether knowingly or unintentionally were concentrated on the airlines and thus neglected to factor airports therein, as an ancillary and critical requirement to the air transport market.

²³⁹ This is the EU aviation regulatory authority that was established in 2002, to regulate the single European air transportation market.

²⁴⁰ Kawagoe (n 190 above) 175.

²⁴¹ Polley (n 231 above) 179.

4 Conclusion

Liberalisation of the air services market in the EU fulfilled the objectives of the EC Treaty of a common transport market. The complete elimination of the bilateral air services agreement system *inter se* member states and the ultimate adoption of a multilateral model with respect to access, capacity, air fares and licensing, eventually led to the adoption of a package referred to as the Single European Sky, which came into effect in April 2004, a European Community aviation policy concerned with the setting of common technical and air management system, irrespective of national borders and reorganising the European airspace according to air traffic patterns. Liberalisation not only led to the removal of barriers but a complete consolidation of rules and standards for air transport across the Community. At the core of these massively progressive developments, national governments had to possess the political will to implement the dictates of the Community and in a supra-national setting of the kind evinced in the EU, it was political will and cooperation that enabled the gradual liberalisation of its internal air transport to unfold, develop and find completion. This kind of political will is surely something that would stand Africa in good stead to achieve a similar goal and fulfil the objectives of the Abuja Treaty.

CHAPTER FOUR

The Regional Domestication of the Yamoussoukro Decision: The progress thus far

1 Introduction

Pursuant to the adoption of the pan-African Yamoussoukro Decision liberalisation framework, implementation thereof by State Parties became imperative. With the international pressure occasioned by deregulation and liberalisation in the US and Europe respectively, and other parts of the globe following suit, the adoption of the Decision compounded the pressure on African governments and RECs to embrace and implement the liberalisation of the internal African air transportation market. The objectives and undertakings contained in the Abuja Treaty and resultant creation of the African Economic Community thereunder, which essentially underscore the adoption of the Decision as a means to address the growth of Africa's air transport sector, could no longer be ignored nor postponed. The Decision is still commonly regarded by the African aviation community and states alike as an important policy framework instrument to develop the African aviation sector.²⁴² In contrast to the EU, which had expressly fixed a date by when to achieve the creation of a European common aviation market through the Single European Act,²⁴³ the liberalisation of the intra-African air transportation services market, in terms of the Decision, was to be a 'gradual'²⁴⁴ process with undefined timeframes. In its conference of 2003, the Worldwide Air Transport Conference clarified the meaning of the terms "gradual and progressive liberalisation" to mean that:

²⁴² Schlumberger (16 above) 30.

²⁴³ In terms of art 13 of the Single European Act, the progressive establishment of an internal market was to expire on 31 December 1992. Art 13 provides:

"The EEC Treaty shall be supplemented by the following provisions:

'Article 8a

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article...The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."

²⁴⁴ Refer to art 2 of the Decision.

...each State would determine its own path and own pace of change in international air transport regulation with a general goal of the gradual, progressive, orderly, and safeguarded change towards market access.²⁴⁵

It is submitted that this meaning that is ascribed to the course of liberalisation in Africa is a reasonable and pragmatic one, particularly in circumstances where market liberalisation is being implemented in a supranational setting such as in Africa; States retain the power of self-determination within a pan-African agreement.

As with any legislation, policy or agreement, its mettle, effectiveness, and pragmatism are truly tested when implemented. Although Schlumberger suggests that the utilisation of the word *implementation* in the context of the Decision is misplaced, what he specifically refers to as ‘pleonasm’ on grounds that the Yamoussoukro Decision is, in and of itself, a decision to implement the Yamoussoukro Declaration;²⁴⁶ this study partially disagrees with that suggestion. Admittedly, the spirit of the objectives of the two instruments is closely related, being the integration of the African air transport industry. However, the Declaration was solely concerned with the cooperation and integration of African airlines whereas the scope of the Decision is broader and that is to liberalise the system of scheduled and non-scheduled intra-African air transportation. The Decision is, in any case, a far more comprehensive and binding framework agreement rooted in the Abuja Treaty. It may perhaps be the imprecise usage of terminology, ‘The Decision to implement the Yamoussoukro Declaration’, to name the Yamoussoukro Decision as such, that augurs with the criticism of Schlumberger.

In cognisance of the regionalised arrangement of the African continent, along former colonial ties, language and geographical location, the provisions related to the implementation of the Decision are captured in Articles 9 and 12. An assessment of the progress of regionalisation and/or domestication of the Decision must be juxtaposed against the reasons for delay, if any, of the Decision.

²⁴⁵ ‘Report of the Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization, Montreal’ 24-28 March 2003, ICAO Doc 9819, ATConf/5 2003, 6, icao.int/Meeting/atconf6/Documents/Doc9819_en.pdf (accessed on 20 September 2022).

²⁴⁶ Schlumberger (n 16 above) 30.

In this chapter, as a point of departure, the organs and organisations which are responsible for the implementation of the Decision, are canvassed. Thereafter, an evaluation of the work done by the RECs of the continent to domesticate the Decision, follows and the chapter closes with a review of the actual and potential challenges and delays to the full implementation of the Decision.

2 The bodies responsible for the execution of the Yamoussoukro Decision

Article 9 of the Decision establishes and identifies organs, collectively referred to as the ‘Monitoring Body’, responsible for the execution of the Decision. Article 9.1 establishes the first organisational tier of implementation, and probably the highest substructure, which is set up pursuant to Article 25²⁴⁷ of the Abuja Treaty. Article 9.1 provides –

Pursuant to paragraph 4 of Article 25 of the Abuja Treaty, a Sub-Committee on Air Transport of the Committee on Transport, Communications and Tourism is hereby established which shall be responsible, inter alia, for the overall supervision, follow-up and implementation of this Decision.

This Sub-Committee is therefore responsible for three aspects of the Decision: general supervision, follow-up and implementation, ultimately, to ensure that the area of the transportation objectives of the Abuja Treaty are fulfilled through the implementation of the Decision. The follow-up responsibility is specifically dealt with further in Article 9.2 of the Decision by higher-ranking officials, being the African Ministers responsible for civil aviation. Seemingly, the responsibly related to ‘supervision’ must relate to the supervision of other bodies that are established in terms of the Decision.

In terms of Article 9.2,²⁴⁸ the Monitoring Body collective comprised of representatives of the ECA, AU, AFCAC, and African Airlines Association (AFRAA), and assisted by

²⁴⁷ In terms of art 25 of the Abuja Treaty, the specialised technical committees tasked with driving the agenda in various economic areas within the Treaty, are established. The Committee on Transport, Communications and Tourism is established in terms of art 25, para 1, subpar (f).

²⁴⁸ Art 9.2 provides:

subregional organisations, is established to give assistance to the Sub-Committee on Air Transport in its duty of following up the Yamoussoukro Decision. As an arm of support to the Sub-Committee established in terms of Article 9.1, the further and specific duties of the Monitoring Body are set out in Annex 2²⁴⁹ to the Decision which are, when closely looked at, substantively advisory and administrative in nature and one its responsibilities are to assist subregions to implement the Decision.²⁵⁰

Lastly, Article 9 establishes an African Air Transport Executing Agency as soon as possible, albeit unnamed in the actual Decision, which is responsible for the successful implementation of the Decision and for the supervision and management of Africa's liberalised air transportation industry.²⁵¹ When closely looked at, the mandate of this Executing Agency is very broad, because it is framed as 'the successful implementation of the Decision' without any indicators or parameters that are included in the text of the Decision to measure the success. Furthermore, it would appear as if the latter part of its responsibility, the management and overseeing of Africa's liberalised air services industry, is centred on post-implementation of the Decision. Out of all the bodies that are established are in terms of Article 9 of the Decision, it is the Executing Agency only upon whom the authority to formulate and enforce

"A Monitoring Body composed of representatives of the ECA, OAU, AFCAC & AFRAA which shall be assisted, as the case may be, by representatives of subregional organizations, is hereby established to assist the Sub-Committee on Air Transport composed of African Ministers Responsible for Civil Aviation in the follow-up of the implementation of this Decision."

²⁴⁹ Annex 2 lists 11 duties and responsibilities for the Monitoring Body which are:

- a) Prepare, for adoption by the sub-committee on Air Transport, the relevant annexes to this Decision;
- b) Formulate proposals on studies, seminars, workshops and other measures aimed at enhancing and updating air transport services in Africa;
- c) Use, if necessary, experts to undertake studies related to implementation of the Decision;
- d) Provide, on request, to interested organization and members State, technical advises for the implementation of the Decision;
- e) Receive declarations made in accordance with the Decision, notification of withdrawals of any declaration of complaints and requests and shall inform the Depository accordingly;
- f) State its views on any disputes resulting from the application and/or interpretation of the Decision and recommend solution to the dispute;
- g) State, on request of States party, its views on predatory and unfair competition practices;
- h) Request the competent national and international bodies for the support required to carry out studies, seminars, work programs and other measures aimed at enhancing and updating air transport services in Africa;
- i) Assist the OAU to organize the meeting of the sub Committee on Air Transport of the Committee on Transport, Communications and Tourism;
- j) Analyze plan for the periodic review of the Decision;
- k) Develop and formulate a coordinated implementation programme of the Yamoussoukro Decision between and within sub-regions."

²⁵⁰ Refer to para 1(k) of Annex 2.

²⁵¹ Refer to art 9.4 of the Decision.

appropriate rule and regulations related to competition *inter se* the State Parties²⁵² is bestowed, as competition is an inescapable offshoot of liberalisation. It was only in May 2007 that an Executing Agency was named and entrusted with the responsibilities in Article 9.4, at the Third African Union Conference of Ministers Responsible for Air Transport in Addis Ababa and it is the AFCAC that was given these responsibilities.²⁵³ The AFCAC is a specialised agency of the AU, much like the ICAO as a specialised agency of the UN, and Schlumberger's criticism in this regard is that, the appointment of the AFCAC is a failure to appoint a powerful and independent executing agency that has no links to any other organisation which decision was occasioned by the rejection from experts to a proposal to partially fund the agency by collecting aviation charges from the AU Community.²⁵⁴

The Decision further makes explicit provision for subregional and regional organisations to play a role in the implementation of the Decision. Article 12.2 provides

-

Subregional and regional organizations are encouraged to pursue and to intensify their efforts in the implementation of this Decision.

It goes without saying that regional and subregional communities are key to the implementation of the Decision.²⁵⁵ Although the language of Article 12.2 is predominantly passive and not instructive to the African regional and subregional communities, they are the platforms from where implementation can be driven and for liberalisation of intra-African air transport services to take meaningful form. They are also highly politicised spaces and as argued earlier elsewhere in this study, political will and consensus is a key component of implementing liberalisation in a supra-national setting. Whilst State Parties may have signed the Decision individually and independently as sovereign governments, regional economic communities and the

²⁵² Art 9.5 provides:

"The Executing Agency shall have sufficient powers to formulate and enforce appropriate rules and regulations that give fair and equal opportunities to all players and promote healthy competition."

²⁵³ Schlumberger (n 16 above) 36.

²⁵⁴ as above.

²⁵⁵ Schlumberger similarly asserts that it was recognised in the initial stages that implementation of the Decision depended largely on the regional economic groupings of the continent; see Schlumberger (n 16 above) 61.

'brotherhood' enjoyed therein, still play a very important role in African politics and economies. In the report of the Worldwide Air Transport Conference: 'Challenges and Opportunities of Liberalization', held in Montreal in March 2004, the position of the 53 African States on the matter is recorded thus:

53 African States...favoured the gradual liberalization of market access on a regional basis for Africa under the Yamoussoukro Decision of 1999. They did not support liberalization of market access on a global basis that would include unrestricted granting of traffic rights beyond the Third and Fourth Freedoms of the air...²⁵⁶

The existence of a regional community within the African continent is further recognised by and entrenched in the Abuja Treaty, which ascribes this meaning to the word "Community" -

...the organic structure for economic integration established under Article 2 of this Treaty and constituting an integral part of the OAU;²⁵⁷

With this firm adoption of a regional approach to air transportation services liberalisation, the current and prominent RECs insofar as the implementation of the Decision, and regulation of competition in relation to the provisions of the Decision are concerned, are:

- the League of Arab States (LAS);
- the Banjul Accord Group (BAG);
- the Central African Economic and Monetary Community (CEMAC);
- the Common Market for Eastern and Southern Africa (COMESA);
- the East African Community (EAC);
- the Economic Community of West African States (ECOWAS);
- the Southern African Development Community (SADC); and
- the West African Economic and Monetary Union (WAEMU).

²⁵⁶ n 245 above, 25.

²⁵⁷ Refer to Article 1(c) of the Abuja Treaty.

The discussion that follows is an examination and critique of the progress that has been made by each region or grouping mentioned above, to implement the Yamoussoukro Decision framework agreement. The discussion is structured in such a way that the communities are discussed within their geographical region²⁵⁸ on the continent i.e., North, South, East, West and Central Africa so as to present comprehensive optics of the state of progress of each individual African region. The discussion will also reveal that some states hold dual membership in different RECs.

Southern and Eastern Africa

2.1 Common Market for Eastern and Southern Africa

COMESA is the largest African regional community, comprising of 20 states from Eastern, Southern and Northern Africa which are: Angola, Burundi, the Comoros, Democratic Republic of Congo, Djibouti, Egypt,²⁵⁹ Ethiopia, Eritrea,²⁶⁰ Kenya, Libya,²⁶¹ Madagascar, Malawi, Mauritius, Rwanda, the Seychelles,²⁶² Sudan, Eswatini, Uganda, Zambia and Zimbabwe.

COMESA has its historical origins in the Treaty for the Establishment of the Preferential Trade Area for the Eastern and Southern African States (PTA), which treaty was signed in September 1982 and founded on the framework of the Lagos Plan of Action to expand trade within African.²⁶³ The objectives of the PTA included the promotion of cooperation in all areas of economic activity, particularly trade and customs, transport, communications, agriculture and monetary affairs, between member states; improving the standards of living of peoples of in the region by forging

²⁵⁸ In art 1(d) of the Abuja Treaty, "Region" is defined as -
"...an OAU region as defined by Resolution CM/RES.464 (XXVI) of the OAU Council of Ministers concerning the Division of Africa into five (5) regions namely North Africa, West Africa, Central Africa, East Africa, and Southern Africa"

²⁵⁹ With effect from 06 January 1999.

²⁶⁰ With effect from 1994.

²⁶¹ With effect from 3 June 2005.

²⁶² With effect from 2001.

²⁶³ Schlumberger (n 16 above) 93. The signatory states to the treaty were: Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Eswatini, Tanzania, Uganda, Zambia and Zimbabwe.

closer relations between member states and; the creation of a common market for goods by the year 2000²⁶⁴ with a focus on the reduction of tariffs and non-tariff barriers in the area of customs. Takirambudde refers to the PTA as an ambitious agenda to reduce the dependence on the South African markets.²⁶⁵ However, challenges were identified with the PTA such as: high transport and transit costs; the significant disparities in economic activity and development between member states and the imbalance of the movement of goods by economically advanced member states at the expense of economically weaker member states.²⁶⁶ Therefore, in its form at the time, the PTA really only served the economic interests of a few member states and did not benefit the entire region and hence the adoption of COMESA Treaty.

In pursuit of the complete integration of trade markets and fulfilling the objectives of the PTA, the PTA was transformed into COMESA and it formally succeeded the PTA on 8 December 1994. It is so recorded in the preamble to the COMESA Treaty that –

BEARING IN MIND the establishment among their respective States of the Preferential Trade Area for Eastern and Southern African States as a first step towards the creation of a Common Market and eventually of an Economic Community for Eastern and Southern Africa;²⁶⁷

RECALLING the provisions of Article 29 of the Treaty for the Establishment of the Preferential Trade Area for the Eastern and Southern African States to the effect that steps should be taken to develop the Preferential Trade Area established by that Treaty into a Common Market and eventually into an Economic Community;²⁶⁸

RECALLING further the decision of the Authority of the Preferential Trade Area for Eastern and Southern African States taken at its Tenth Meeting held in Lusaka, Zambia from 30 – 31 January, 1992 to transform the Preferential Trade Area for Eastern and Southern African States into a Common Market for Eastern and Southern Africa;²⁶⁹

²⁶⁴ Appendix 2C: The Preferential Trade Area of Eastern and Southern Africa, 1 <https://www.fao.org/3/w5973e/w5973e06.htm> (accessed on 23 September 2022).

²⁶⁵ PE Takirambudde 'The legal structure of trade and liberalisation under the Treaty establishing the Preferential Trade Area for Eastern and Southern Africa: Yesterday's vision and today's reality' (1994) 27 *The Comparative and International Law Journal of Southern Africa* 1 https://hdl.handle.net/10520/AJA001040s1_460 (accessed on 27 September 2022).

²⁶⁶ as above, 9.

²⁶⁷ Refer to para 2 of the Preamble.

²⁶⁸ Refer to para 3 of the Preamble.

²⁶⁹ Refer to para 4 of the Preamble.

The aims of the Common Market are essentially aligned to that of the Abuja Treaty:²⁷⁰ integration and development of the region and it retains a very strong focus on customs, goods and services liberalisation, much like the PTA. Other aims and objectives of the COMESA Treaty include attaining the sustainable growth and development of the member states;²⁷¹ joint development and co-operation in all fields of economic activity;²⁷² co-operation in peace and security efforts among member states;²⁷³ and reinforcing relations between the Common Market and the rest of the world.²⁷⁴ To achieve these objectives as set out in Article 3, the COMESA Treaty lists specific undertakings in Article 4 thereof and specifically in the field of transport and communications, the specific undertakings are:

- (a) foster such co-operation among themselves as would facilitate the production of goods and facilitate trade in goods and services and the movement of persons;
- (b) make regulations for facilitating transit trade within the Common Market; and
- (c) adopt a Third Party Motor Vehicle Insurance Scheme.²⁷⁵

Read closely, these specific undertakings are focused more on the facilitation of trade in goods and services and presumably, the [free] movement of people. There is not even a mention about the area of communications in the specific undertakings. Also apparent is that these specific undertakings are silent on the liberalisation of air transport or of any mode for that matter, within the Common Market.

²⁷⁰ Art 3 (f) provides that one of the aims of the Common Market shall be:

“to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.”

Art 6 of the COMESA Treaty reiterates the conformance of the treaty with the Abuja Treaty in the following manner –

“The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June, 1991...”

²⁷¹ Art 3(a).

²⁷² Art 3(b).

²⁷³ Art 3(d).

²⁷⁴ Art 3(e).

²⁷⁵ Art 4, para 2.

In the economic sphere of transport and communications of the Common Market, the member states broadly undertake to coordinate and harmonise their relevant policies to facilitate the movement of inter-state traffic, persons, goods and services.²⁷⁶ Air transport is specifically encapsulated in Article 87 and it records the consolidated response of the Common Market to both the Yamoussoukro Declaration and the Yamoussoukro Decision, although Schlumberger asserts that the air transportation policy of the Common Market is more aligned to the Declaration.²⁷⁷ It would appear that COMESA member states still espouse the objectives of the Declaration, of integrating their airlines and perhaps view it as an important tenet to air transport liberalisation. Similar to Article A of the Declaration, Article 87 of the COMESA Treaty provides:

In order to promote the provision of better and efficient air transport, the Member States shall promote the establishment of joint ventures for cooperation in the use of equipment, in the pooling of aircraft maintenance and training facilities, in the acquisition and use of fuel and spare parts, in insurance schemes, in the coordination of flight schedules and the improvement of managerial techniques and skills.²⁷⁸

The Member States shall take necessary steps to promote the establishment of joint air services operations by their designated airlines on intercontinental routes and the joint use by them of wide body aircraft as steps towards the eventual establishment of a Common Market airline.²⁷⁹

Further and more specific undertakings by member states in relation to air services liberalisation in Article 87(3) of the COMESA Treaty are:

- (a) adopt common policies for the development of air transport in the Common Market in collaboration with other relevant international organisations including the African Civil Aviation Commission, the African Airlines Association, the International Air Transport Association and the International Civil Aviation Organisation:

²⁷⁶ Art 84 provides:

“The Member States undertake to evolve coordinated and complementary transport and communications policies, to improve and expand the existing links and establish new ones as a means of furthering the physical cohesion of the Member States, so as to facilitate movement of inter-State traffic and to promote greater movement of persons, goods and services within the Common Market...”

²⁷⁷ Schlumberger (n 16 above) 94.

²⁷⁸ Art 87, para 1.

²⁷⁹ Art 87, para 2.

- (b) ...
- (c) liberalise the granting of air traffic rights for passengers and cargo operations with a view to increasing the efficiency and profitability of their airlines;
- (d) harmonise civil aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation, with particular reference to Annex 9 thereof;
- (e) establish common measures for the facilitation of passenger and cargo services in the Common Market;
- (f) ...
- (g) ...
- (h) ...
- (i) ...
- (j) agree to charge the same rates and apply the same rules and regulations relating to scheduled air transport among themselves;

Liberalisation of the Common Market air services is specifically addressed in Article 87(3)(c), and from the said provision, it is intended to increase efficiency [of air travel] and increase the profitability of the regional airlines. There is a further attempt in Article 87(3)(j), albeit broadly so, to direct member states to agree to charge uniform air fares and apply common rules and regulations for scheduled air travel. Leaving the issue of air tariffs so open-ended to agreement *inter se* member states may actually result in the absence of consensus; unlike in the US and EU where formulae for the imposition of air fares is explicitly set out in legal instruments and that is a far more sensible and pragmatic approach where many state parties are involved and there are considerations of economic survival and sustainability. It is however a progressive undertaking that the Common Market will develop air transport policies for the Common Market in collaboration with specialised agencies such as AFCAC and ICAO, as stipulated in Article 87(3)(a) of the Treaty, which will achieve regional harmonisation of policies for the air transportation sector.

In furthering the objectives of the Yamoussoukro Decision, the Abuja Treaty, and Article 87(3)(c) of the COMESA Treaty, the Council of Ministers of the Common Market adopted a regulation in 1999 to liberalise scheduled and non-scheduled air services within the region. The Council of Ministers is a structure established in terms of Article 7²⁸⁰ of the COMESA Treaty and it draws the authority to enact regulations from Article 9(2)(d) which empowers the Council to -

make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty;

2.1.1 Legal Notice No. 2 of 1999

i. Phase I

The Council accordingly enacted the regulation entitled ‘Legal Notice No. 2 of 1999 – COMESA Regulations for the implementation of the Liberalised Air Transport Industry’ (Legal Notice) which is directly aimed at implementing the provisions of the Yamoussoukro Decision and that of the COMESA Treaty. Slightly similar to the European Community approach, the Legal Notice introduces two phases through which liberalisation is to be achieved, in Article 2 thereof thus -

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

- (a) Phase I
Phase I: October 1999
- (i) Introduction of free movement of intra-COMESA air cargo and non-scheduled passenger services;

²⁸⁰ Art 7 provides:

“1. There shall be established as organs of the Common Market:
(a)...
(b) The Council;”

- (ii) Introduction of free movement of intra-COMESA scheduled passenger services with frequency limit of up to two daily frequencies between any city pairs. Beyond the two daily frequencies bilateral services will apply; and
- (iii) Adoption of multiple designation and elimination of capacity restrictions.
- (b) Phase II
Phase II: October 2000
Free movement of intra-COMESA air transport services.

From the foregoing, Phase I of the COMESA liberalisation plan of action was to last for a period of only one year, from 1999 until 2000, with restrictions on frequencies and directing Member States to enter into bilateral agreements if the set frequency restrictions are exceeded. From the year 2000, the Legal Notice provides for free and unrestricted movement of air cargo and passengers. Notably, this timetable of the Council of Minister is that Phase I is very short and would seem that it was really intended to prepare the environment, the industry, and the market for a fully-fledged liberalised air transport service. Article 2(a)(ii) of the Legal Notice which directs member states to enter into bilateral agreements if the stipulated frequency is exceeded, is in harmony with the provisions of Article 10.5²⁸¹ of the Decision which makes allowance for State Parties to enter into bilateral agreements for more flexible arrangements than those stipulated in the Decision.

Article 3 of the Legal Notice prescribes the conditions precedent for air carriers to gain market access to the Common Market, which are:

1. Any air carrier will be eligible provided it is substantially owned and effectively controlled by a COMESA Member State or a combination of COMESA member states or their nationals.
2. The air carrier must be eligible for designation in the State/States of incorporation.
3. The air carrier must demonstrate financial, managerial and technical ability to perform the services for which the application is being made.
4. Restrictions relating to multiple designation, fifth freedom traffic rights and Cabotage (in Phase II) will be abolished to stimulate the development of the COMESA air transport services for the benefit of the users.

²⁸¹ Art 10.5 of the Decision provides:

“State Parties undertake not to enter into any obligations that would be more restrictive than this Decision. However, State Parties shall not be precluded from maintaining or developing on a bilateral basis or amongst themselves, arrangements more flexible than those contained herein.”

5. In addition to (1), (2) and (3) above, the air carrier must have an air carrier license from the appropriate licensing authority of a COMESA State.

Somewhat akin to the provisions of the Decision, specifically Article 6.9 thereof, paragraph 1 of Article 3 of the Legal Notice partially mirrors the 'substantial ownership and effective control' rule, which rule originates in the International Air Transport Agreement²⁸² and International Air Services Transit Agreement²⁸³ which form part of the Chicago Convention and in essence, prescribe that a contracting State may withhold its permission or authorisation to an air carrier if a greater part of the ownership and control is not vested in the state or nationals of the state to which the air carrier belongs. It is a criterion that is explicitly restated in Article 10²⁸⁴ of the Legal Notice for eligibility to explore the commercial benefits of liberalisation. Similar eligibility criteria in the Decision are that an airline should have its central administration, headquarters, and principal place of business physically located in the State Party²⁸⁵ and be effectively controlled by a State Party.²⁸⁶ With the prevailing historical posture by governments to protect flag carriers, the inclusion of this provision could have been intended as a means to such end. However, the Legal Notice ameliorates this stringent requirement and limitation by encouraging the formation intra-COMESA airline alliances and commercial agreements in Article 6,²⁸⁷ subject to

²⁸² Sec 6 of the International Air Transport Agreement provides:

"Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement."

²⁸³ Sec 5 of the Air Services Transit Agreement provides:

"Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement."

²⁸⁴ Art 10 of the Legal Notice reads –

"For the exploitation of the commercial potentials resulting from the liberalisation of the COMESA air transport industry, the eligible air carriers shall be those substantially owned and effectively controlled by the Governments of COMESA Member States and or their nationals."

The term "effective control" is defined in the Legal Notice as:

"...controlled by COMESA States, a national of a COMESA States or a combination of COMESA States and/or their nationals through a simple majority shareholding and through both the Board and executive management"

²⁸⁵ Refer to art 6.9(b) of the Decision.

²⁸⁶ Refer to art 6.9(g) of the Decision.

²⁸⁷ Art 6 of the Legal Notice provides:

"COMESA will as a policy encourage intra-COMESA airline alliances and commercial arrangements. However, any such alliances or commercial arrangements that undermine the COMESA rules and regulations of competition will not be permitted."

the COMESA competition rules and regulations. In the pursuit of full implementation of the liberalisation of air services in the Common Market, Article 3(4) of the Legal Notice provides for the complete abolishment of restrictions on fifth freedom rights and cabotage in Phase II of the implementation of the Legal Notice. The balance of the provisions in Article 3 don't present with any controversies as they are standard terms related to safety, financial and technical ability, and the licensing of an airline.

Insofar as capacity and traffic rights are concerned, which are integral to the success of liberalisation of the air transportation market, Article 5 of the Legal Notice repeats the contents of Article 2 and introduces the granting of fifth freedom air traffic rights in Phase I, based on these restrictions –

- (a) during Phase I, fifth freedom traffic rights shall be limited to 30% of the carrier's capacity on routes where third and fourth freedom traffic rights service are provided;
- (b) fifth freedom traffic rights shall be granted to carriers without any restrictions on routes where there are no third and fourth traffic freedom rights services; and
- (c) during phase II fifth freedom traffic rights shall be granted without restrictions.

In terms of the Legal Notice, during Phase I, member states are not obligated to grant cabotage traffic rights²⁸⁸ and as stipulated in Article 3(4), cabotage traffic rights may be granted in Phase II. As already opined, the member states appear to have utilised Phase I as the time period within which to prepare the commercial environment for the full implementation of liberalisation of its air transportation market.

In conclusion, Phase I of liberalisation within COMESA placed restrictions on capacity, frequency and the air traffic rights. The Legal Notice is however noticeably silent on express provisions pertaining to air tariffs, even in Phase II of implementation of the COMESA liberalisation policy, causing an inference to be drawn that this will remain an area of independent determination by the member states. However, Schlumberger suggests a presumption to the contrary in this regard, to be drawn from a part of the preamble to the Legal Notice which records that member states have agreed to

²⁸⁸ Art 8 of the Legal Notice provides –

“During Phase I of the liberalisation process of air transport, COMESA Member States will not be obliged to grant Cabotage Traffic rights.”

remove all tariff and non-tariff barriers in the formation of a free trade area.²⁸⁹ Although it is viewed as a failure on the part of COMESA to articulate itself with certainty on the issue of tariffs, Schlumberger's suggestion can hold water when understood within the context of the formation of the COMESA Free Trade Area (with a greater focus on customs and trade)²⁹⁰ and Article 87(3)(j) of the COMESA Treaty which binds member states to agree to charge the same rates for scheduled air transportation services.

ii. Phase II

Phase II of the Legal Notice entails the removal of all restrictions chiefly on capacity, frequency, and air traffic rights whilst tariffs, as argued, remains linked to the objective of the COMESA Treaty to create a free trade area within the Common Market. Essentially, Phase II introduced the unrestricted movement of passengers and cargo.

In terms of Article 2(b), the Legal Notice prescribes that there shall be free movement of air transportation services within the COMESA Community. Article 5(c) of the Legal Notice grants traffic rights, including fifth freedom and cabotage, without restrictions. Interestingly and in furtherance of the liberalisation objectives and probably cognisant of the varying capacities amongst member states as far as aircraft is concerned, Article 7²⁹¹ of the Legal Notice does not place restrictions to the type and capacity of aircraft to be used, subject to airport limitations and airworthiness requirements.

²⁸⁹ Schlumberger (n 16 above) 96. Para 3 of the Preamble reads:

“CONSIDERING that COMESA member States have agreed on the need to create and maintain a full free trade area guaranteeing the free movement of goods and services produced within COMESA and the removal of all tariff and non-tariff barriers.”

²⁹⁰ Art 45 of the COMESA Treaty provides:

“There shall be progressively established in the course of a transitional period of ten years from entry into force of this Treaty, a Customs Union among the Member States. Within the Customs Union, customs duties and other charges of equivalent effect imposed on imports shall be eliminated. Non-tariff barriers including quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States shall also be removed. Furthermore, a common external tariff in respect of all goods imported into the Member States from third countries shall be established and maintained.”

²⁹¹ Art 7 of the Legal Notice provides –

“There will be no restrictions on the type and capacity of aircraft to be used by a COMESA air carrier except as may be dictated by airport operating limitations and airworthiness requirements.”

2.1.2 Status of implementation of the Legal Notice

Notwithstanding the clear programme of implementation of liberalisation of air services in the COMESA region, it has not been without its challenges. Insofar as Phase I is concerned, by 2004, only twelve member states within the COMESA had implemented it namely, Burundi, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Rwanda, Uganda, Sudan, Zambia, and Zimbabwe whilst other states indicated that they have challenges in implementation and were permitted to seek derogation.²⁹² Scholars²⁹³ are in agreement that noticeable and positive changes emerged from the implementation of Phase I which were:

- an increase of flight frequencies between city pairs within the COMESA region. For example, flights between Nairobi, Kenya and Entebbe, Uganda have increased from two flights per week prior to liberalisation to about thirty-four per flights per week;
- reduction in air fares due to increased competition;
- increase in cooperation between COMESA airlines in relation to code-sharing and other mutual arrangements. These arrangements often give carriers access to a greater pool of customers and code-sharing enables carriers to offer flights to passengers to destinations that they don't physically serve but are serviced by their alliance partners;
- increase in revenue to airports and service providers of air traffic services, as a result of the charges that are payable to airports; and

²⁹² EM Irandu 'Aviation in Transition: Challenges and Opportunities of Liberalisation, COMESA'S Experience' (2008) Powerpoint presentation 13 https://www.google.com/search?q=aviation+in+transition%3A+challenges+and+opportunities+liberalisation%2C+comesa%27s+experience&rlz=1C1GCEU_enZA1071ZA1071&oq=aviation+in+transition%3A+challenges+and+opportunities+liberalisation%2C+comesa%27s+experience&aqs=chrome..69i57.35776j0j15&sourceid=chrome&ie=UTF-8 (accessed 18 August 2022).

²⁹³ n 292 above, 15; KF Luoga 'Air Transport Competition Law: Africa – To what extent is the Southern and Eastern Africa liberalized?' 9, <https://protect-za.mimecast.com/s/Z1D3C48vgltzLvK1cOxrLY> (accessed on 13 July 2022); A Marawa 'The COMESA Air Transport Liberalization Experience' Paper presented at the seminar prior to the International Civil Aviation Organization Worldwide Air Transport Conference on the Challenges and Opportunities of Liberalization, Montreal, 22-23 March 2003, 7, <http://www.icao.int/Meetings/ATConf5/Documents/Marawa.pdf> (accessed on 25 August 2022).

- increase in the creation of new privately owned air carriers and thus more choice for passengers due to new airlines entering the market.²⁹⁴

However, Phase II was stalled in 2001 when the COMESA Council of Ministers decided to defer the implementation thereof pending the preparation and adoption of competition regulations,²⁹⁵ understandably to deal with the anticipated influx of new carriers and the emergence of airline alliances and commercial agreements in light of the ownership and control rules stipulated in the Legal Notice. In fact, alliances and commercial agreements are encouraged by the Legal Notice.²⁹⁶ The Decision is not of much assistance to the state parties and economic regions in the area of competition and does not pronounce itself with any specificity except to broadly state that there shall be equal opportunity on a non-discriminatory basis for a designated African airline to provide air transportation services.²⁹⁷ The Legal Notice on the other hand is completely silent on competition rules and dealing with the impact that is bound to visit fair competition upon liberalisation under Phase II and if unregulated, a powerful airline would end up dominating the regional skies which would be contrary to the objectives of liberalisation. However, in terms of Article 55, paragraph 3 of the COMESA Treaty, the Council of Ministers is mandated to enact regulations to regulate competition amongst the member states. The COMESA Secretariat further identified other outstanding items which needed to be in place in order to effectively implement Phase II of liberalisation in the region,²⁹⁸ namely:

- the development of institutional and monitoring apparatus for the liberalisation and associated competition rules;
- the adoption of a COMESA air transport policy;
- the implementation of air transport competition rules;

²⁹⁴ In contrast to the resultant effects in the EU and US, where there was congestion at airports due to a proliferation of low-cost air carriers, this was not the case in Africa.

²⁹⁵ Schlumberger (n 16 above) 97.

²⁹⁶ Refer to Art 6 of the Legal Notice.

²⁹⁷ Art 7 of the Decision provides:

“State Parties shall ensure fair opportunity on non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territory.”

²⁹⁸ Marawa (n 293 above) 7.

- the drafting of a memorandum for the Court of Justice, established in terms of Article 7 (c) of the COMESA Treaty, and Tribunal on the jurisdiction and enforcement of decisions under the competition rules;
- building capacity and awareness in key stakeholders and airlines on the implementation of the Legal Notice and the Yamoussoukro Decision;
- drafting of comprehensive regulations for consumer protection in the air transport industry against potential anti-competitive conduct;
- the harmonisation of the air transport regulatory framework;
- the drafting of a standardised procedure for market access and enjoying the privileges enshrined in the Legal Notice and in the Yamoussoukro Decision; and
- the incorporation of all the regulations for the Council of Ministers into the national legal and administrative procedures of individual Member States.

With much hanging on the adoption and implementation of a competition regulatory framework within the region in order to implement Phase II of the COMESA liberalisation programme, and it seeming that the deferral of Phase II is due to same, it begs the question whether member states deem the existence of competition rules to be a condition precedent to complete liberalisation of the intra-COMESA airspace? If the response is in the affirmative, can this line of argument be sustained in light of the fact that the Legal Notice does not prescribe anything to that effect in its text? Luoga²⁹⁹ and Schlumberger disagree that the existence of competition rules is a condition precedent for the implementation of Phase II and this study concurs with that view. The Decision and the Legal Notice make allowance for member states to enter into bilateral agreements³⁰⁰ which can be crafted to be aligned to the legal elements of the Decision and of the Legal Notice, temporarily while the competition regulations are being drafted. This suggestion does not however, detract from the need for a comprehensive set of competition standards to manage the consequences of reformation of the air transportation industry and protect vulnerable carriers from any potential anti-competitive offshoots.

Notwithstanding the current set of circumstances, COMESA, under the authority of the Council of Ministers and pursuant the provisions of Article 55 of the COMESA Treaty,

²⁹⁹ Luoga (n 293 above) 9; Schlumberger (n 16 above) 98.

³⁰⁰ Art 10.5 of the Decision provides-

“...However, State Parties shall not be precluded from maintaining or developing on a bilateral basis or amongst themselves, arrangements more flexible than those contained herein.”

developed draft Air Transport Competition Regulations in consultation with the relevant air transport industry stakeholders. Article 55, paragraph 1 of the COMESA Treaty prescribes –

1. The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.
2. The Council may declare the provisions of paragraph 1 of this Article inapplicable in the case of:
 - (a) any agreement or category thereof between undertakings;
 - (b) any decision by association of undertakings;
 - (c) any concerted practice or category thereof;

which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefit: Provided that the agreement, decision, or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or the effect of eliminating competition.

3. The Council shall make regulations to regulate competition within the Member States.

These specialised draft competition regulations were developed jointly with other regional organisations, the EAC and the SADC, to accommodate regional organisations that belong to more than one regional economic community. In 2002, the joint draft regulations were considered in a Joint Meeting of Directors of Civil Aviation Authorities and adopted by a Joint Meeting of Council of Ministers responsible for civil aviation in the COMESA member states, EAC and SADC in 2004.³⁰¹ The pertinent regulatory provision is Article 2³⁰² which provides that the purpose of the

³⁰¹ Marawa (n 293 above) 6.

³⁰² Art 2 provides:

Regulations is for the protection of consumers in the Common Market; Article 3, paragraph 2³⁰³ provides that the Regulations enjoy primary jurisdiction over an industry or sector of an industry which is subject to the jurisdiction of a separate regulatory entity; Article 16³⁰⁴ sets out the business practices which are prohibited and renders void any agreement or decision which is a prohibited business practice unless it is exempted on grounds that it brings economic or technical progress to the Common Market; and Article 18 defines what is meant by ‘abuse of a dominant position’ within the Common Market. The Regulations augur well with the arrangements of the Legal Notice in terms of which member states are encouraged to enter into alliances or arrangements in order to explore and benefit from the liberalisation of the COMESA air transportation market.

In November 2006, the Ministers responsible for civil aviation in COMESA, EAC and SADC jointly approved and adopted the Guidelines, Provisions and Procedures for the Implementation of the Regulations for Competition in Air Transport Services within COMESA, EAC, and SADC. This document states that a joint competition authority shall be established, to administer the process of liberalisation, and this Joint Competition Authority has been approved to be established by the Joint Meeting of

“The purpose of these Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of consumers in the Common Market, and to protect consumers against offensive conduct by market actors.”

³⁰³ Art 3, para 2 provides:

“These Regulations shall have primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Parts 3 and 4 of these Regulations. This Article does not apply to conduct expressly exempted by national legislation.”

³⁰⁴ Art 16 provides:

1. The following be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which:
 - a) may affect trade between Member States; and
 - b) have as their object or effect the prevention, restriction or distortion of competition within the Common Market.
2. Para 1 applies only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market.
3. Any agreement or decision which is prohibited by paragraph 1 is void.
4. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - a) any agreement or category thereof between undertakings;
 - b) any decision by associations of undertakings;
 - c) any concerted practice or category thereof; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - b) afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question.”

COMESA, EAC and SADC Minister responsible for air transport.³⁰⁵ Unfortunately, the Joint Competition Authority is facing a challenging of funding³⁰⁶ and thus rendering it confronted with limitations in the execution of its mandate of overseeing the implementation of the air transport liberalisation policy.

2.1.3 Conclusion

The foregoing discussion demonstrates that the COMESA region has made much progress in implementing the Yamoussoukro Decision, *albeit* to a limited extent. Phase I can be said to be a restricted form of air transport liberalisation, but it is liberalisation nonetheless, with restrictions on capacity, frequency and traffic rights. The policy as contained in the Legal Notice, if implemented in its complete form, will in fact be more liberal than the Decision and may yield a greater impact than that of Phase I for the economies of COMESA member states. The Legal Notice holds much promise for the peoples of that region too insofar as the movement of people and goods is concerned and is bound to definitely create an enabling environment for the region to compete in international markets. One of the COMESA member states is home to one of the prominent and accomplished carriers in the Sub-Saharan region, Ethiopian Airways, which is testament to the positive effects of liberalisation of the air services market. However, it is critical that the principles of liberalisation as espoused in the Decision are fully unlocked in this regional community so that all the member states of COMESA can potentially derive the same benefits and growth being enjoyed by Ethiopian Airways.

2.2 The East African Community

The EAC is a comparatively smaller regional community, comprised of five African states namely, Burundi, Kenya, Rwanda, Tanzania, and Uganda³⁰⁷ with the founding

³⁰⁵ Luoga (n 293 above) 14.

³⁰⁶ as above.

³⁰⁷ T Disenyana 'Towards an EAC, COMESA and SADC Free Trade Area: Issues and Challenges' South African Institute of International Affairs, 6
<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/2009%AEC->

members being Kenya, Tanzania and Uganda in 1999.³⁰⁸ Burundi and Rwanda joined the EAC later in 2007.³⁰⁹ The EAC has a politically charged history but following its re-establishment in 1999, it has fared progressively and peacefully in its regional cohesion activities and initiatives.

The Treaty for the Establishment of the East African Community (EAC Treaty) has, as its foremost objective, the development and harmonisation of common programmes and policies aimed at deepening co-operation among the partner states in matters of politics, economics, culture, research, technology, defence, security, legal, judicial affairs and social matters.³¹⁰ In pursuit of the fulfilment this objective, the partner states commit to –

...establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.³¹¹

Noteworthy about the language of the EAC treaty is that its signatories are referred to as 'Partner States' and if considered from a business entity perspective, it may perhaps point to an intention by the signatory states to contribute equally to the success of the regional organisation and share the spoils equitably too; this sentiment is echoed in the above quoted article. It also displays a mindset of equality of standing on the part of the partner states. The key principles³¹² to which the EAC binds itself to achieve the objectives are:

[%Towards%20an%20EAC%20COMESA%20and%20SADC%20Free%20Trade%20Area%20Issues%20and%20Challenges.pdf](#) (accessed 27 February 2022).

³⁰⁸ These founding States signed the East African Treaty in November 1999.

³⁰⁹ N Ford "Rwanda, Burundi to Join East African Community" African Business 1 (April) 6 <http://www.thefreelibrary.com/Rwanda%2c+Burundi> (accessed 23 October 2022).

³¹⁰ Art 5, para 1 of the EAC Treaty provides:

"The objectives of the Community shall be to develop policies and programmes aimed and widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit."

³¹¹ Art 5, para 2 of the EAC Treaty.

³¹² Refer to Art 6 of the EAC Treaty.

- (a) mutual trust, political will and sovereign equality;
- (b) peaceful co-existence and good neighbourliness;
- (c) peaceful settlement of disputes;
- (d) good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
- (e) equitable distribution of benefits; and
- (f) co-operation for mutual benefit.

The principle of mutual trust, political will and sovereign equality is particularly well considered because the very act liberalisation of any industry, and in *casu*, air transportation, requires political will and within a supra-national setting, mutual trust and respect for sovereignty is critical.

The Common Transport Policy of the EAC is outlined in Article 89 of the Treaty which is broadly aimed at co-ordinated, complementary, and harmonised transport policies,³¹³ extended to standards and regulatory, rules procedures and practices³¹⁴ and the pooling and joint use of facilities,³¹⁵ which are some of the defined steps that will be taken to attain the objectives of the region's transport policy. With regards to civil aviation within the regional community, Article 92 provides:

1. The Partner States shall harmonise their policies on civil aviation to promote the development of safe, reliable, efficient and economically viable civil aviation with a view to developing appropriate infrastructure, aeronautical skills and technology, as well as the role of aviation in support of other economic activities.

2. The Partner States shall take necessary steps to facilitate the establishment of joint

³¹³ Art 89 provides:

"In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States undertake to evolve co-ordinated, harmonised and complementary transport and communications policies; improve and expand the existing transport and communication links; and establish new ones as a means of furthering the physical cohesion of the Partner States, so as to facilitate and promote the movement of traffic within the Community..."

³¹⁴ Art 89(a) provides:

"develop harmonised standards and regulatory laws, rules, procedures and practices;"

³¹⁵ Art 89(g) provides:

"take measures directed towards the harmonisation and joint use of facilities and programmes within their existing national institutions for the training of personnel in the field of transport and communications..."

air services and the efficient use of aircraft as steps towards the enhancement of air transportation within the Community.

3. The Partner States shall in particular:

- (a) adopt common policies for the development of civil air transport in the Community in collaboration with other relevant international organisations including the African Civil Aviation Commission (AFCAC), the African Airlines Association (AFRAA), the International Air Transport Association (IATA), and International Civil Aviation Organisation (ICAO);
- (b) undertake to make civil air transport services safe, efficient and profitable through, inter alia, autonomous management;
- (c) liberalise the granting of air traffic rights for passengers and cargo operations with a view to increasing efficiency;
- (d) harmonise civil aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation, with particular to Annex 9 thereof;
- (e) establish a Unified Upper Area Control system;
- (f) establish common measures for the facilitation of passenger and cargo air services in the Community;
- (g) co-ordinate the flight schedules of their designated airlines;
- (h) consider ways to develop, maintain and co-ordinate in common, their navigational, communications and meteorological facilities for the provision of safe air navigation and the joint management of their air space;
- (i) encourage the joint use of maintenance and overhaul facilities and other services for aircraft, ground handling equipment and other facilities;
- (j) agree to take common measures for the control and protection of the air space of the Community;

- (k) apply the ICAO policies and guidelines in determining user charges and apply the same rules and regulations relating to scheduled air transport services among themselves;
- (l) adopt common aircraft standards and technical specifications for the types of aircraft to be used in the Community; and
- (m) co-ordinate measures and co-operate in the maintenance of the high security required in respect of air services operations and operate joint search and rescue operations.

The EAC air transportation policy places more emphasis on harmonisation of air transportation policies, rules, regulations, and standards as per Article 92, paragraph 3(d) and (l) and the establishment and development of common civil aviation facilities³¹⁶ and airspace operational areas,³¹⁷ leaning towards the creation of a common airspace for the region. The liberalisation of air transportation services is captured solely in Article 92, paragraph 3(c) which makes mention of the liberalisation of air traffic rights only and does not specify further measures to liberalise air transportation services. There is no mention in the treaty about capacity, air tariffs and frequency which can be regarded as limited liberalisation as opposed to effective liberalisation and clearly points to a limited incorporation of the Yamoussoukro Decision principles into the EAC Treaty. Article 92 also makes no mention of the utilisation of bilateral agreements amongst the partner states.

Notwithstanding that not all the principles of the Decision are reflected in the relevant portions of the EAC Treaty, the EAC continued to work on the liberalisation of its air transportation services market. Under the auspices of the EAC Sectoral Council on Transport, Communications, and Meteorology, additional work was undertaken on several key measures of the Decision and a significant output of this work was the implementation of a liberalised air transportation policy for scheduled air services.³¹⁸ The EAC did not enact regulations specifically and especially for liberalisation within its regional community, like other regional economic communities, but elected rather

³¹⁶ Refer to art 92, para 3(f), (h) and (i).

³¹⁷ Refer to art 92, para 3(e) and (j).

³¹⁸ Schlumberger (n 16 above) 107.

to focus on the amendment of bilateral agreements between partner states³¹⁹ and this approach came out of a decision of the EAC Council of Ministers which approved significant and meaningful directives related to air transportation at its 11th Meeting of the Council of Ministers in 2006. Schlumberger summarises the interventions of the Council of Ministers thus: ³²⁰

- The amendments to the bilaterals between the EAC states toward full implementation of the Yamoussoukro Decision on air transport liberalization are approved and must be incorporated into the respective bilaterals.
- The amendments include full liberalization of air services between any points within the territory of the EAC. Following the principles of the Yamoussoukro Decision, no restriction shall be posted on frequency, capacity or types of aircraft operated by designated EAC carriers.
- The EAC Secretariat is to inform the Economic Commission for Africa, with copies to COMESA and SADC, that the EAC is fully compliant with the Yamoussoukro Decision. The latter two organizations are urged to “expedite the move towards continental implementation of the Yamoussoukro Decision”
- The EAC Air Transport Subcommittee for implementation of the Yamoussoukro Decision will be staffed with an official responsible for administering the bilaterals and with officials from the civil aviation authorities, airport authorities, and the attorneys general chambers of each partner state.
- The heads of civil aviation and airport authorities of each partner state are authorized and instructed to renegotiate the funding for civil aviation safety and airport projects with their respective ministers of finance and to seek other resources for such projects.
- The revised civil aviation regulations for the EAC are to be promulgated to facilitate the establishment of the East African Civil Aviation Safety and Security Agency...The implementation of priority airport projects is approved.
- The EAC Secretariat must develop a comprehensive funding arrangement for the priority airport projects for consideration by the Sectoral Council on Transport, Communications and Meteorology.

³¹⁹ as above.

³²⁰ as above.

This directive of the Council of Ministers is decisive and is a significantly far greater implementation leap than that of the Treaty which talks to liberalisation of air traffic rights only. The directive states that the EAC is “*fully compliant with the Yamoussoukro Decision*” however, it is silent on the aspect of market access and air fares, but it really represents a far more liberal approach than that of COMESA which has ownership and control rules as a condition precedent of market access. Furthermore, the approach of the Council of Ministers to approve the amendments to bilaterals between the partner states *en masse* to be aligned with the Yamoussoukro Decision, as opposed to remitting that responsibility to individual partner states, is a demonstration of the political will of the partner states, as one of the founding principles of the Community, to comply with and implement the Yamoussoukro Decision. Possibly, the latter approach may have proved to be time-consuming and counterproductive to the liberalisation of air transportation services in the Community. The commitment of the EAC to the liberalisation of its air transport services market is also evinced in its decision to capacitate its Air Transport Subcommittee with dedicated resources for the implementation of the Decision.

The balance of the directives issued by the Council of Ministers really speaks to the funding of aviation infrastructure safety, and the harmonisation of the civil aviation rules and regulations of the partner states, with a view to form the Community’s Civil Aviation Safety and Security Oversight Agency (CASSOA) as per the import of some of the undertakings in Article 92 of the EAC Treaty, similar to the EU when it later formed the EASA to regulate air transport of the European Community. The Council of Ministers approved the establishment of CASSOA at an extraordinary meeting that took place on 18 June 2007.³²¹ According to Article 4 of the Protocol on the Establishment of the East African Community Civil Aviation Safety and Security Oversight Agency of 2007, the objectives of the CASSOA are to foster safe, secure and efficient use of and development of civil aviation³²² and assist the partner states

³²¹ East African Community Gazette, Vol. AT – No. 004, Arusha 30th December 2007, 28 gazettes.africa/archive/eac/2007/eac-gazette-dated-2007-12-30-no-4.pdf (accessed 25 October 2022).

³²² Refer to art 4(a) of the Protocol.

to meet their international safety and security obligations under the Chicago Convention and associated Annexes.³²³

The formation of a single safety and security agency by regional economic communities is not a principle that is explicitly scribed in the Decision but it must be regarded as a highly sensible, pragmatic, and supportive tool if air transport liberalisation is to be achieved, so that uniform rules and regulations are applied to what will become a common aviation market. It bears noting that the EAC developed and adopted a protocol for its safety and security agency, whereas for the implementation of the Yamoussoukro Decision and liberalisation activities, the Community utilised directives, an indication that air safety and security oversight is one of the main priorities for the EAC region insofar as air transportation services are concerned and this is consistent with the approaches of the EU and US which did not compromise safety in the course of liberalising air transportation services.

A study conducted by Intervistas³²⁴ and Abate³²⁵ *et al* unanimously finds that liberalised air services within the EAC region has yielded positive results for passengers and for the EAC economy at large, contributing to increased trade and tourism, inbound investment, growth of productivity, growth in employment, and economic development.³²⁶ Although a considerable number of the air services bilateral agreements between the EAC partner states were found to be partially liberalised, the studies positively suggest that the EAC could, with full liberalisation consistent with the Yamoussoukro Decision policy framework, enable a multilateral 'open skies' environment within the region.³²⁷ Abate *et al* correctly conclude that liberalisation leads to lower fares and increased frequencies and resultant higher passenger traffic,³²⁸ and one of the key reasons for the moderate uptake of the

³²³ Refer to art 4(b) of the Protocol.

³²⁴ InterVISTAS Consulting 'Costs and Benefits of 'Open Skies' in the East African Community (EAC)' (2016) tralac.org/images/docs/12689/costs-and-benefits-of-open-skies-in-the-eac-key-findings-eabc-intervistas-consulting-earf-september-2016.pdf (accessed 28 October 2022).

³²⁵ KM Abate, I Kincaid 'Effects of Air Transport Liberalisation in the East African Community (EAC)' (2020) 52 *Journal of Transport Economics and Policy* 440 ingentaconnect.com/content/lse/jtep/2018/00000052/0000004/art00005 [accessed 28 October 2022].

³²⁶ as above 442; InterVISTAS (n 324 above) 45.

³²⁷ as above.

³²⁸ KM Abate & I Kincaid (n 325 above) 427.

principles of the Decision is the paucity of clear and specific information.³²⁹ This therefore implies that the monitoring bodies established by the Decision need to conduct continuous information-sharing with State Parties on this aspect to foster an understanding of the impact of liberalisation. Another hindrance to liberalisation that was identified within the EAC region is poor airport infrastructure such as navigational aids, airline ownership and investment, technical human resources, and taxes.³³⁰ Taking into account that the EAC partner states elected to amend their BASAs to be aligned to the principles of the Yamoussoukro Decision instead of implementing the principles of Decision in their entirety, some of the key findings of the study by InterVISTAS of the current air service levels found that domestic and international air service offerings are both inadequate and costly, and as a result, travellers chose to travel by way of road to reach cities in the region due to poor air connectivity,³³¹ in circumstances where some of the road networks in the region are equally poorly maintained and renders the journey to be far much longer than if taken by way of air travel. Notwithstanding same, the study finds that the increased levels of air service and traffic has contributed positively to the EAC economy in areas of trade and tourism, investment, increased employment, growth in productivity and economic development,³³² an indication that the EAC region is on course to attaining a liberalised air transportation services market.

2.2.1 Conclusion

The EAC is a relatively smaller regional community, which, in terms of the EAC Treaty, takes decisions by way of mutual consent, and all things considered, this may make the politics and aeropolitics (a reference to the political relations prevailing in the air transport market), if any, attendant on matters of liberalisation, slightly more manageable. The EAC has made solid strides in the implementation of the Decision, *albeit* largely at the standard of consolidation and harmonisation of its civil aviation

³²⁹ n 325 above, 428.

³³⁰ InterVISTAS (n 324 above) 27.

³³¹ as above, 18.

³³² as above, 45.

rules and regulations. The adoption of an EAC visa enabling the peoples of the region to move freely between the partner states is simply consonant with the ideals of liberalisation of air services and the founding objectives of the Abuja Treaty, being the unity and integration of Africa and her peoples. Liberalisation of BASAs in the region will also complement the Northern Corridor Integration Projects involving Kenya, Rwanda and South Sudan³³³ which is aimed at expediting the development of infrastructure in the region.

The approach elected by the EAC to rather amend existing bilateral air services agreements between partner states to be aligned to the Decision is in conformance with Article 10.5 of the Decision which recognises the maintenance and development of bilateral agreements, on conditions that such bilateral agreements are not more restrictive than the obligations of the Yamoussoukro Decision. According to the directive by the Council of Ministers, the said amendments and alignment relate to flight frequency, capacity and types of aircraft to be operated by EAC carriers. The actual amendment of the bilateral agreements to fully conform to the framework principles of the Decision, will ensure that the EAC achieves its vision of an integrated East African Community and by extension, the aims of the Abuja Treaty and will definitely complement other regional initiatives already in place.

2.3 The Southern African Development Community

The Southern African Development Community (SADC) Declaration and Treaty were adopted at Summit by the Heads of State in August 1992, in Windhoek, Namibia.³³⁴ The adoption of the Treaty was preceded by the formation and existence of the Southern African Development Co-ordination Conference (SADCC), which was established as a vessel for economic and political emancipation of the region and for equitable regional integration,³³⁵ a precursor to the Treaty. The Declaration by the Heads of States of the Southern African states pins the regional integration of

³³³ The Northern Corridor Infrastructure Projects is an agreement between Rwanda, Kenya and South Sudan to develop transport, energy, customs infrastructure within the regions and cooperate on matters concerning defence, peace and security and human resources technical expertise.

³³⁴ SADC Treaty Declaration by the Heads of States or Government of Southern African States, (i).

³³⁵ n 334 above, 3.

Southern Africa to the principles of balance, equity and mutual benefit.³³⁶ The Declaration further takes cognisance of the difficult history of Southern Africa, marked by colonialism and racism, especially in South Africa, which was governed under an oppressive system of apartheid, in opposition to the national liberation movements and the consequent armed conflicts in South Africa and Zimbabwe. A resultant effect of this racially discriminatory system is that South Africa, under the apartheid government was economically and politically isolated from and sanctioned by the international community, which was the collaborative retaliation of the international community to the apartheid system. Akin to other regional treaties discussed elsewhere in this study, the adoption of the SADC Treaty is informed by and founded on the Abuja Treaty and the Lagos Plan of Action of 1980, which are clarion calls for continental integration.³³⁷

The broad strategy of the region on the area of transport, under the title ‘Infrastructure and Services’³³⁸ places emphasis on improved transport infrastructure and effective, cost-efficient, coordinated, and competitive transport systems. The strategy is captured thus in the Declaration:

In order to enhance services to the people of the region, to support industrial development and growth, and promote intra-regional trade; the rehabilitation and upgrading of existing, and development of new transport and communication and energy systems will remain a priority.

Emphasis will also be placed on increased and effective operational coordination, towards efficiency, cost-effectiveness and competitiveness, or order to ensure economic viability of the systems.

The SADC regional economic community comprises of 15 member states: Angola, Botswana, the Democratic Republic of Congo, Kingdom of Eswatini, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa,³³⁹ Tanzania,

³³⁶ n 334 above, (ii).

³³⁷ n 334 above, 2. Para 10 of the Preamble to the Treaty also provides –

“TAKING INTO ACCOUNT the Lagos Plan of Action and the Final Act of Lagos of April 1980, and the Treaty establish the African Economic Community signed at Abuja, on 3rd of June, 1991;”

³³⁸ SADC Treaty Declaration, 7.

³³⁹ At the time of its adoption in 1992, South Africa was still under apartheid rule and as stated, it was isolated from participation in the regional and international communities and economies. Therefore,

Zambia, and Zimbabwe. Article 4 of the SADC Treaty provides that the organisation is guided by the principles of –

- a) sovereign equality of all Member States;
- b) solidarity, peace and security;
- c) human rights, democracy and the rule of law;³⁴⁰
- d) equity, balance and mutual benefit;
- e) peaceful settlement of disputes.

The regional objectives of SADC are set out in Article 5 of the Treaty and in the main, the SADC exists to achieve development and economic growth of the region, alleviate poverty, improve the standard and quality of the life its regional peoples through regional integration.³⁴¹ The inclusion of the word ‘Development’ in the name of the region is telling of the socio-economic circumstances of the region, marked by a history of injustices to human rights in some of the member states. The objectives include, *inter alia*, common political values, systems and institutions that will evolve,³⁴² the promotion and defence of peace and security,³⁴³ and the strengthening and consolidation of historical social and cultural ties among the people of Southern Africa.³⁴⁴ In order to achieve its objectives, the SADC shall:³⁴⁵

- a) harmonise political and socio-economic policies and plans of Member States;
- b) encourage the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC;

South Africa acceded to the SADC Treaty on 29 August 1994, after the installation of a democratic government. These are the peculiar circumstances of some of the SADC member states referred to in the study.

³⁴⁰ This principle is a direct redress to the political history of some of the member states such as South Africa.

³⁴¹ Art 5, para 1, subpara (a) of the Treaty provides that the objectives of SADC shall be to: “achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.”

³⁴² Refer to art 5, para 1, subpara (b).

³⁴³ Refer to art 5, para 1, subpara (c).

³⁴⁴ Refer to art 5, para 1, subpara (h).

³⁴⁵ Art 5, para 2 of the SADC Treaty.

- c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of the programmes and operations of SADC and its institutions;
- d) develop policies aimed the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States;
- e) promote the development of human resources;
- f) promote the development, transfer and mastery of technology;
- g) improve economic management and performance through regional co-operation;
- h) promote the coordination and harmonisation of the international relations of Member States;
- i) secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the Region;
- j) develop such other activities as Member States may decide in furtherance of the objectives of this Treaty.

The harmonisation of policies and plans of the SADC member states, and the development of policies to progressively remove hurdles to the transportation of goods and people are aligned to the objectives of liberalisation. At a supranational level such as in RECs, the harmonisation of policies is necessary and sensible to obtain a seamless implementation of the Yamoussoukro Decision principles. The allowance for member states to develop other activities to further the objectives of the Treaty is significant insofar as the areas of co-operation are concerned. Similar to the EAC and COMESA treaties, decisions in the SADC are taken by way of consensus at the highest level of decision-making which is the Summit³⁴⁶ which consists of the Heads of State or Government of all member states. Decisions taken at the Summit level are binding.³⁴⁷

³⁴⁶ Refer to article 10, para 1, sub-para 8.

³⁴⁷ as above.

In terms of the areas of co-operation, the SADC member states have agreed to co-ordinate, harmonise and rationalise their overall macroeconomic and sectoral policies, and related programmes, projects and strategies.³⁴⁸ The specific areas of co-operation listed in Article 21, paragraph 3 of the Treaty are:

- a) food security, land and agriculture;
- b) infrastructure and services;
- c) industry, trade, investment and finance;
- d) human resources development, science and technology;
- e) natural resources and environment;
- f) social welfare, information and culture; and
- g) politics, diplomacy, international relations, peace and security.

A reading of these areas of co-operation, it is apparent that there is no specific mention of transport as an area of co-operation. It becomes necessary to revert to the Declaration of the Heads of State that precedes the Treaty, wherein transport is referred to as part of its broad strategy on infrastructure and services,³⁴⁹ with the emphasis on transport infrastructure and systems. Notwithstanding same, Article 21, paragraph 4³⁵⁰ allows the SADC Council to decide upon other areas of co-operation which have not been identified in subparagraph 3. This therefore means that the areas of co-operation are not a closed list and there is scope for member states, under the authority of the Council, to identify and enter into other areas collaboration.

The SADC member states, in order to better define the scope and objectives related to the areas of co-operation, are directed to enter into and conclude Protocols for this purpose. Article 22 provides:

³⁴⁸ Refer to art 21, para 2.

³⁴⁹ See n 338 above.

³⁵⁰ Art 21, para 4 provides:

“Additional areas of co-operation may be decided upon by the Council.”

1. Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.
2. Each Protocol shall be approved by the Summit on the recommendation of the Council, and shall thereafter become an integral part of this Treaty.
3. Each Protocol shall be subject to signature and ratification by the parties thereto.

The criticism in this regard is thus: the adoption of Protocols to define policy, deliverables and priorities in areas of co-operation is, respectfully, a somewhat cumbersome and potentially time-consuming manner of fulfilling the objectives of the SADC Treaty, considering that Protocols must be approved at the level of the Summit. However, it may have been elected to be done in that manner, in consideration of the varying and contrasting degrees of economic and political development and stability amongst member states, at the time of the adoption of the Treaty which, it is submitted, is a balanced approach and mechanism. To this end, the SADC member states adopted the Protocol on Transport, Communications and Meteorology to define the objectives and priorities in these areas of co-operation, which is analysed hereunder to determine the outlook and progress of the region on the implementation of the Yamoussoukro Decision framework principles and the liberalisation of its air services market.

2.3.1 The Protocol on Transport, Communications and Meteorology in the SADC Region

The Protocol on Transport, Communications and Meteorology (Protocol) was signed by the member states on 24 August 1996 and became effective on 6 July 1998³⁵¹ and it details the objectives and policy of the SADC on all modes of transport, communications, and meteorology. The general objectives of the member states regarding these areas of co-operation are explained in Article 2.3 of the Protocol thus

—

³⁵¹ Schlumberger (n 16 above) 102.

Member States' general objective is to establish transport, communications and meteorology systems which provide efficient, cost-effective and fully integrated infrastructure and operations which best meet the needs of customers and promote economic and social development while being environmentally and economically sustainable.

The objective to establish transport operations which are efficient, cost-effective and fully integrated and promote economic and social development is an objective that is within the spirit of liberalisation of the air services market. The Protocol's objective, however, does not speak to the issue of a competitive transport system which may have been an unintended oversight on the part of member states. However, one of the strategic goals for the integrated transport policy of the region is to allow all modes of transport the necessary economic space to operate in a self-sustaining free market environment.³⁵²

To effectuate the general objective, Article 2.4 sets out a list of strategic goals, which for the purposes of air transportation liberalisation, are, *inter alia*:

- (a) Integration of regional transport, communications and meteorology networks to be facilitated by the implementation of compatible policies, legislation, rules, standards and procedures;
- (b) Elimination of reduction of hindrances and impediments to the movement of persons, goods, equipment and services;
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) regional and global competitiveness of the Community's large and small service providers;
- (h) ...
- (i) ...
- (j) ...
- (k) ...

³⁵² Art 3.2, para 2(f) provides:

"Member States shall apply the following principles –

(f) all modes of transport are allowed the necessary economic space to operate in a self-sustaining free market environment."

- (l) improved diversity of services and provision of services on a competitive basis through the promotion of fair and healthy competition between service providers in terms of transparent, flexible, predictable and streamlined regulatory framework;

The policy of the region on civil aviation is laid out in Chapter 9 of the Protocol, commencing with the objectives for the air transportation sector laid out in Article 9.1 thereof, which takes recognition of aviation as a means of serving the national interests of the SADC member states and aiding the socioeconomic development of the region, in accordance with the ICAO safety standards and recommended and practices.³⁵³ The member states further recognise, as part of its objectives on civil aviation, that enhanced regional co-operation is necessary to become globally competitive, overcome the small market share of its airlines and the market restrictions.³⁵⁴ The focal point of the policy objectives are to improve regional air services to be safe, secure and cost-efficient, and increase the market share of regional airlines, through regional co-operation. Accordingly, and in order to accomplish these objectives, in Article 9.2, the member states consent to –

- ...develop a harmonized regional civil aviation policy in respect of, amongst others –
 - (a) the gradual liberalization of intra-regional air transport markets for the SADC airlines;
 - (b) regionally owned airlines;
 - (c) the economic concomitant institutional restructuring of the SADC airlines, airports and the provision of air traffic and navigation services in a phased and co-ordinated manner,

³⁵³ Art 9.1, para 1, of the Protocol provides:

“Member States, recognizing the importance of air transport as a means of serving the national interests of the SADC Member States and the importance of promoting social and business relations amongst their nationals, shall ensure the provision of safe, reliable and efficient services in accordance with the ICAO SARPs, with a view to improving service levels of service and cost-efficiency in support of the socio-economic development of the region.”

³⁵⁴ Art 9.1, para 2, of the Protocol provides -

“Member States recognise further that in order to overcome the constraints of small national markets, market restrictions and the small size of some SADC airlines and further to ensure the competitiveness of regional air services in a global context, there is a need for enhanced co-operation within the regional air transport market.”

Liberalisation is given a mention in the policy, without any clear targets or priorities and that it shall be gradually pursued in the region, consistent with the principles of the Yamoussoukro Decision which signifies that the region acknowledges the *raison d'être* of the Yamoussoukro Decision – liberalisation of African air services. The policy also carries the aims of the Declaration, to foster co-operation amongst African airlines with a view to eventual integration of same.³⁵⁵ Article 9.3 of the Protocol details how the member states will improve the commercial viability of the regional airlines. In its regional co-operation undertakings, the SADC member states, like other RECs, are alive to the ICAO standards and recommended practices for air safety and security and commit to comply with these requirements.³⁵⁶ The uptake of the principles of the Decision by the SADC region for the liberalisation of its intra-regional air transportation services market has been moderate and this view is shared by Disenyana and Khumalo who observe that implementation of the Decision by the Southern African Customs Union (SACU) Member States has been slow;³⁵⁷ progress has however been made by its involvement in the formation of the joint competition authority with COMESA and EAC for this purpose of managing the anti-competitive effects of liberalisation.

Notwithstanding the slow pace of implementation in the region, Disenyana *et al*³⁵⁸ identify some progressive projects of the region which are within the scope of liberalisation. These projects are targeted at co-operation in other areas contingent with air transportation as opposed to direct liberalisation thereof, which may in the long run create an enabling environment for full implementation of the Yamoussoukro Decision principles. These efforts are:³⁵⁹

- The SADC Cooperative Development of Operational Safety and Continuing Airworthiness Project (COSCAP), which is purposed to assist member states overcome shortcomings in their systems to ensure safety in air transport. The project was approved, subject to the securing of

³⁵⁵ Refer to art 9.3, para 2(b) which specifically makes mention of airline integration and the establishment of regionally owned airlines.

³⁵⁶ Refer to art 9.4 of the Protocol.

³⁵⁷ T Disenyana & N Khumalo 'Transport Services in SACU: Accelerating Harmonisation and Liberalisation' (2009) SAIIA Research Report 1, Development Through Trade Programme, 36 www.saiia.org.za (accessed 28 November 2021).

³⁵⁸ as above, 37.

³⁵⁹ as above.

funds by the SADC Secretariat and ICAO. The project was borne from audits conducted by the ICAO which found that all SADC member states, to varying degrees, have paucities in their safety oversight capacity. The project will further address gaps in aviation legislation and regulation relating to personnel licensing, airworthiness, certification, surveillance and harmonisation of regulations.

- The civil aviation authorities of the SADC region decided to explore the implementation of the Upper Airspace Control Centre Project, an area of air traffic management, with the aim of integrating the air traffic services of the region under one regional upper space control centre. This arrangement will enable the provision of a singular air traffic management service in the whole of the SADC area – merging of the SADC airspace.
- The SADC launched the Communications, Navigation and Surveillance Project from the SADC airspace to aid communication, navigation and surveillance of aircraft in the region. For this purpose, a first-generation Very Small Aperture Terminal network was developed and is co-ordinated by the Air Traffic Navigation Services of South Africa.

Although the region has not taken further steps to implement the principles of the Decision, it appears that SADC member states have decided rather to address the safety deficiencies in its air transport and shape-up the commercial operations and market share of its regional airlines. Co-operation is taking place in the sphere of air traffic control with the goal of creating one upper regional airspace. One of the glaring challenges with the SADC member states is its continued practice of protecting its flag carriers, some of which are ailing.

Nonetheless, the structures of the SADC region, especially the Summit, being the highest-ranking decision-making body with binding decisions, can do more to regionalise the principles of the Decision which will have extensive effects on the economies of the member states and on the ultimate treaty objective of poverty alleviation.

2.3.2 The implementation of the Yamoussoukro Decision by South Africa

Although the regional optics related to the implementation of the Decision are comparatively lagging, South Africa has, individually, as a state, embraced the tenets

of the Yamoussoukro Decision and this is reflected in the bilateral agreements it has concluded with some of its fellow SADC member states and it is patriotically apt to dedicate a portion of this study to the progress made by South Africa to implement of the Yamoussoukro Decision in its civil aviation environment.

The policy outlook of South Africa on commercial international air services is informed by its Airlift Strategy adopted in 2006 and is driven by the Department of Transport, which mainly took into consideration the air transport needs of the trade and tourism sectors³⁶⁰ and aimed at, *inter alia*, the creation of growth of the air transport market³⁶¹ and providing passengers and enterprises of the industry with reasonable flexibility and choice within the market.³⁶² The disposition of South Africa in relation to the Yamoussoukro Decision is captured thus in the Airlift Strategy –

...South Africa has opted to implement the spirit of the YD on a bilateral level with willing partners as an interim measure, pending full implementation of the YD across Africa. The DOT has also embarked on the development of an approach aimed at accelerating the implementation of YD. This will include an econometric study to quantify the economic cost of regulatory constraints, including benefits that could be reaped as a direct result of the implementation of the Yamoussoukro Decision. This will guide South Africa's approach towards YD when engaging with the African Union, NEPAD and bilateral counterparts in Africa.

It is on these premises that the South African government has shaped its bilateral engagements with bilateral counterparts on air transportation agreements, of which a brief review ensues hereunder.

(i) Memorandum of Understanding between South Africa and Mozambique

The Memorandum of Understanding (MOU) for the implementation of the associated BASA, concluded between South Africa and Mozambique encompasses all the

³⁶⁰ Department of Transport Airlift Strategy, July 2006. Para 1.1 of the Airlift Strategy states that, "It is recognised that the Strategy at this stage focuses mainly on the air transport needs of the trade and tourism sectors and does not necessarily address the requirements of all Government Departments."

³⁶¹ Para 1.3 of the Airlift Strategy.

³⁶² as above.

principles of the Yamoussoukro Decision. Clause 4.1 of the MOU states that the purpose of reviewing the BASA is to align it “with the current developments of liberalizing air services within the continent”. In terms clause 4.2, there are no restrictions on capacity, frequency and aircraft types on services offered on passenger and cargo services.³⁶³ The MOU grants “multiple designation on all routes, from all entry points in both countries.”³⁶⁴ This is a provision more generous than the Decision which requires the designation of at least one airline to operate air transportation services within Africa.³⁶⁵ The states agree that the tariffs to be charged by the designated airlines shall be according to market forces.³⁶⁶ The designated airlines are granted unrestricted access to routes from any point within the states, on a reciprocal basis,³⁶⁷ with the privilege to exercise unrestricted fifth freedom traffic rights on intra-African route points in line with the principles of the Decision.³⁶⁸ The MOU further authorises designated airlines to enter into code-sharing arrangements on the agreed routes,³⁶⁹ consistent with Article 11.3 of the Yamoussoukro Decision.

The MOU between South African and Mozambique unequivocally epitomises the full embracing and implementation of the principles of the Decision, and on some aspects surpasses the minimum principles of the Decision and reflects the appreciation of the respective governments of liberalisation of the internal air transport market, at least *inter se* the states.

³⁶³ Clause 4.2 reads:

“There shall be no limit on the number of frequencies and capacity offered on passenger and all cargo air services linking any city pair combination between and beyond the Contracting Parties. Designated airlines shall be allowed to operate the capacity and frequency as deemed appropriate with any aircraft type and size.”

³⁶⁴ Clause 4.3 of the MOU.

³⁶⁵ Refer to art 6.1 of the Decision.

³⁶⁶ Clause 4.4 of the MOU. Parties undertake to advise each other if the air tariffs are deemed to be anti-competitive.

³⁶⁷ Annexure C of the MOU.

³⁶⁸ Clause 4.7 reads:

“The designated airlines may exercise unrestricted 5th freedom traffic rights on intra-African points in accordance with the Yamoussoukro Decision.”

³⁶⁹ Annexure B of the MOU.

(ii) Memorandum of Understanding between South Africa and Namibia

The MOU on air transport arrangements signed between South Africa and Namibia is slightly restrictive than the provisions of the Yamoussoukro Decision on some areas. On frequency and capacity, clause 3.1 of the MOU mirrors Article 5.1³⁷⁰ of the Decision and places no restrictions on capacity, frequency and aircraft type, subject to environmental, safety or technical considerations. Tariffs of designated airlines are subject to the double disapproval regime,³⁷¹ meaning that an airfare can be disapproved only if the governments of Namibia and South Africa do not agree and only for certain, specified reasons intended to safeguard competition. It therefore means that, in terms of this MOU, air tariffs are subject to market forces unless they are found, by both governments, to impugn or distort fair competition in the market. The MOU limits the designation of airlines to three per route per state, in respect of passenger services,³⁷² which is still more generous than the minimum prescribed by the Decision. Insofar as air traffic rights are concerned, the MOU grants the designated airlines unrestricted freedoms of the air from the first to the fifth,³⁷³ consistent with the principles of the Yamoussoukro Decision.

Although it contains restrictions, more so on the air tariffs, the MOU between South Africa and Namibia is liberalised in accordance with the Decision and has room for increased liberalisation of the air services network between the two countries.

(iii) The Memorandum of Understanding between South Africa and Botswana

Botswana and South Africa concluded an MOU for air services arrangements, in terms of which, the contracting states acknowledge and recognise the principles of the

³⁷⁰ Art 5.1 of the Decision provides: -

“Subject the provisions of Article 3, there shall be no limit on the number of frequencies and capacity offered on air services linking any city pair combination between the State Parties concerned. Each Designated Airline will be allowed to mount and operate such capacity and frequency as such airline deems appropriate. Consistent with this right, no State Party shall unilaterally limit the volume of traffic, the type of aircraft to be operated or the number of flights per week, except for environmental, safety, technical or other specific considerations.”

³⁷¹ Clause 3.2 of the MOU.

³⁷² Clause 3.3 of the MOU. Insofar as air cargo services are concerned, the Parties agree that it shall be dealt with on an ad hoc basis.

³⁷³ Clause 3.5 of the MOU.

Yamoussoukro Decision as it is stated in the MOU that they shall adopt a new BASA containing the “approach of the Yamoussoukro Decision (YD)”. The MOU places no restrictions on capacity and frequency for passenger and air cargo services on the agreed routes.³⁷⁴ The multiple designation of airlines on the agreed routes is allowed,³⁷⁵ which are open routes and include the fifth freedom for both passenger and cargo services.³⁷⁶ Similar to the MOU between South Africa and Namibia, air tariffs are also subject to double disapproval.³⁷⁷ The MOU goes further to encourage SADC airlines to cooperate through code share arrangements, which the contracting states also agree to in the MOU.³⁷⁸

This MOU reflects the spirit of the Yamoussoukro Decision and is full alignment to the framework principles, practically creating an “open skies” market between the two states.

(iv) The Memorandum of Understanding between South African and Zambia

The MOU entered into between South Africa and Zambia make provision for unrestricted frequencies and capacity on passenger and cargo services on offer between and beyond the states and with no restrictions on aircraft type, subject to competition rules.³⁷⁹ The contracting states agree to the multiple designation regime,³⁸⁰ and tariffs to be charged by designated airlines to be set according to market forces. Analogous to the contractual arrangements with other states, South Africa and Zambia included a code share framework for designated airlines in terms of this MOU.³⁸¹ The designated carriers of the two states enjoy a reciprocal open route arrangement on any points within the two states,³⁸² with the privilege of fifth freedom on intermediate and points beyond.³⁸³

³⁷⁴ Clause 3.2 of the MOU.

³⁷⁵ Clause 3.3 of the MOU.

³⁷⁶ Clause 3.7 of the MOU.

³⁷⁷ Clause 3.4 of the MOU.

³⁷⁸ Clause 3.5 of the MOU

³⁷⁹ Clause 4.2 of the MOU.

³⁸⁰ Clause 4.4 of the MOU.

³⁸¹ Clause 4.5 of the MOU and Annexure C.

³⁸² Clause 4.6 of the MOU and Annexure D.

³⁸³ Clause 4.7 of the MOU.

This bilateral agreement is consistent the minimum principles of the Yamoussoukro Decision and makes generous provision for multiple designation of airlines whereas the Decision requires only at least the designation of one airline.

(v) *The Memorandum of Agreement between South Africa and Tanzania*

In their MOU, the contracting states agree to the multiple air carrier designation regime, subject to conformance with the ICAO SARPs for safety, by the designated airlines.³⁸⁴ The MOU also makes allowance for the designated airlines of the contracting states to enter into cooperative marketing and commercial arrangements, subject to the applicable laws and the conditions associated thereto.³⁸⁵ The contracting states also adopt the non-regulated tariff regime, and thereby permitting market forces to determine the price of air fares between the two states. The MOU however draws a distinction between the passenger and cargo capacity and frequencies. Insofar as it relates to passenger services, the designated airlines of each contracting state are allowed to operate a maximum of 28 flights per week, using any type of aircraft. The parties agree that an increase in passenger services frequencies shall be favourably considered through correspondence, once the agreed 28 flights have been exhausted.³⁸⁶ However, insofar as air cargo services are concerned, the designated carriers of the contracting states are permitted to conduct cargo flights with no restrictions on capacity or frequency, with owned or leased aircraft, and may exercise fifth freedom cargo traffic rights to and from any intermediate point and beyond;³⁸⁷ therefore, air cargo services between the two states are completely liberalised. For passenger services, the states agree that the designated airlines of either contracting state may exercise fifth freedom air traffic

³⁸⁴ Clause 3(a) of the MOU reads –

“The Parties confirmed the multiple designation regime and agreed that designation of airlines must ensure safety oversight is adhered to and be in conformity with ICAO Standards and Recommended Practices and associated procedures contained in the Annexes to the International Civil Aviation Convention and related documents.”

³⁸⁵ Clause 4 of the MOU.

³⁸⁶ Clause 7.1 of the MOU reads:

“Pursuant to the Article 2 and Article 3 of the initialled ASA, the Parties agreed that, the designated airline(s) of each Contracting Party shall be permitted to operate up to 28 flights in total per week, using any type of aircraft. It was further agreed that any increase in frequencies will be favourably considered through correspondences, once the agreed 28 have been exhausted.”

³⁸⁷ Clause 7.2 of the MOU.

rights only on the sectors not serviced by the designated airline of the other contracting state and this privilege will cease six months after commencement of operations by the designated airline of the other contracting state.³⁸⁸

This MOU is comparatively slightly restrictive than the ones South Africa has concluded with other member states, analysed above, particularly on the fifth freedoms, and the capacity and frequencies for passenger services. Perhaps this is so because Tanzania has overlapping membership with the both the EAC and the SADC and places such limitations to safeguard its domestic air travel market and airlines. However, in the main, this agreement encompasses the principles of the Yamoussoukro Decision.

2.3.3 Conclusion

The implementation of the Yamoussoukro Decision in the SADC region seems to be moderate, a state of affairs possibly attributed to varied levels of economic development amongst its member states and the retention of protectionist state policies and practices towards national carriers, which in turn impedes new entrants or low-cost carriers from accessing the region's air transportation market. This is an observation shared by Steyn and Mhlanga too, who decry the resultant effect of high travelling costs on passengers.³⁸⁹

Member States such as South Africa have opted to rather apply the principles of the Yamoussoukro Decision in government-to-government agreements as part of their framework air services agreements. The economies of the SADC member states are largely developmental and more than anything, more political will is required to improve and expedite the implementation of the Yamoussoukro Decision. The Protocol, which is the more detailed policy document on transportation, mentions that there shall be gradual liberalisation of the SADC air transport services and nothing more; however, there is no implementation plan such as the Legal Notice adopted by

³⁸⁸ Clause 8 of the MOU.

³⁸⁹ JN Steyn & O Mhlanga (n 87 above) 11.

COMESA, for example. In the absence of a clear and binding plan, member states may get lost to the meaning of 'gradual liberalisation'. There is also a lack of expertise skill and institutions within the region to deal with matters of competition,³⁹⁰ which is an inevitable adjunct to the process of market deregulation. The condemnation by Steyn *et al* is that governments regard the implementation of the Yamoussoukro Decision as a discretionary matter because the Decision carries no punitive provisions for the failure by State Parties to implement it;³⁹¹ whilst there is some merit in this criticism, this view cannot be wholly concurred with and the arguments on the developing economies of the SADC region are repeated herein. The inclination of governments is to first protect its economies and therefore, continued education and information-sharing by the bodies established in the Yamoussoukro Decision is encouraged, to foster a better understanding of the benefits of cultivating open skies in the SADC region amongst member states, and eventually in the whole of Africa.

Whilst more collaborative and joint efforts have been applied in other equally important areas of air transportation, such as safety and a move towards the single control of the SADC airspace which functions in tandem with a liberalised regional airspace, air transportation must be enabled to move goods and the peoples of the region without barriers within the region and this can be done through the full implementation of the Yamoussoukro Decision, even on a gradual basis which is precisely what is envisaged in the framework document. Currently and in consideration of the prevailing political conservatism, BASAs remain the vehicle by which the implementation of the Yamoussoukro Decision is accomplished, which is the case in other regional economic communities too. There is however an opportunity for the SADC region to do more in this regard.

2.4 The Economic Community of the West African States

The Economic Community of West African States (ECOWAS) REC consists of 15³⁹² African states situated in the west of the continent, namely: Benin, Burkina Faso, Cape

³⁹⁰ as above.

³⁹¹ JN Steyn & O Mhlanga (n 389 above) 12.

³⁹² The Islamic Republic of Mauritania was initially part of ECOWAS, but it withdrew from the REC in 2002.

Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Historically, the ECOWAS region went through some challenges in its initial establishment, with a lack of political will for the ratification of trade liberalisation legal instruments by some member states,³⁹³ resulting in the drawing up and adoption of a revised treaty for the REC in 1993, known as the ECOWAS Revised Treaty.³⁹⁴

The ECOWAS Commission identified a myriad of challenges within the ECOWAS region which have hindered the liberalisation of the region's intra-air transportation market which are:³⁹⁵

- Political: where political unrest has occurred in the region, it has resulted in damage to airport infrastructure, facilities and equipment and adverse impact on the confidence of passengers;
- Protectionist attitudes: the unwillingness of some Member States to grant air traffic rights aligned to the principles of the Yamoussoukro Decision;
- Socio-economic ills: of the marginalisation of west Africa since the collapse of some its commercial airlines (Air Afrique, Nigeria Airways, Ghana Airways) has led to constraints in setting up a competitive and profitable air carrier. There is also the presence of insufficient air connectivity between the capital cities of ECOWAS Member States; poor co-operation between ECOWAS air carriers on matters such as flight scheduling, interline agreements and alliance formations; and insufficient technically skilled human resources;
- High operating costs of airlines: these are costs as they relate to taxes and fees for fuel, insurance, maintenance, training of personnel and high fares for cargo customers. The high interest rates from aircraft leasing companies also compounds the challenge of high operating costs as none of the ECOWAS carriers own their aircraft;
- Poor access to financing for airlines and high interest rates. ECOWAS carriers often purchase used aircraft that are available at low cost on the market;
- Poor air navigational and air traffic control infrastructure and equipment at aerodromes; and
- Low standards of air safety and security: maintenance on the aged aircraft is not done well, the certification of aerodromes is poor, and the ICAO audits have identified a number of shortcomings in aviation safety and security in some Member States.

³⁹³ Schlumberger (n 16 above) 73.

³⁹⁴ The ECOWAS Treaty is entitled the 'Revised Treaty'.

³⁹⁵ Presentation by PAM Ganemto, ECOWAS Commission, "Improving Flight Connections in ECOWAS Region" Special Air Transport Meeting of ECOWAS Member States, Accra Ghana, (28 March 2017), https://www.icao.int/Meetings/SUSDEV-AT/Documents/Presentation_Ganemto%20ECOWAS.pdf (accessed 11 October 2022).

The ECOWAS community however presents with a unique *modus operandi* insofar as the air transportation policy in the region is concerned. Amongst the ECOWAS member states, two languages are predominantly spoken, English and French, which formed the basis for extended regional identity and collectivism, particularly in the area of the air transportation policy and implementation of the Yamoussoukro Decision. Consequently, ECOWAS split into two distinct groups for this purpose being the Banjul Accord Group (BAG) comprising of seven predominantly English-speaking states, and the West African Economic and Monetary Union (WAEMU), comprising of eight French-speaking countries in 1997 and 1994, respectively.³⁹⁶ The air transportation policies of these subregional organisations shall also be analysed in this discussion. The ECOWAS can be regarded therefore, as an umbrella organisation of the West African states. The existence of these subregional organisations as drivers of implementation of the Yamoussoukro Decision nonetheless accords with the provisions of Article 12.2 thereof.

2.4.1 The ECOWAS Revised Treaty

The ECOWAS Revised Treaty, analogous with the treaties of other RECs, is informed by the Abuja Treaty which is the cornerstone of the creation of the AEC project. Mindful of the lack of political will of some Member States in the past, one of the things member states are convinced of, and which is recorded in the preamble to the Revised Treaty is –

...that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will;

A further aim of ECOWAS as captured in the preamble to the Revised Treaty, which is indicative of the trajectory of the region on the issue of the economy, is for the REC to finally culminate into the economic union of West Africa through accelerated and

³⁹⁶ Schlumberger (n 16 above) 72.

sustained economic development.³⁹⁷ Article 2, paragraph 1 of the Treaty corresponds to this ultimate aim of the Community and provides –

THE HIGH CONTRACTING PARTIES, by this Treaty, hereby re-affirm the establishment of the Economic Community of West African States (ECOWAS) and decided that it shall ultimately be the sole economic community in the region for the purpose of economic integration and the realisation of the African Economic Community.

It is arguable that, with the separation of ECOWAS into WAEMU and BAG for the purposes of implementation of the Yamoussoukro Decision as aforementioned, it goes against this spirit of the Revised Treaty to form a sole economic community in the west African region however, as indicated in the Revised Treaty, it is the ultimate aim, and not an immediate one. The aims and objectives³⁹⁸ of the ECOWAS Community are, summarily, to promote co-operation and integration and raise the standard of living of its peoples. To achieve this stated aim, the ECOWAS region shall ensure,³⁹⁹ *inter alia*

–

- a) the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications...
- b) ...
- c) ...
- d) the establishment of a common market through;
 - i) ...
 - ii) ...
 - iii) the removal, between Member States, of obstacles to the free movement of persons, goods, services and capital and to the right of residence and establishment;

³⁹⁷ Para 13 of the Preamble reads:

“AFFIRMING that our final goal is the accelerated and sustained economic development of Member States, culminating in the economic union of West Africa;”

³⁹⁸ Art 3, para 1 provides –

“The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations – among Member States and contribute to the progress and development of the African Continent.”

³⁹⁹ Refer to art 3, para 2 of the Revised Treaty.

The air transportation sector is dealt with in Article 32, paragraphs (f) and (g) of the Revised Treaty, under the broad title of transport, and there is no separate article in the Revised Treaty dedicated solely to it. Article 32 provides:

1. For the purpose of ensuring the harmonious integration of the physical infrastructures of Member States and the promotion and facilitation of the movement of persons, goods and services within the Community, Member States undertake to:
 - a) evolve common transport and communications policies, laws and regulations;
 - b) ...
 - c) ...
 - d) ...
 - e) ...
 - f) Encourage co-operation in the flight-scheduling, leasing of aircraft and granting and joint use of fifth freedom rights to airlines of the region;
 - g) promote the development of regional air transportation services and endeavour to bring about the merger of national airlines in order to promote their efficiency and profitability;

These provisions of the Revised Treaty, apart from calling for the harmonisation of transport policies and the development of common transport policies and barring the shared enjoyment of fifth freedom rights by airlines, are silent on liberalisation of the air transportation sector, particularly in consideration of the aim of the Treaty to enable the unrestricted flow of persons and goods within the ECOWAS region. The emphasis of the Revised Treaty, insofar as air transportation is concerned, is on co-operation in matters of flight-scheduling, leasing of aircraft and the merging of national airlines to improve their profitability, which all are doctrines of the earlier Yamoussoukro Declaration which is a recurring feature in other African regional air transportation policies. All these objectives are the responsibility of the ECOWAS Commission, which is tasked with the duty of coordination and harmonisation of policy, programmes, actions, projects, as entrusted to it by member states informed by the Chicago Convention, Yamoussoukro Declaration, Yamoussoukro Decision, and SAATM amongst others. In cognisance of the silence of the Revised Treaty on this particular

aspect and the need to define its air transportation liberalisation programme within a common Community legal framework and harmonise the national policies of member states accordingly, the ECOWAS Heads of States and Government, the highest decision-making structure in the Community, adopted several supplementary Acts in this regard in the subsequent years, on recommendation by the Project Secretariats of both the ECOWAS and CEMAC regions, which Acts are examined hereunder.

(i) *Decision A/DEC.7/7/96 on the Conclusion of a Multilateral Air Transport Agreement Among Member States*⁴⁰⁰

Earlier in 1996, prior to the adoption of the Yamoussoukro Decision, the member states of ECOWAS, through its Heads of State and Government, adopted a decision to conclude a multilateral air transport agreement “establishing a single air space within the Community”.⁴⁰¹ This Decision was adopted with the appreciation of the then prevailing Yamoussoukro Declaration, with reference to the provisions of Article 2 thereof which provide:

The Executive Secretariat shall monitor and also ensure the implementation of this decision in collaboration with Member States coordinating the implementation of the Yamoussoukro Declaration in West Africa.

The region was, in this Decision, clearly motioning towards the establishment of a liberalised air space underpinned by the commitment to cooperate in transport and communications in the Revised Treaty⁴⁰² and the need to develop air transport services within ECOWAS,⁴⁰³ even though the Yamoussoukro Decision was not yet in place.

⁴⁰⁰ <http://ecowas.akomantoso.com> (accessed 11 November 2022).

⁴⁰¹ Refer to art 1 of the Decision.

⁴⁰² Refer to para two of the Preamble to the Decision.

⁴⁰³ Refer to para four of the Preamble to the Decision.

(ii) Decision A/DEC.6/12/03 Relating to the Liberalisation of the Air Transport Sector in West Africa⁴⁰⁴

On 19 December 2003, the Heads of State and Government of the ECOWAS Community adopted Decision A/DEC 6/12 which was the first call deploring the delayed pace of implementation of the Yamoussoukro Decision in Africa, and a call to the ECOWAS member states and the Central African region to liberalise their aviation markets.⁴⁰⁵ The inclusion of Central Africa in this Decision marks the air interconnectivity between the two regions, which culminated in the signing of a MOU between the two regional organisations for the implementation of their policy on air transportation as defined therein and signed in Yamoussoukro on 14 November 1999.⁴⁰⁶ In terms of Article 1 of this Decision, an Action Plan for the implementation of the Yamoussoukro Decision is approved. Article 2 of the Decision further calls on member states to –

...expedite action on the implementation of all the measures and activities identified in the action plan.

Pursuant to the adoption of this Decision, the Community undertook feasibility studies on air transport economic regulation between 2004 and 2005, which studies were financed by the World Bank and the African Development Bank and, in the process, an Air Transport Harmonization Committee was formed by the Council of Ministers.⁴⁰⁷ This Committee was assigned the responsibility for the development of common regulations for the economic regulation of air transportation for both ECOWAS and the

⁴⁰⁴ <http://ecowas.akomantoso.com> (accessed 11 November 2022).

⁴⁰⁵ The Preamble to this Decision reads –

“Mindful of Articles 7, 8 and 9 of the ECOWAS Treaty establishing the Authority of Heads of State and Government and defining its composition and functions;

Mindful of the 1999 Yamoussoukro Decision relating to the liberalization of the air transport market in West and Central Africa;

Recalling that the Yamoussoukro Decision aims at facilitating access to air transport markets in Africa;

Aware of the need to facilitate free movement of persons and goods within the Community and to interconnect the capitals of Member States with a view to making them accessible to national air transporters;

Desiring to adopt an action plan and measures capable of transforming the air transport sector into a subregional liberalized market

On the recommendation of the fifty-first session of the Council of Ministers, held in Accra from 15 to 18 December, 2003;”

⁴⁰⁶ Schlumberger (n 16 above) 74.

⁴⁰⁷ Ganetmore (n 395 above) 11.

Central African region and to periodically monitor the progress of implementation of the Yamoussoukro Decision at state level.⁴⁰⁸ Harmonisation is key in the development of common rules and standards because it creates uniformity and fairness in liberalisation.

(iii) *Supplementary Act A/SA.1/12/08 Adopting Community Competition Rules and Modalities of their application within ECOWAS*⁴⁰⁹

The ECOWAS Community pronounces itself clearly on the aspect of competition within the ECOWAS Common Market through this Supplementary Act. The Supplementary Act importantly recognises, in its preamble, that, ‘...the protection of market conditions through the effective implementation of competition rules is consistent with international best practices and is in the interest of economic integration within the ECOWAS region’⁴¹⁰ which, it is submitted, bodes well for the programme of air transportation liberalisation.

In terms of Article 3 of the Supplementary Act, the targeted objectives of the Act are to –

- (a) promote, maintain and encourage competition and enhance economic efficiency in production, trade and commerce at the regional level;
- (b) prohibit any anti-competitive business conduct that prevents, restricts or distorts competition at the regional level;
- (c) ensure the consumers’ welfare and protection of their interests;
- (d) expand opportunities for domestic enterprises in Member States to participate in world markets.

As with any legal instrument regulating competition within the market, the Supplementary Act makes provision for prohibited market practices within the ECOWAS Common Market, which are regarded as being incompatible with the ECOWAS Common Market,⁴¹¹ and are listed in Article 5⁴¹² of the Supplementary Act.

⁴⁰⁸ as above, 75.

⁴⁰⁹ <https://ecotis.projects.ecowas.int> (accessed 11 November 2022).

⁴¹⁰ Refer to para 6 of the Supplementary Act.

⁴¹¹ Refer to art 5(1).

⁴¹² The Supplementary Act provides that these prohibited practices are:

Article 8 (2) sets out the circumstances under which state aid will be viewed to be compatible with the ECOWAS Common Market; interestingly, the Supplementary Act does not explicitly state that such state aid will be permitted but rather that it will be considered ‘compatible’ which, it is submitted leaves the legislation open to interpretation that compatibility with ECOWAS Common Market amounts to permissibility. Article 11 of the Supplementary Act details the instances in which practices will be exempted from the provisions Article 5. In terms of Article 13,⁴¹³ the Regional Competition Authority is established as the structure responsible for the implementation of the Supplementary Act in the ECOWAS Community, which presents a clear picture for competition regulation in the ECOWAS Community and by extension, to the liberalisation of its regional air transportation market, and brings the regional body into alignment with Article 7 of the Yamoussoukro Decision, wherein State Parties are directed to ensure that, as part of implementation of the Yamoussoukro Decision, African airlines enjoy fair opportunity.

This Supplementary Act must, however, be read with Supplementary Act A/SA.2/12/08 which complements the provisions of Article 5 and provides more details on the powers of the Regional Competition Authority and its procedures for the purposes of administration of the competition rules of the ECOWAS Community.

(iv) *Supplementary Act A/SA.2/12/08 on the Establishment, Functions and Operation of the Regional Competition Authority for ECOWAS*⁴¹⁴

The objective of this Supplementary Act is to provide the granular details on the functioning of the ECOWAS Competition Authority: the composition and appointment

-
- “(a) directly or indirectly fix purchase or selling prices, terms of sale, or any other trading conditions;
 - (b) limits or control production, markets, technical development, or investment;
 - (c) share markets, customers or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties; thereby placing them at a competitive disadvantage; or
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

⁴¹³ Art 13 provides, *inter alia*, –

“(1) A structure to be known as the Regional Competition Authority responsible for the implementation of the present Supplementary Act within ECOWAS shall be established.

(2) The organizational and operating rules of the Authority shall be defined in a Regulation.”

⁴¹⁴ <http://ecowas.akomantoso.com> (accessed 11 November 2022).

of its top management,⁴¹⁵ its functions,⁴¹⁶ and powers.⁴¹⁷ Importantly, the ECOWAS Competition Authority has ‘teeth’ in the sense that it is empowered to issue fines to a person who commits an offence to the competition rules of the Community.⁴¹⁸ Overall, the Supplementary Act clarifies the duties and powers of the ECOWAS Competition Authority.

(v) *Supplementary Act A/SP.9/02/12 Relating to the Common Rules on Certain Categories of Agreements, Decisions and Concerted Practices Relating to Rules of Competition in Air Transport Services Within ECOWAS Member States*⁴¹⁹

As asserted above, the Competition Rules of the Community contained in Supplementary Act A/SA.1/12/08 are also applicable to the sector of air transportation and same is confirmed in Article 1 of this Supplementary Act which plainly provides that,

The community competition rules and the modalities for their implementation as defined in the Supplementary Act No. A/SA/11/ date 19 November 2008 shall apply to air transport services within the Member States of ECOWAS;

The stated objective⁴²⁰ of this Supplementary Act is to create the dispensation for exemption from competition rules of the Community, for air transport services within the ECOWAS region under the command of the Regional Competition Authority.⁴²¹ The modalities and conditions under which exemptions may be granted by the Regional Competition Authority are set out in Articles 4, 5, 6 and 7 of the Supplementary Act.

⁴¹⁵ Refer to art 2 of the Supplementary Act.

⁴¹⁶ Refer to art 3 of the Supplementary Act.

⁴¹⁷ Refer to art 4 of the Supplementary Act.

⁴¹⁸ Refer to art 3(k)(xiv).

⁴¹⁹ <http://ecowas.akomantoso.com> (accessed 11 November 2022).

⁴²⁰ Refer to art 2, para 2 of the Supplementary Act.

⁴²¹ This power given to the Regional Competition Authority is contained in Art 3 of the Supplementary Act.

(vi) Supplementary Act A/SP.3/02/12 Relating to the Common Rules on Liberalization of Market Access to Ground Handling Services in Airports of ECOWAS Member States⁴²²

Although ground handling services at airports are not expressly included as an aspect of liberalisation in the Yamoussoukro Decision, Article 10.5 thereof grants State Parties the right to assume any obligations that would not be more restrictive than the provisions of the Decision and a wide interpretation can be attached thereto, to include other commercial activities inherent to the aviation industry. It is further expressed in the preamble⁴²³ to this Supplementary Act that the ECOWAS Member States identified discrepancies in the national rules and regulations concerning some activities such as ground handling, hence the adoption of this Supplementary Act.

Article 2 of the Supplementary Act records that the aims of the Supplementary Act are to liberalise access to the ground handling market of the ECOWAS member States.⁴²⁴ Article 4, paragraph 1 expressly mandates Member States to grant service providers free access to ground handling markets thus –

Member States shall ensure that service providers are granted free access to ground handling markets.

This free access of service providers to ground handling markets is however subject to approval issued by a competent authority,⁴²⁵ and the Supplementary Act prescribes the conditions⁴²⁶ that a service provider must meet to obtain approval which include: sound finances, technical capability, sufficient insurance coverage, the safety and security of the ground handling facilities, aircraft, equipment or persons, environmental

⁴²² <http://ecowas.akomantoso.com> (accessed 11 November 2022).

⁴²³ Para 8 of the Preamble to the Supplementary Act provides –
“ACKNOWLEDGING that the reports of the 3rd-4th and 5th Meetings of Ministers responsible for Civil Aviation in West and Central Africa, noted some discrepancies in national rules and regulations concerning Slot Allocation, Denied Boarding, Ground Handling, Approval of Airline, Conditions for Market Access, Air Tariffs, Liability of Airline in case of an Accident, Rules of Competition and Exemption issued by the member States in West and Central Africa;”

⁴²⁴ Art 2 provides that the purpose of the Supplementary Act as:
“The Supplementary Act aims at liberalizing access to the ground handling market in the ECOWAS member States.”

⁴²⁵ Refer to art 4, para 2 of the Supplementary Act.

⁴²⁶ These criteria are listed in article 2, para 2, subpara a) of the Supplementary Act.

impact and compliance with the relevant social legislative prescripts and all these criteria are reasonable. In the event that special circumstances, such as congestion, safety and security constraints, prevail that may render the liberalisation of ground handling services impossible according to the text of the Supplementary Act,⁴²⁷ the Supplementary Act, in terms of Article 9 thereof, authorises member states to select service providers for ground handling services at airports and in so doing, the Supplementary Act prescribes that member states shall utilise specifications that are ‘objective, transparent and non-discriminatory’⁴²⁸ to warrant that there is fairness and that these special circumstances are not applied to the benefit of some or preferred service providers. When closely examined, these essentially make-up the exemption provisions for this Supplementary Act.

(vii) Supplementary Act A/SP.4/02/12 Relating to the Common Rules Determining Slot Allocation at Airports: Member States⁴²⁹

This Supplementary Act sets out the common rules for the ECOWAS Community for the allocation of slots of designated carriers at the airports of member states. In terms of Article 4⁴³⁰ of the Supplementary Act, the allocation of slots is to be achieved through the appointment of an Airports Slot Coordinator, who is an individual or legal entity from the civil aviation authority concerned with experience in coordinating the planning of movements of aircraft. It is submitted that the slight difficulty that this model presents is that a civil aviation authority is mandated to regulate and oversight the aviation activities of role players, air carriers included, within the industry and if

⁴²⁷ These special circumstances are provided for in Article 10 as Special provisions –

“1. When at an airport:

- a) the level of activity does not justify the existence of several service providers with guaranties of public service continuity;
- b) specific constraints of space or available Capacity, in particular based on congestion and utilization rate of surfaces, make impossible the liberalization of the ground handling market to the level provided for in the present Supplementary act;
- c) specific safety and security constraints so require; Member States may limit the number of service providers for one or several categories of ground handling Services.

⁴²⁸ Refer to art 9, para 3 of the Supplementary Act.

⁴²⁹ <http://ecowas.akomantoso.com> (accessed 11 November 2022).

⁴³⁰ Art 4, para 1 provides:

“The Member States in charge of a coordinated airport shall, appoint an individual or legal entity from the Civil Aviation Authority experienced in coordinating the planning of the aircraft movements of air carriers and be designated as airport coordinator, after consultation or in agreement with the air carriers regularly using the airport, their representative organizations as well as the airport authorities. The same/coordinator may be designated for several airports.”

appointed to be the Airport Slots Coordinator, as prescribed in this Supplementary Act, that may well potentially cause a conflict of interest in the execution of its regulatory mandate. The appointment of technical personnel from within the airport entity itself, and not from the civil aviation authority, who are far much closer to the movements of the aircraft of air carriers at the airports than the regulator, may have been a better model to achieve the objectives of this Supplementary Act.

With reference to Article 4, paragraph 4 of the Supplementary Act, the Airport Slots Coordinator is responsible for the slot allocations and the development of emergency procedures for slot allocations, where necessary and monitoring the use of slot allocations.⁴³¹ Member States have the responsibility to ensure that the coordinator discharges its duties in an independent manner,⁴³² and in this regard, the Airport Slots Coordinator is assisted, in an advisory capacity, by the Airport Slots Coordination Committee, established in terms of the provisions of Article 5⁴³³ of the Supplementary Act. The establishment of this committee is surely designed to safeguard against a single Airport Slots Coordinator exercising authority in an unfettered way and ensure fairness in the allocation of slots, which is an equally important infrastructural requirement in the air transportation liberalisation value chain.

(viii) Supplementary Act A/SP.6/02/12 Relating to the Common Rules on Tariffs Applicable to Passengers, Freight and Mail for Air Transport Within, From and To ECOWAS Member States⁴³⁴

The member states of ECOWAS, insofar as the setting of air tariffs is concerned, have removed the involvement or approval of the state, consistent with the terms of Article 4.1 of the Yamoussoukro Decision. Article 3 of the Supplementary Act unequivocally sets forth that –

⁴³¹ Refer to art 4, para 4 & 5.

⁴³² Refer to art 4, para 2.

⁴³³ Art 5, para 1 provides –

“Member States shall ensure that, at any coordinated airport, an Airport Slots Coordination Committee, chaired by the Civil Aviation Authority or administration is established for the purpose of assisting, in an advisory capacity, the coordinator referred to in Article 4 above.”

⁴³⁴ <http://ecowas.akomantoso.com> (accessed 11 November 2022).

Air carriers shall freely set air tariffs applicable for the carriage of passenger, freight and mail within ECOWAS Member States.

In the event of an air tariff increase, the Supplementary Act prescribes that,

1...there shall be no approval required by the aeronautical authorities of the ECOWAS Member State concerned for tariff to be charged by the designated airlines of Member States for the Carriage of passengers, freight and mail. The airlines shall in this case file such tariffs before competent authorities 30 working days before they enter into effect.

2. This provision is not applicable in the case of lowering tariff which takes immediate effect according to the will of the airline.

The provisions above mirror that of the Yamoussoukro Decision and exhibit that the ECOWAS Member States have embraced and adopted an unequivocally unregulated tariff regime for air services, which is generally regarded to be a positive economic posture for fostering competition in the market and greatly beneficial for passengers.

(ix) Supplementary Act A/SP.8/02/12 Relating to the Common Rules on the Conditions of Access to Air Transport Markets in ECOWAS Member States⁴³⁵

The purpose of this Supplementary Act is to determine the conditions for market access for scheduled and non-scheduled air transportation services in the ECOWAS Community.⁴³⁶ Interestingly, a ‘traffic right’ in the Supplementary Act is defined as the

—

Right of an air carrier to carry, subject to payment, passengers, freight and/or mail or an air link between two or several airports in West and Central Africa.

⁴³⁵ <http://ecowas.akomantoso.com> [accessed 11 November 2022].

⁴³⁶ Art 2 of the Supplementary Act provides:

“This Supplementary Act shall determine the conditions of access of the air carriers to scheduled and non-scheduled air services of the Community. An ECOWAS designated air carrier shall be permitted to operate between any two airports within the Community.”

This definition clearly elucidates the air connectivity relations enjoyed between West and Central Africa, because in terms thereof, market access of designated airlines within ECOWAS is effectively extended to Central Africa which actually creates a greater market reach for designated air carriers. According to Article 3 of the Supplementary Act, air carriers shall be designated and authorised by the respective member states to exercise traffic rights.⁴³⁷ Article 4 of the Supplementary Act, concerned with authorisation and designation, substantively deals with market access for air carriers thus -

1. Each Member State shall have the right to designate in writing one or more carrier(s) to operate air transport services in accordance with article 3 of this Supplementary Act. Such designation shall be notified to the other member State(s) concerned, accompanied by the operating license and AOC of the air carrier and the corresponding insurance policies, and the ECOWAS Commission.
2. A member State may also designate an air carrier from another member State [or other State Party to the Yamoussoukro Decision] to operate air services on its behalf.
3. A member State shall have the right to designate a multinational air carrier in which it (the State) and/or ECOWAS citizens have shares and the rights to operate its air services on their behalf. :
4. On receipt of the notification of such designation, the other member State(s) concerned shall, subject to paragraphs 5 and 6 of this article, without delay but not later than 30 days, grant to the air carrier that has been authorized the appropriate authorization to the designated air carrier.
5. A member State concerned shall have the right to satisfy itself that the air carrier, designated has been authorized and agreed to fulfil the conditions for the operation of the air routes for which it has been designated.
6. A member State concerned shall have the right to refuse to grant the authorization referred to in paragraphs 4 of this article, or to impose such conditions as it may

⁴³⁷ Although these traffic rights are not articulated, art 3 provides –

“Subject to compliance with the provisions of this Supplementary Act, the air carriers shall be designated and authorised by the member States concerned to exercise traffic rights on air services within ECOWAS territory.”

deem necessary on the rights specified [in] article 3 of this Supplementary Act, in any case where it is not satisfied that the designated air carrier has been certificated and licensed to fulfil the conditions for the operation of the routes for which it has been designated

Accordingly, the ECOWAS member states have agreed to single or multiple designation of air carriers, in harmony with the provisions of Article 6.1 of the Yamoussoukro Decision, subject to the possession of a valid air operating licence. Furthermore, in terms of Article 4, paragraph 2, an air operator from a state that is not party to the ECOWAS Revised Treaty but a signatory to the Yamoussoukro Decision may be designated by an ECOWAS member state to provide an air service within its territory. The qualifying criterion in this regard is that the state from which the air carrier originates must be a party to the Yamoussoukro Decision. In the absence of a licence to operate air services, a receiving member state is at liberty to refuse to grant authorisation to an air carrier.

The Supplementary Act further prescribes that for third party air carriers wishing to render air services in the ECOWAS Community and who adhere to the principles of the Yamoussoukro Decision, such air carriers shall be considered as authorised by the ECOWAS member states and allowed to operate air services on a reciprocal basis as an operator originating within the ECOWAS region.⁴³⁸ In other words, there is in the Supplementary Act, a presumption of authorisation, a *fait accompli* if you will, that operates in favour of air carriers that are established outside of the ECOWAS Community if they oblige to the principles of the Yamoussoukro Decision. It is a laudable precondition because it will ensure that air operators established outside the ECOWAS region do not impede nor regress the harmonisation of the transport policies and liberalisation of the ECOWAS air transportation market.

Article 7 of the Supplementary Act provides that the exercise of air traffic rights is subject to considerations of the ECOWAS competition laws, national or local operating rules as regards aviation safety, security, environmental protection and slot

⁴³⁸ Art 6, para 2 provides:

“Air carriers established in a non-member State that adheres to the Yamoussoukro Decision shall be considered as authorized by the member States to operate air services on the same conditions as an air carrier of ECOWAS on a reciprocal basis.”

allocations.⁴³⁹ In this regard, member states were under no obligation to grant cabotage rights to licensed and authorised air carriers from another member state, for a duration of 12 months from the date of coming into effect of this Supplementary Act,⁴⁴⁰ which period has since lapsed. Presumably, as things stand, cabotage rights may be some of the air traffic rights that carriers operating air transportation services in the ECOWAS member states enjoy in current day.

In enabling entry to the ECOWAS Community air service market, the Supplementary Act, aligned to the principles of the Yamoussoukro Decision, permits scheduled and non-scheduled air carriers to enter into cooperative arrangements for marketing, leasing of aircraft, and code-sharing⁴⁴¹ which is in line with creating wider access to the ECOWAS air transportation services market for potential air operators.

(x) *Supplementary Act A/SP.10/02/12 Relating to the Common Rules on the Approval of Air Carriers SRE ECOWAS Member States*⁴⁴²

In a supranational setting, for purposes of air safety and procedural fairness, uniform rules to be applied to the approval and/or licensing of air operators are critical, and such is the objective of this Supplementary Act which sets out the criteria for the issuance and continuing validity of approval of carriers established within the ECOWAS member states.⁴⁴³

Article 3 of the Supplementary Act provides –

1. Without prejudice to paragraph 5 of Article 5 below, Member States shall not issue or maintain valid an air carrier's approval for commercial air services

⁴³⁹ Art 7 of the Supplementary Act provides –

“The exercise of traffic rights shall be subject to competition laws within the Community as enacted by the ECOWAS Treaty and community, national or local operating rules as published concerning aviation security, safety and environmental protection and slot allocation.”

⁴⁴⁰ This Supplementary Act was adopted on 17 February 2012. Art 11 thereof provides:

“A Member State shall not be obligated to authorize the exercise of cabotage rights on its territory by air carriers holding a license issued by another Member State up to 12 months from the date of the coming into force of this Supplementary Act.”

⁴⁴¹ Refer to art 8 of the Supplementary Act.

⁴⁴² <http://ecowas.akomantoso.com> (accessed 11 November 2022).

⁴⁴³ Refer to art 2, para 1 of the Supplementary Act.

whenever the conditions established by the Supplementary Act are not adhered to.

2. Any enterprise meeting the conditions as determined in this Supplementary Act shall be entitled to an air carrier's approval.

The language of Article 3, paragraph 2, specifically the employment of the word 'entitled' is peremptory in that, once an enterprise meets the approval criteria in the Supplementary Act, there is no space to deny approval. The air operator is, in turn, entitled to an approval if it meets the licensing criteria. The rationale for crafting the provision in this fashion may be to prevent flag carrier protection or favouritism and skewed treatment of air carriers that are registered in another ECOWAS member state.

According to Article 4, the conditions for the issuing of an initial approval to an air carrier by an aeronautical authority are:

- a) its main place of business, or headquarters is located in the member State issuing the approval;
- b) its main activity is air transport, exclusively or combined with any other commercial activity including aircraft operations or aircraft maintenance and repair;
- c) is effectively controlled by member States or nationals of member States; and the services operated by it have, in majority, as departure or arrival points one or more airports in a member State and its technical, operational and managerial staff is made in majority, of member State's nationals; The enterprise shall be, at any time, in a position to demonstrate to the Aeronautical Authority which issued the air carrier's approval that it meets the conditions set forth in the present article.

These mutually inclusive conditions are common in international civil aviation and are age old requirements found in the ownership and control rules of international air transport agreements and in Article 6.9 of the Yamoussoukro Decision, although when scrutinised, ownership as a condition is excluded; what is required is 'effective control'. Of interest, however, is the condition found in Article 4 (c) that the technical, operation

and managerial staff complement must be made up, in the majority, of nationals of the designee member state. This is an innovative means of embedding job protection and reservation for the nationals of ECOWAS member states into the air transportation policy of the region. The challenge that might be encountered in this respect, considering the special technical skills required for aviation and the scarcity thereof, member states may have to seek these personnel from other states.

An additional condition for the granting of an approval to an air carrier, although not included in Article 4, is found in Article 6 which prescribes:

1. The granting of an approval to the air carrier shall be subject to verification of the integrity, competence and qualification of the persons who will effectively manage the activities of the enterprise. The production of documents issued by the appropriate authorities of the Member State of origin shall be accepted as sufficient evidence.

Therefore, over above the conditions articulated in Article 4, a qualification and competence integrity verification exercise shall be undertaken *ex facie* the documents speaking to such qualifications and competence for personnel who will be effectively responsible for the management of operations. All these conditions signify that the ECOWAS approval regime is quite detailed and ensures that there is a presence of the requisite skills to conduct an air service within the region, which more than anything, is good for air safety and security.

2.4.2 Conclusion

The analysis presented above illustrates the great and detailed strides taken by the ECOWAS regional community to harmonise their air transportation policies and legislation, as a mechanism to achieve the objectives of the Yamoussoukro Decision. The legal instruments which have been adopted, particularly in the areas of tariffs, authorisation and designation (market access), eligibility to operate and cooperative arrangements are mirror provisions found in the Yamoussoukro Decision.

Although the Yamoussoukro Decision is rather passive in its text on competition rules, this regional body has decisively enacted a legal framework for the regulation of competition within the ECOWAS region and adopted rules dealing specifically with competition within the internal air services market. All the legislation which has been analysed is referred to as ‘common rules’ which brings certainty to the member states of the ECOWAS region and non-member states about the rules to be applied in matters of air transportation. The implementation of the Yamoussoukro Decision in the ECOWAS Community, according to the Supplementary Acts, is unequivocal and is supported by substantive and clear provisions for, which will see the region enjoying a competitive air transport market and an enabling environment for air carriers; this will create access to even those member states of ECOWAS who are geographically landlocked as alluded to above, as a liberalised air space will encourage more investment in aviation infrastructure. This common legal framework for the ECOWAS air transport market exemplifies true political will on the part of its member states. Notwithstanding the progressive common laws of the Community, in reality there exists an anomaly, a different picture. At a meeting held on 26 May 2021, the ECOWAS Ministers in charge of Air Transport and Finance consulted with a view to make air travel more affordable within the region. The meeting observed that –

...the several challenges being faced by the Air Transport industry in the ECOWAS Region, which makes it very non-competitive on the continental and international market...contributory factors are high cost of flight tickets resulting from excessive taxes by governments, charges and fees which leads to high operating costs of airlines; safety and security concerns; inadequate air connections between the capitals and major economic centers of ECOWAS Member States; lack of cooperation between regional airlines as well as with major international airline alliances, non-conducive environment for the liberalization of the air transport market; and difficulties in accessing finance for airlines and air transport projects.⁴⁴⁴

The ECOWAS Community, which may be dubbed the ‘mother body’ of its subregional organisations, BAG and WAEMU, has established clear rules and guidelines for the implementation of the Yamoussoukro Decision; it however remains crucial to review

⁴⁴⁴ ECOWAS Press Releases. 2021. *ECOWAS air transport and finance ministers consult on making affordable air travels*, Press release issued on 9 June 2021 <https://ecowas-air-transport-and-finance-ministers-consult-on-making-affordable-air-travels/> (accessed 18 November 2022).

the respective air transport policies of these subregional bodies to determine the levels of consistency and compliance with the laws of the ECOWAS Community.

2.4.3 The Banjul Accord Group

The Banjul Accord Group (BAG) was founded on 29 January 2004 by seven West African states, namely: Cape Verde, The Gambia, Ghana, Guinea, Liberia, Nigeria, and Sierra Leone.⁴⁴⁵ This subregional grouping is borne from the initial Banjul Accord formation of 1997 for the accelerated implementation of the Yamoussoukro Declaration, which had, as its primary aim, the safeguarding of international air transportation in the region and fostering co-operation among national carriers.

The Banjul Accord Group Agreement of 2004 (Agreement) however widens the objective to include the implementation of both the Yamoussoukro Declaration and the Yamoussoukro Decision.⁴⁴⁶ In doing so, the member states to the Agreement agree to enter into strategic partnerships or co-operative agreements to promote the development and growth of international civil aviation among member states and non-member states and organisations.⁴⁴⁷ The emphasis of the Agreement leans more towards the objectives of the Yamoussoukro Declaration, being co-operation amongst airlines, than it is about liberalisation of the air transportation market of the subregion, as outlined in the Yamoussoukro Decision. The criticism from Schlumberger in this regard is that, the combination of both the Yamoussoukro Declaration and the Yamoussoukro Decision as objectives of the Agreement creates a level of confusion or contradiction, insofar as the policy regarding air services in the region is concerned.⁴⁴⁸ Whilst this criticism is understood from a perspective of the need for clarity in policy documents, the Yamoussoukro Decision does however cater for cooperation amongst airlines in Article 11.3 thereof, *albeit* it is not as explicit as the Yamoussoukro Declaration. Ultimately, in the course of implementing the

⁴⁴⁵ Schlumberger (n 16 above) 82.

⁴⁴⁶ Refer to art 3.1 of the Agreement.

⁴⁴⁷ Refer to arts 3.2 & 3.3 of the Agreement.

⁴⁴⁸ Schlumberger (n 16 above) 83.

Yamoussoukro Decision, air carriers may come together to co-operate or contract in areas where their operational or technical reach may be limited.

Notwithstanding the 'mixed bag' policy posture, the BAG subsequently adopted a document to complement the Agreement, namely: the Multilateral Air Services Agreement (MASA).

(i) The BAG Multilateral Air Services Agreement

The BAG Multilateral Air Services Agreement (MASA) was signed on 29 January 2004, by all the West African countries which are signatories to the BAG Agreement, and it is basically a replica of the Yamoussoukro Decision. The contents of the MASA include the following:⁴⁴⁹

- Article II, paragraph 1 provides that first and second freedom traffic rights are granted unconditionally and third and fourth freedom rights are granted for any scheduled and non-scheduled flights that are conducted in the territory of the contracting states. With respect to fifth freedom traffic rights, the MASA stipulates that such rights will be enjoyed by contracting states with third party African states in accordance with the Yamoussoukro Decision.⁴⁵⁰ This stance of the Agreement is consistent with Article 3 of the Yamoussoukro Decision is a re-affirmation of the principles contained therein.
- In terms of Article III of the Agreement, each contracting state may designate one or more airlines to operate on the routes specified in the MASA and designation and authorisation to operate may be withheld by a contracting state if the candidate designee does not conform to the eligibility criteria prescribed in Article 6.9 of the Yamoussoukro Decision. These provisions are drawn from Article 6 of the Yamoussoukro Decision.
- Article XII, paragraph I of the MASA provides that air tariffs are to be freely devised based on commercial consideration, without the need for state approval.

⁴⁴⁹ Schlumberger (n 16 above) 84.

⁴⁵⁰ Refer to art II, para 2 of the Agreement.

However, in the event that tariffs are unreasonably high, restrictive or artificially low, the contracting parties may intervene. Notifications to aeronautical parties shall happen 30 days prior to the coming into effect of the tariff, upon request by a contracting party. If a contracting state considers an announced tariff to be discriminatory, consultations between the contracting states should settle the matter and if no mutual agreement can be reached between the contracting states, then the pre-existing tariff shall continue to be in effect.⁴⁵¹ This article in the MASA concerning tariffs is in principle aligned to Article 4 of the Yamoussoukro Decision; it however opens the door for tariff negotiations or consultations between contracting states, in circumstances where there are indications of discriminatory tariff setting which stretches the Yamoussoukro Decision principle slightly.

- On the issue of capacity, frequency and types of aircraft used for air services, the MASA provides that there shall be no restrictions placed thereon, except for environmental, safety, and security considerations,⁴⁵² which is also largely in line with Article 5 of the Yamoussoukro Decision.
- The BAG takes adherence to international safety and security standards seriously because in terms of Article VII, paragraph 1 of the MASA, contracting states may request consultations with other contracting states on matters of safety standards relating to aviation facilities and services, air crews, aircraft and designated airlines. Furthermore, a contracting party is empowered to withhold, revoke or limit the operating authorisation or technical permission of a designated airline of another party, in the event that the defaulting contracting party fails to take appropriate corrective action.⁴⁵³ This provision goes beyond the scope of Article 6.10 of the Yamoussoukro Decision which limits the power of revocation of authorisation to the failure of a designee to meet the eligibility criteria outlined in Article 6.9 of the Yamoussoukro Decision. Schlumberger correctly interprets this restrictive provision of the MASA to mean that a BAG Member State is empowered to ground the aircraft of a foreign airline and revoke

⁴⁵¹ Refer to art XII, para 4 of the MASA.

⁴⁵² Refer to art II, para 4 of the MASA.

⁴⁵³ Refer to art VII, para 2 of the MASA.

its foreign operator's permit.⁴⁵⁴ Infact, Article 6.9 of the Yamoussoukro Decision may be regarded to be relatively soft as regards the ICAO safety and security standards as it simply demands that an airline should demonstrate its ability to maintain such standards.

The provisions considered above signify that the BAG, through the adoption of the MASA, has established an air transport services liberalisation regime which is in conformance with the principles, obligations and terms of the Yamoussoukro Decision and the regional policy of the ECOWAS too. Its strong, clear and detailed focus on air safety is commendable and should serve as an example to other regional bodies in order to create an internationally competitive market, yet safe air transportation services.

2.4.4 The West African Economic and Monetary Union

The West African Economic and Monetary Union (WAEMU) also known as the Union Economique et Monétaire Ouest-Africaine (UEMOA) in French, is the French subregional collective of the ECOWAS region for air transport, as aforementioned. It consists of 8 West African countries: Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.⁴⁵⁵

The Treaty establishing WAEMU (Treaty) came into force on 01 August 1994 and conjointly refers to the organisation as the Union.⁴⁵⁶ The goals of the Union, detailed in Article 4 of the Treaty, are to enhance competitiveness in the financial and economic sectors of the member states; harmonise economic policies; establish a common market in the Union for the free mobility of capital, goods, people and services and importantly, co-ordinate national sectoral and common policies in the area of *inter alia*, transport; and harmonise the laws of member states for the proper functioning of the

⁴⁵⁴ Schlumberger (n 16 above) 85.

⁴⁵⁵ n 8 above, 46.

⁴⁵⁶ Art 2 of the Treaty provides:

“In this Treaty, the High Contracting Parties shall complement the African Economic and Monetary Union (WAEMU) imposed them in order to achieve its economic and Monetary Union (WAEMU), hereinafter referred to as the Union.”

Common Market. According to these objectives, specifically Article 4(d), transport will be administered through the adoption of sectoral policies, and it is evidently so in the Treaty, as the Treaty contains no further stipulations concerning transport in the Union. Article 6 of the Treaty, read with Article 43 thereof unambiguously and strongly deal with the application of legislative measures taken by WAEMU. The articles provide, respectively –

The Acts adopted by the institutions of the Union for the achievement of the objectives of this Treaty and in accordance with the rules and procedures laid down by the latter, are applied in each Member State contrary notwithstanding any domestic legislation, before or after.

Regulations have a general scope they [sic] are binding in their entirety and directly applicable in all member States...Decisions shall be binding in their entirety to those whom they designate.

These stipulations of the Treaty unequivocally delineate that the law of the Union supersedes the national law of the member states of WAEMU, particularly with regards to Article 6 and this policy attitude is much like that of the EU which perhaps is the means by which to eventually attain harmonisation and convergence of laws and regulations in a supranational organisation to establish a single community. Article 7⁴⁵⁷ of the Treaty further instructs member states to refrain from any conduct that is likely to impede the implementation of the Treaty and the acts adopted for its implementation, for the fulfilment of the Treaty objectives. Admittedly, the tone of this Treaty is quite a stern one, surely with the intention to safeguard against non-compliance to the laws of the Union by member states or to defer implementation of legislation or directives, on account of domestic laws.

In response to the objective in the Treaty to coordinate national sectoral policies and implement common policies in the sphere of transport, amongst other things, as outlined in Article 4, the WAEMU Council of Ministers adopted a common air transportation programme⁴⁵⁸ (the programme) in 2002 which can be considered to be

⁴⁵⁷ Art 7 provides:

“Member States shall contribute to the achievement of the objectives of the union by adopting general or specific measures necessary to ensure the fulfilment of their obligations under this Treaty. For this purpose, they shall abstain from any measures likely to impede the implementation of this Treaty and of acts adopted for its implementation.”

⁴⁵⁸ n 8 above, 46.

the sectoral strategy for the air transport in the Union. The broad objectives⁴⁵⁹ of the programme are to create access to the air transport market within WAEMU, create an efficient air transportation system, make air transportation more accessible to the peoples of the subregion and attract tourism in order to stimulate the economy of the Union. The programme takes cognisance of the reality that the member states of the Union are largely disengaged from the commercial air transportation sector and the need to fully liberalise access to the aviation market of the Union, by the granting of eighth freedom air traffic rights to WAEMU air carriers.⁴⁶⁰

The programme forms the legal framework through which the Union has enacted specific Regulations for the implementation of the Yamoussoukro Decision, which are appraised hereunder.

(i) Regulation No. 24/2002/CM/UEMOA on Market Access⁴⁶¹

In terms of Article 2 of this Regulation, the objective is to set out the conditions of access for air carriers of the Union for scheduled and non-scheduled services. Article 3 grants unreserved traffic rights to air carriers of the union, including cabotage,⁴⁶² which right member states were entitled to withhold until 31 December 2005. The traffic rights in this Regulation exceed those contained in the Yamoussoukro Decision. Important about this Regulation, is that it was adopted taking into account the Regulation related to the Common Competition Rules, which will form part of the review in this chapter. Traffic rights are however limited for non-WAEMU member states, who are granted traffic rights on intra-community routes only,⁴⁶³ which to an extent, is incompatible with the Yamoussoukro Decision and reflects the reservation the WAEMU may still harbour about the complete and unreserved application of the Yamoussoukro Decision on a continental scale and is, it is submitted, a possible indication of veiled protection of the Union's air carriers and its air transport market.

⁴⁵⁹ *Programme Common du Transport Aérien des Etats Membres de l'UEMOA*. Ouagadougou: WAEMU 2, <http://www.uemoa.int> (accessed 18 December 2022).

⁴⁶⁰ n 459 above, 7.

⁴⁶¹ n 8 above, 175.

⁴⁶² Refer to art 8 of the Regulation.

⁴⁶³ Refer to art 5 of the Regulation.

(ii) Regulation No. 07/2002/CM UEMOA on the Licensing of Air Carriers⁴⁶⁴

Article 4 of the Regulation sets out conditions of approval for the licensing of air carriers, which are similar to those of the ECOWAS Community and accordingly reinforce the law of the ECOWAS region. Similarly, this Regulation provides that an enterprise is entitled to be approved to carry out air services, if it satisfies the criteria prescribed in the Regulation.⁴⁶⁵

(iii) Regulation No. 08/2002/CM/UEMOA related to Tariff Regulation⁴⁶⁶

In terms of Article 3 of this Regulation, WAEMU member states adopt a liberal tariff regime, in terms of which air service operators may freely fix air tariffs for passenger, freight or postal air services. In other words, tariffs for air services shall be fixed without the involvement of the state. This Regulation is consistent with Article 4 of the Yamoussoukro Decision. The tariffs need to be filed 72 hours before the tariff comes into effect,⁴⁶⁷ whereas in terms of the Yamoussoukro Decision, the period is 30 days. The WAEMU filing period for air tariffs is far less than that required by the Yamoussoukro Decision.

(iv) Regulation No. 02/2002/CM/UEMOA related to Anti-Competitive Practices within UEMOA

Common Competition Rules are adopted pursuant to Article 7 of the Yamoussoukro Decision, as argued, are really open-ended and the discretion has been left to State Parties to the Yamoussoukro Decision to independently articulate themselves in the field of competition regulation, regarding the liberalisation of air transportation. The WAEMU has listed prohibited practices in Article 3 of the Regulation and further forbids the abuse of a dominant position.⁴⁶⁸ The Regulation also makes a margin of allowance for exemptions from the common competition rules in Article 7 of the Regulation and

⁴⁶⁴ n 8 above, 179.

⁴⁶⁵ Refer to art 3 of the Regulation.

⁴⁶⁶ n 8 above, 183.

⁴⁶⁷ Refer to art 5, para 1 of the Regulation.

⁴⁶⁸ Refer to art 4 of the Regulation.

is, in that sense, a comprehensive legal instrument that responds to the Yamoussoukro Decision in a manner beyond the scope thereof. To complement these Common Competition Rules, the WAEMU put in place Regulation No. 03/2002/CM/UEMOA which are the competition procedures of the Union.

2.4.5 Conclusion

The WAEMU has evidently made notable strides to free its air transport services market. The Union, in its legal instruments, evinces a firm and intentional attitude to implement the Yamoussoukro Decision. The Regulations, which all include a reference to the Yamoussoukro Decision,⁴⁶⁹ are either consistent or more generous than the terms of the Yamoussoukro Decision, and in some instances, a bit restrictive. However, the reality is that member states of the WAEMU are lagging on maintaining the international aviation safety and security standards which is a concern and may limit the overall and intended effectiveness of its liberalisation Programme within the region. Notwithstanding same, the execution of gradual liberalisation of air transport services in this West African region is showing itself to be in progress, the key word being 'gradual' as decreed in Article 2 of the Yamoussoukro Decision.

2.5 The Central African Economic and Monetary Community

The Central African Economic and Monetary Community (CEMAC) represents the collective of states of Central Africa, which are the Republics of Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea, and Chad,⁴⁷⁰ established to foster economic integration in the Central African region amongst the states that share a common currency, the Central African Franc.⁴⁷¹

⁴⁶⁹ Schlumberger (n 16 above) 82.

⁴⁷⁰ CEMAC Treaty.

⁴⁷¹ Schlumberger (n 16 above) 86.

The Revised Treaty of CEMAC of June 2008 sets out the objectives of the regional body in Article 2⁴⁷² thereof which is to promote peace and the harmonious advancement of its member states through under the aegis of two Unions: The Monetary Union and the Economic Union, with a view to complete the process of economic and monetary integration of the region. To this end, the Revised Treaty establishes the monetary and economic Unions in Article 10,⁴⁷³ which are two of the five institutions established to achieve the objectives of the Union. The CEMAC has also adopted two conventions specifically aligned to the said Economic and Monetary Unions, namely the UEAC and UMAC Conventions with Specialised Institutions to support these two Unions.⁴⁷⁴ Akin to the WAEMU, the CEMAC Treaty renders the compliance with regulations applicable and binding on all Member States,⁴⁷⁵ and any acts adopted by the Community are binding irrespective of national law⁴⁷⁶ – thus, Community law again takes precedence over national law which, for purposes of implementation of the Yamoussoukro Decision within the Community, augurs well.

The Economic Union objectives, as espoused in Article 2 of the Convention, are:

- strengthening economic and financial competitiveness by harmonising the regulatory frameworks of Member States;
- converging overall macroeconomic policy by coordinating the economic and monetary policies of Member States to assure an improved economic output;

⁴⁷² Article 2 of the Revised Treaty provides:

“The essential mission of the Community is to promote peace and the harmonious development of the Member States, within the framework of the institution of two Unions: an Economic Union and a Monetary Union. In each of these two areas, the Member States intend to move from a situation of cooperation, which already exists between them, to a situation of Union capable of completing the process of economic and monetary integration.”

⁴⁷³ Article 10 provides –

“The Community is made up of five Institutions:

- the Economic Union of Central Africa;
- the Central African Monetary Union;
- the Community Parliament;
- the court of Justice ;
- the Court of Auditors.

⁴⁷⁴ Refer to art 11 of the Revised Treaty.

⁴⁷⁵ Refer to art 41 of the Revised Treaty.

⁴⁷⁶ Article 44 of the Revised Treaty provides:

“Subject to the provisions of Article 43 of this Treaty, the acts adopted by the Institutions, Bodies and Specialized Institutions of the Community for the achievement of the objectives of this Treaty shall be applied in each Member State notwithstanding any national legislation opposite, anterior or posterior.”

- the establishment of a common market on the basis of the unrestricted movement of goods, services and capital; and
- the coordination of national policies of Member States in agriculture, livestock, fisheries, industry, trade, tourism, transport, telecommunications, energy, environment, research and education.

With regards to air transport, CEMAC member states concluded and adopted the Agreement on Air Transport,⁴⁷⁷ under the authority of the Council of Ministers, and complemented by the CEMAC Civil Aviation Code and Joint Competition Regulation – all of this purposely to fulfil the objective of the CEMAC Revised Treaty to coordinate the national policies of its member states in the sphere of transport, amongst others. The CEMAC Civil Aviation Code is an embodiment of the co-ordination and harmonisation of the policies of member states, as it codifies the air transport standards applicable to the Community and same is considered below.

2.5.1 The CEMAC Civil Aviation Code⁴⁷⁸

The CEMAC Civil Aviation Code (Code) was adopted in July 2000 and replaced all obsolete or inconsistent aviation legislation within the Community. Insofar as the Yamoussoukro Decision is concerned, the Code incorporates the major principles of the Yamoussoukro Decision as follows:

- Market access: the Code liberalises scheduled air transport services within the Community of first to fifth freedom rights and grants full liberalisation of cargo and on-demand traffic.⁴⁷⁹
- Tariffs: the Code prescribes free but “reasonable” air tariffs to be fixed by air carriers and filed 60 days in advance, and allows anticompetitive practices such as dumping by civil aviation authorities to be interdicted.⁴⁸⁰
- Frequency and capacity: the Code places no restrictions on frequency and capacity; however, commercial aviation activities must be coordinated among air services operators and their programmes must be approved by the relevant national aeronautical authority.⁴⁸¹

⁴⁷⁷ This agreement was adopted on 18 August 1999.

⁴⁷⁸ <https://www.icao.int> [accessed 25 December 2022].

⁴⁷⁹ Refer to art VII-1 & Art III.2.1 of the Code.

⁴⁸⁰ Refer to art VIII-1 of the Code.

⁴⁸¹ Refer to art II.3.7 of the Code.

- Designation and establishment: the Code makes an allowance for single or multiple designation of operators by each Member State, subject to the enterprise being owned by the nationals of the Member State and satisfaction of the minimum technical, financial and managerial requirements and no restrictions on the type of aircraft used.⁴⁸²
- Competition regulation: Incorporated into the Code is a code of conduct for air carriers that aims establishing a sound competitive air transport environment by barring all forms of price and capacity dumping, including discrimination against a carrier designated by another Member State.

2.5.2 Conclusion

Much like its French fraternal organisation, WAEMU, the CEMAC has implemented the key framework principles as guided by the Yamoussoukro Decision. Harmonisation of the air transport policies has been effected through the adoption of the Code and conclusion of the multilateral air services agreement. Their legal instruments and regulations are also aligned to those of the ECOWAS, to which the CEMAC belongs. Notwithstanding the challenges which have been identified in the West African region concerning air transport services, ranging from infrastructure to ailing airlines, the legal measures taken thus far by the REC and the subregional bodies concerning the implementation of the Yamoussoukro Decision is surely a display of political will, alignment, and commitment to develop air services within the territory and beyond.

2.6 The League of Arab States

North Africa is represented by the League of Arab States (League), founded in Cairo, Egypt, on 22 March 1945 in accordance with the Charter of Arab League (Charter), signed initially by seven Arab nations, namely: Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, the Syrian Arab Republic and the Republic of Yemen.⁴⁸³ The signatory states of the League signify that state membership of the organisation is beyond the African borders; it is on the strength of shared nationality, possibly also religion that

⁴⁸² Refer to art II.1.4 and VII.1.9 of the Code.

⁴⁸³ Schlumberger (n 16 above) 65.

transcends continents. Since its formation, the League has increased its membership base which currently stands at 22,⁴⁸⁴ with two states granted observer status.

Article I of the Charter clearly provides that the League consists of independent Arab states – whilst it is not explicitly stated in the Charter, it can be deduced from this provision that a state and its peoples must be of Arab origin for eligibility of membership to the League.⁴⁸⁵

The objectives of the League, as captured in Article II of the Charter, are –

...the strengthening of the relations between the member-states, the coordination of their policies in order to achieve co-operation between them and to safeguard their independence and sovereignty; and a general concern with the affairs and interests of Arab countries. It has also as its purpose the close co-operation of the member-states, with due regard to the Organisation and circumstances of each state, on the following matters:

A ...

B. Communications, this includes railroads, roads, aviation, navigation, telegraphs and posts.

These objectives differ somewhat slightly from various other treaties considered in this paper, which in the main and summarily, aim to harmonise national policies and integrate the peoples of the region. There is an undercurrent tone in the aims of the League to strengthen relations yet safeguard independence and sovereignty; perhaps almost omitting, whether by will or oversight, the unification of the League member states, which is a recurring feature in the text of the treaties of other RECs. The realisation of the objectives of the League and the execution of agreements related to same, is entrusted to the Council, in terms of Article III⁴⁸⁶ of the Charter. Furthermore,

⁴⁸⁴ The additional State Members are Libya, Sudan, Morocco, Tunisia, Kuwait, Algeria, Bahrain, Oman, Qatar, United Arab Emirates, Mauritania, Somalia, Palestine, Djibouti and the Comoros. The observer nations are Eritrea and India.

⁴⁸⁵ Support for this view is in art I which further provides that “Any independent Arab state has the right to become a member of the League...”

⁴⁸⁶ Art III provides:

“It shall be the task of the Council to achieve the realisation of the objectives of the League and to supervise the execution of agreements which the member-states have concluded on the questions enumerated in the preceding Article, or on any other questions.”

the unanimous decisions of the Council are binding on all member states of the League, whereas majority decisions are binding only on those member states which have accepted the decisions.⁴⁸⁷

With aviation expressly mentioned as one of the areas of co-operation amongst member states, the League established an entity called the Arab Civil Aviation Commission which is a specialised entity of the League⁴⁸⁸ and through its co-ordinated efforts to pursue liberalisation of the air services sector in the Arab states, this culminated in several of the League member states⁴⁸⁹ entering into a multilateral agreement on the liberalisation of air services between those contracting member states, which Schlumberger, in short, refers to as the 'Arab League Open Skies Agreement'.

2.6.1 The Arab League Multilateral Air Transport Liberalisation Agreement

The multiparty agreement concluded by the League is founded on the Arab free trade area and is designed to fortify that arrangement of the member states to liberalise trade within the region. The agreement does not make a single reference to the Yamoussoukro Decision, considering that some of the signatories to the agreement, such as Algeria, Egypt, Libya and Tunisia are State Parties to the Yamoussoukro Decision. That may be so owing to the fact that some contracting states of the multilateral agreement are not signatories to the Yamoussoukro Decision and therefore cannot be bound thereto. However, insofar as there are African states which are signatories to the Yamoussoukro Decision, the analysis of the two instruments is still relevant.

Article 4, paragraph 2 of the agreement provides designated air carriers with the following traffic rights –

- a) The right to over fly any territories of the territories of states parties.

⁴⁸⁷ Refer to art VII of the Charter.

⁴⁸⁸ Schlumberger (n 16 above) 67.

⁴⁸⁹ The member states which signed this agreement are Bahrain, Egypt, Iraq, Jordan, Lebanon, Oman, Palestine, Somalia, Sudan, Syria, Tunisia and the Republic of Yemen.

- b) The right to land in any of the territories of the state parties for non-commercial purposes.
 - c) The right to embark and disembark passengers, cargo and mail, whether separately or in combination, from and to any of the territories of the States parties.
3. This Agreement does not impose on states parties the rights of internal transport.

These air traffic rights clearly speak to the first to third freedoms of the air that are granted to air service operators, with the granting of cabotage rights being discretionary on a contracting state. However, the interpretation by Schlumberger is that, built into these rights, are fifth freedom traffic rights based on the wording in subparagraph (c) which includes traffic 'from and to any of the territories of the States parties'⁴⁹⁰ and whilst this interpretation accords with fifth freedom traffic rights, it is unclear whether it is indeed the intention of the contracting states. If the interpretation is accepted, then the multilateral agreement is aligned to Article 3 of the Yamoussoukro Decision which directs State Parties to grant to each other first to fifth air traffic rights.

In terms of Article 5, contracting states are entitled to designate one or multiple air carriers,⁴⁹¹ and authorisation to carry out air services shall be on condition of substantial ownership and control vesting in the state party or the state party nationals,⁴⁹² that the headquarters of the entity are based in the state party⁴⁹³ and that the designated airline satisfies the international laws and regulations applicable to air transport.⁴⁹⁴

Subject to considerations of competition and discrimination, designated airlines are granted unrestricted rights insofar as frequency and capacity are concerned, using any type of aircraft.⁴⁹⁵ In terms of Article 7, a state party may only place restrictions

⁴⁹⁰ Schlumberger (n 16 above) 69.

⁴⁹¹ Refer to art 5, 1.

⁴⁹² Art 5, para 2(a).

⁴⁹³ as above.

⁴⁹⁴ Art 5, para 2(b).

⁴⁹⁵ Art 7.

on capacity, frequency and aircraft type in circumstances related to technical, environmental, safety and security considerations, similar to Article 5.1 of the Yamoussoukro Decision.

Article 8 of the agreement and Annex 1 thereto sets out a detailed regime for tariffs, in a far more detailed manner than the Yamoussoukro Decision and provides that tariffs shall be determined in accordance with Annex 1 to the agreement.⁴⁹⁶ The criterion for the determination for tariffs is commercial considerations, which includes operating costs, service offering type, reasonable profit and market competition,⁴⁹⁷ which is really a business-type package set of criteria consistent with the costs associated with running an air service. Civil aviation authorities may intervene in the setting of tariffs only to prevent discriminatory practices and protect consumers⁴⁹⁸ and to this end, Annex 1 contains an elaborate procedure for dispute resolution.⁴⁹⁹ The agreement is far more prescriptive on the aspect of tariffs than the Yamoussoukro Decision which adopts a *laissez-faire* tariff-setting regime and imposes no criteria for determination of same. Similarly, the competition rules amongst State Parties are also substantively articulated in Annex 2 to the agreement. Therefore, comparatively, and although the agreement is not informed by the Yamoussoukro Decision, there are no inconsistencies between these two agreements save for, the multilateral agreement gives more expression to the issue of tariffs and competition but there is alignment.

2.6.2 Conclusion

The League has evidently responded to the Decision and adopted meaningful and progressive measures to liberalise the air transportation market amongst the Arab

⁴⁹⁶ Art 8 provides:

1. Tariffs for air carriage of passengers, cargo and mail shall be determined in conformity with Annex 1 of this Agreement.
2. The approval of the civil aviation authorities by the states parties of air tariffs referred to in the first paragraph is not binding to the designated airline/airlines belonging to a state party. Nevertheless, the designated airline/airlines must notify the civil authorities concerned of these tariffs thirty days prior to their application.
3. Each state party has the right to suspend the application of tariffs in force, if it is proven that they are in conflict with the provisions of this Agreement, particularly provisions relating to competition, but has to notify the civil aviation authority of this action.

⁴⁹⁷ Annex 1, para 3.

⁴⁹⁸ Annex 1, para 7.

⁴⁹⁹ Annex 1, paras 7 to 12.

States. It is common cause that Morocco and the EU have entered into an open skies agreement and with Morocco being a member state of the League, this represents a door of opportunity for the entire League to follow suit which will bode well for the aviation economy and air transport sector of the League and its member states. It could lead to open skies negotiations between two supranational organisations, if the League latches onto the current agreement between its member state, being Morocco, and the EU. The League member states who are also signatories to the Yamoussoukro Decision are bound by it and the form and spirit of the terms of the multilateral agreement pose no obstacle or conflict to the implementation of the Yamoussoukro Decision.

CHAPTER FIVE

The Impediments to Complete Implementation of the Yamoussoukro Decision and Liberalisation of the Intra-African Air Transportation Services Market

1 Introduction and overview of liberalisation of air services in Africa

Africa has largely and evidently made marked strides to liberalise its air transportation market, through guidance from the principles of the Yamoussoukro Decision framework, bar the League of Arab of States, which does not make mention of the Yamoussoukro Decision in its civil aviation code. The RECs, as discussed in the preceding chapter, which are the driving agents of implementation, have adopted varying measures to implement the provisions of the Yamoussoukro Decision within their member states. The analysis reveals however, that the pace and degree of implementation are not the same and it can be summarised thus:

- In SADC, the REC has given policy expression to the Yamoussoukro Decision through the adoption of the Protocol on Transport, Communications and Meteorology which defines transport as an area of regional coordination. Bilateral air services agreements, incorporating and informed by the principles of the Yamoussoukro Decision, are utilised to effectuate the liberalisation of the SADC airspace. Although not an actual signatory to the Yamoussoukro Decision of all the SADC member states, the Republic of South Africa has demonstrably implemented same in its BASAs with fellow member states. Some of the BASAs are slightly restrictive on aspects such as tariffs, frequency, and traffic rights. The pace and extent of implementation in the SADC region has admittedly been slow and Mhlanga and Steyn⁵⁰⁰ opine that this was owing to the fear by smaller nations, such the Kingdom of Eswatini, Lesotho and

⁵⁰⁰ O Mhlanga & JN Steyn 'Liberalisation Initiatives of the airline industry in southern Africa: Progress achieved and hindrances to implementation' (2018) 7(1) *African Journal of Hospitality, Tourism and Leisure* 12, <http://www.ajhtl.com> (accessed 15 May 2022).

Namibia that a larger airline such as South African Airways (SAA), as it enjoyed dominance then, would effectively eliminate competition in Southern Africa, if the market was liberalised. Although SAA does not enjoy as much market dominance anymore since it underwent business rescue proceedings and the subsequent liquidation of South African Express, there is however, room for more to be done in the SADC region. The results show that it is possibly one of the RECs on the continent that is lagging with regards to liberalisation advancement. However, some of the SADC member states hold overlapping membership to COMESA (Angola, Malawi, Eswatini, Zambia and Zimbabwe) and have experienced slight growth of its air transport market within that body and benefitted from liberalisation that has taken place in that region.⁵⁰¹

- The Eastern region of Africa, under the leadership of the EAC, has also demonstrated its commitment to the Yamoussoukro Decision by taking a resolution to amend its bilateral agreements to be aligned to the principles of the Yamoussoukro Decision. Within the region, Kenya has emerged as the strongest contender and operates a strong and competitive flag carrier under the liberalised environment, while the air transport sectors of Burundi, Uganda⁵⁰² and Rwanda are not as comparatively developed as that of Kenya although Uganda has completely opened up its air transport services market to external air service operators.⁵⁰³ Some of the BASAs between the member states are still slightly restrictive and has, consequently, delayed the establishment of intra-EAC open skies; nonetheless, the air traffic in the region has grown. In fact, the overall observation by Njoya⁵⁰⁴ is that Eastern and Southern Africa have made much more progress in establishing a strong air transport industry, than Central and Western Africa which, as discussed, is beset by socio-economic, financial, and infrastructural challenges, amongst others. The argument nonetheless persists that, it is still critical for the REC to formulate a policy for the liberalisation of its aviation market which may, in the long term, see the reduced utilisation of BASAs.

⁵⁰¹ Schlumberger (n 16 above) 143.

⁵⁰² Uganda's national carrier was liquidated.

⁵⁰³ Schlumberger (n 16 above) 140.

⁵⁰⁴ Njoya (n 66 above) 9.

- COMESA, comprising of states from Eastern and Southern Africa, and some located by the Indian Ocean, such as the Seychelles and Comoros has, through the Legal Notice, enacted a mechanism to liberalise its regional airspace and stimulate a stable development of the air transportation industry. The implementation of Phase II of the Legal Notice, which is poised to grant unrestricted freedoms of the air, remains outstanding. COMESA has also established a joint competition authority with the SADC and EAC for the regulation of competition related issues in air transport. Ethiopian Airlines is notably a carrier from the COMESA member states that has benefitted from the liberalisation policy of the region, both continentally and internationally and has, as a result, expanded its fleet exponentially which is due to a clear policy perspective from government, sound and consistent management and importantly, although wholly owned by government, non-interference by government.⁵⁰⁵ The airline services 83 international destinations, 20 domestic ones and 49 cities in Africa and is one of the leading air carriers on the African continent.⁵⁰⁶ While the strengthening of Kenya Airways and Ethiopian Airlines must be celebrated as one of the by-products of the air transportation market liberalisation guided by the Yamoussoukro Decision, it should also serve as a concerning reflection on the state of air carrier establishment and development in Africa, including the availability of funding, even at the level of low cost carriers. Liberalisation should effectively create a more open and accessible market.
- The West African region, comprising ECOWAS, and subregions WAEMU and BAG, has done extensive policy formulation and implementation in the area of air services and specifically with regards to liberalisation, the policies are wholly consistent with the Yamoussoukro Decision, and this must be lauded. The policies are explicit and even though the ECOWAS REC is further grouped into BAG and WAEMU, the policies are aligned with the ultimate view to form an economic and monetary Western Africa Union. Within the ECOWAS REC,

⁵⁰⁵ Costantinos (n 69 above) 4, 7.

⁵⁰⁶ as above, 5.

there is no one air operator that emerged fortified from the liberalised internal market, per se, and as indicated in the earlier discussion, a few of its ailing regional carriers went defunct even prior to liberalisation. States such as Senegal and Cape Verde have however developed their markets through their flag carriers.⁵⁰⁷ Air Senegal, with the involvement of Royal Air Maroc of Morocco, has successfully seized the service routes to and from Dakar which have been abandoned by the now defunct Air Afrique.⁵⁰⁸ Nigeria is another member state which has since displayed a steady development of its air transport industry through private sector air carriers and is quite dominant in the region as it boasts a sizeable fleet. The overall finding resulting from liberalisation is that the region underwent growth through the emergence of smaller operators and that the Yamoussoukro Decision has played a positive political and regulatory role in the West African region. The observation by Bofinger is that the BAG states have shown the highest growth in international travel within Africa,⁵⁰⁹ although the failure and collapse of the regional carrier, Air Afrique, is repeatedly lamented by scholars and regarded as an occurrence which had a deeply adverse effect on the air transportation markets in West and Central Africa.⁵¹⁰ The ECOWAS region has experienced moderate pockets of success stemming from its air transport market liberalisation policies. The socio-economic difficulties, challenges in financial investment, infrastructure, poor safety standards, amongst others, has rendered it difficult for the West African region to fully reap the gains from its liberalisation programme.

- CEMAC has similarly incorporated the Yamoussoukro Decision into its regional Civil Aviation Code, to replace all obsolete and inconsistent regulations and standards in its air transportation industry, and to really harmonise the national policies of member states, as it relates to economic and technical regulation of air transport. The CEMAC and ECOWAS also work closely together on the

⁵⁰⁷ Schlumberger (n 16 above) 132.

⁵⁰⁸ as above.

⁵⁰⁹ HC Bofinger “An Unsteady Course: Growth and Challenges in Africa’s Air Transport Industry” Background Paper 16 for Africa Infrastructure Diagnostic, July 2009, 14 <https://www.infrastructureafrica.org> (accessed 03 January 2023).

⁵¹⁰ n 509 above, 5; K Button, G Martini & D Scotti ‘African Decolonisation & Air Transportation’ (2015) 49 *Journal of Transport Economics and Policy* 630 <https://www.jstor.org> (accessed 04 January 2023).

area of air transport. The creation of an open skies within the CEMAC region has stimulated the private sector to channel its resources to the aviation sector.⁵¹¹ The liberalisation of the intra-Community air transportation sector has broadened and unified what was a fragmented market and national carriers are able to service routes without restrictions on capacity, frequency and traffic freedoms. Fifth freedom rights granted to non-CEMAC states has also led to the presence of foreign carriers in the Community, which is good for competition, air traffic and the establishment of new air routes. The liquidation of Air Afrique, registered in Côte d'Ivoire, impacted the air transportation industry of the Community adversely as non-member carriers such as Ethiopian Airlines, Kenya Airways picked up the routes previously serviced by Air Afrique. This situation simply translates into the granting of fifth freedom traffic rights to the benefit of foreign operators more than it does domestic and regional carriers. Overall, the CEMAC has embraced, adopted and implemented the principles of the Yamoussoukro Decision.

- Northern Africa has made some headway towards the liberalisation of its air services market through its subregional body, the League of Arab States. Although some of the member states within the League are not from Africa, its air transportation policy espouses the principles of the Yamoussoukro Decision, and at some junctures, in measures that are far more than what is prescribed in the Yamoussoukro Decision. In Algeria, liberalisation of the market in 2000 diluted the monopoly of the national carrier of the market and ushered in new carriers. However, the absence of adequate regulatory mechanisms, new entrants to the market soon collapsed and only two operators remained in Algeria's domestic market.⁵¹² Libya on the other hand has steadily operated flights to West Africa and Europe. Royal Air Maroc of Morocco continues to enjoy dominance in the Northern region, and also its route networks to Europe through the air services agreement concluded between the parties, particularly the route to France. Egypt is a member of COMESA which has partially implemented the Yamoussoukro Decision. The League of Arab States, being

⁵¹¹ n 8 above, 62.

⁵¹² Schlumberger (n 16 above) 132.

an organisation that is comprised of African and non-African Arab countries, therefore means that only some of its member states are signatories to the Yamoussoukro Decision and so the consideration of and influence of the Yamoussoukro Decision, in text, on the region's air transport industry is not visible but it is aligned to global trends of international air transportation, although more in tandem with external jurisdictions such as Europe and the Middle East, more than in Africa. North Africa presents an overall stable and well-developed air transportation network, given also its strong links to the European and international Arab states aviation network.

1.2 Conclusion

The picture presented above illustrates an incomplete execution of the Yamoussoukro Decision on the continent, a blueprint and binding framework agreement on signatory State Parties that is progressive and aligned to international trends. An observation that emerges is the dichotomy of the air transportation market development and growth between Sub-Saharan Africa and West and Central Africa, where, in the latter regions, the Yamoussoukro Decision has seen full implementation. The markets of East and Southern Africa are anchored in Ethiopia, Kenya and South Africa. In some African regions, the principles have been incorporated into the community law and even prescribe beyond the minimum standards of the Yamoussoukro Decision, in some regions, implementation on some aspects of the Yamoussoukro Decision has been held in abeyance and in other regions; reliance is still placed on the bilateral agreement system. Button *et al*⁵¹³ opine that, even if, from an airline perspective there has been little integration of international networks in Africa, liberalisation has progressed fairly.

The regions which have fully embraced and implemented the Yamoussoukro Decision, Western and Central Africa, have not been able to fully appreciate the gains of policy reformation due to airline failure and a general lack of presence of air carriers which originate from those regions. Operators from other regions are benefitting from the

⁵¹³ K Button *et al* (n 510 above) 631.

unrestricted fifth freedom granted in West and Central Africa, which present a niche market opportunity for more air services and investment. In summary, the overall pronounced outcomes derived by Africa from the Yamoussoukro Decision thus far are, *inter alia*⁵¹⁴ –

- a limited amount of relatively strong air carriers, such as Ethiopian Airlines and Kenya Airways, were bolstered by the reformation of the market, partly because they were already in a sound financial state, managed properly and had a commercial presence on the continent and other continents. The Yamoussoukro Decision was, therefore, a catalyst for growth. South African Airways, through the bilateral agreements entered into by the state, also emerged as one of the African carriers which saw significant growth in its operations and expansion of routes. These three carriers, until South African Airways underwent business rescue proceedings, dominated the Eastern and Southern Africa air transportation market;
- whilst some operators in the Eastern and Southern region flourished as liberalisation ensued, already weak African carriers, such as Nigerian Airways, Air Tanzania and Cameroon Airlines, either diminished or became completely defunct;
- air operators consolidated the air traffic network on the already high-capacity routes to the main hubs, and the development of new routes from the main hubs. As a result, low-capacity routes were phased out, impacting on the air inter-connectivity to regions such as West and Central Africa;
- the Yamoussoukro Decision ushered in lower fares and fifth freedom traffic rights amongst regions and states, enabling local carriers to offer more services to country-pairs at a lower cost, and forcing dominant regional carriers offering third and fourth freedom services to lower air fares; and

⁵¹⁴ Schlumberger (n 16 above) 147.

- the liberalisation of the third and fourth freedom capacities within Africa under the Yamoussoukro Decision, fostered the formation of sixth freedom traffic on the continent and with intercontinental counterpart states.

The Yamoussoukro Decision, which, according to its full title, is targeted at the implementation of the Yamoussoukro Declaration, carries a broader liberalisation scope than the Yamoussoukro Declaration. The Yamoussoukro Decision complements well the objectives of the Abuja Treaty, to create an AEC and facilitate the free movement of capital, goods and persons.

The question then is, what has impeded full liberalisation of the intra-Africa air transportation market since 2000 when the Yamoussoukro Decision came into effect? Parts of Africa carry vestiges of a difficult history, and there are some economic challenges that prevail. There also appears to be a silent hesitation or fear on the part of the State Parties to really 'let go', as it were, and let the markets simply run on the principles of the Yamoussoukro Decision. There is no single or simple answer to the question raised, however, in an attempt to answer same, the succeeding discussion seeks to illuminate the potential causes of the delayed implementation of the Yamoussoukro Decision in its entirety, on the continent.

2 The Impediments to implementation of the Yamoussoukro Decision

2.1 Protectionist attitudes towards flag carriers and lack of political will

It is common cause that national air carriers are regarded firstly, as the pride of the state of origin as they fly the state flag in the sky, and secondly, as a source of revenue for the state. Flag carriers embody the state capability insofar as commercial aviation is concerned, and considering that aviation is a capital-intensive industry, the ability of a government to successfully operate and sustain a flag carrier, is deemed to be quite an accomplishment. Flag carriers also enjoy dominance or monopoly of the air transport market. The conventional ownership model with flag carriers is that they are

wholly owned by the government or otherwise, the government holds majority shares and therefore, they are largely financed by government and survive mostly on state bailouts. Instinctively, the state will determinedly protect such an asset and be equally recalcitrant to reform air transport policies into liberalised policies or implement same. Abate points out that, historically, African aviation policies were centred on the protection of the interests of national airlines rather than that of consumers.⁵¹⁵ It is by no means an attempt to create the impression or presumption that the possession of a national airline is digressive to the liberalisation agenda; it is more the interference of government in such an entity that poses a delay to liberalisation and may lead to its failure. Constantinos points out that an airline can be successful if left to run autonomously whilst being fully owned by government,⁵¹⁶ with reference to Ethiopian Airlines – in other words, there must be no government interference in the management of the national airline and this viewpoint is supported. The effectiveness of the presence of a flag carrier is a question of the compromise between market size and sustainability, which includes aspects such as fleet size, choice of aircraft, personnel and route network; flag carriers have a greater margin to experiment with routes than a private airline because the government normally carries the costs (and losses). Bofinger identifies the flag carriers on the continent which he refers to as “healthy”: Air Tunisia, Egypt Air, Ethiopian Airlines, Kenyan Airways, Royal Air Maroc and South African Airways⁵¹⁷ and argues that others, are operating on large deficits⁵¹⁸ but he nonetheless dismisses the notion that a flag carrier will eventually generate income for a government.⁵¹⁹ Kenyan Airways became the first to be privatised in 1996, followed by Air Tanzania in 2002.⁵²⁰

Whilst this impediment is not tangible but rather manifests itself in attitude, the criticism levelled at states in this regard is the desire to have a national airline. The finding

⁵¹⁵ Abate (n 14 above) 14.

⁵¹⁶ Constantinos (n 69 above) 7.

⁵¹⁷ South African Airways underwent a process of business rescue proceedings in 2020 but has since resumed limited operations. Other domestic carriers took over its elaborate routes whilst the carrier was not operational. It remains to be seen whether it returns as a healthy state carrier.

⁵¹⁸ Bofinger (n 509 above) 6.

⁵¹⁹ as above, 7.

⁵²⁰ G Pirie ‘Geographies of air transport in Africa: aviation’s ‘last frontier’ in AR Goetz & L Budd (eds) (2014) *The Geographies of Air Transport* (2014) 5 https://www.researchgate.net/publication/331967812_Geographies_of_air_transport_in_Africa_aviation's_'last_frontier' (accessed 04 January 2023).

made by the study conducted by Intervistas is that the failure of African states to possess a vehicle through which they can build and jointly own airlines on the continent is one of the major obstacles to liberalisation,⁵²¹ and presumably by so doing, it may eliminate insular nationalist perspectives. It is arguable that the Yamoussoukro Declaration served precisely that purpose of co-operation, integration and establishment of African regional airlines, even though that did not substantially materialise. The Yamoussoukro Decision did not really retain the objectives of the Yamoussoukro Declaration. Article 11.3, the Yamoussoukro Decision makes provision for the conclusion of co-operative commercial arrangements such as blocked-space, code-sharing, franchising or leasing; it is silent on the formation of and joint ownership of airlines, but same could be viewed as a consequence of liberalisation.

Some countries resist liberalisation of their air transport markets on the pretext that their national airlines are not ready to compete in a liberalised, competitive market⁵²² because of being accustomed to market dominance and the security guaranteed by government. Conversely, where the aviation industry has been liberalised, some states charge foreign operators a fee for additional frequencies that are in excess of the terms and conditions of the BASA,⁵²³ which is really a disincentive for non-local carriers. The protection of a flag carrier drives up air fares, restricts growth of the market and denies consumers options in air transport services.

Political will is intrinsically embedded in the protection of flag carriers and is therefore pivotal to overcome protectionist attitudes and policies; it is submitted that political will is in fact, the genesis of policy reformation and consequently liberalisation. It has been repeatedly asserted in this study that political will is extremely important to the success of liberalisation of the air transportation markets of Africa, as demonstrated by the EU in the creation of its common aviation area. Mhlanga and Steyn argue that political commitment to the implementation of the Yamoussoukro Decision is required to make liberalisation less heterogenous in the various regions,⁵²⁴ as currently there are

⁵²¹ n 324 above, 34.

⁵²² as above.

⁵²³ as above.

⁵²⁴ O Mhlanga & JN Steyn (n 500 above) 12.

variances from one region to another. The lack of political will or commitment, where it prevails, may also lead to stunted economic growth for such states as liberalisation is not concerned only with the movement of people, but also that of cargo.

It is reasonable to perhaps accord to states the benefit of the doubt that, the lack of political will in the initial years of liberalisation, was borne from trepidation about the unknown as it relates to liberalisation of air transportation services. Be that as it may, there is now a plethora of empirical evidence showing that it is the prevalent business and legal model for international civil aviation and that it reaps economic and consumer benefits. The circumstances of Africa are akin to those of the EU in that: it is composed of supranational formations at both a regional and continental level, and supranational or multi-national economic integration requires, to some extent, that the grip on autonomy be released for the realisation of common objectives and in this regard, Africa can take a leaf from the book of the EU.

2.2 The heterogenous African aviation industry and the legacy of colonisation

Air transportation services in Africa are largely rendered through BASAs, which are negotiated and concluded between state governments for utilisation by air operators and Africa consists of 54 states and it therefore possibly translates into 54 air transportation markets. Out of the 54 states, 16 are landlocked⁵²⁵ and air transportation becomes all the more important in this regard. Africa is the world's second largest continent in terms land size and population, where more than 2,138 languages are spoken and there are over twenty official languages.⁵²⁶ Linked to the spoken languages are the associated ethnic groups. Africa is, accordingly, a colossal continent in land mass with diverse languages, cultures and invariably, different governments one state to another. Although this study has advanced the argument that the circumstances of Africa are akin to that of the EU that liberalisation is a policy convergence of many separate and independent nations into one, the comparison by Brown is correct is that Europe has a far lesser population, land mass and language

⁵²⁵ Abate (n 14 above) 3.

⁵²⁶ Brown (n 86 above) 233.

divergence than that of Africa.⁵²⁷ The other important indicator that is arguably omitted from Brown's comparative analysis is economic stability and development.

The terms and conditions of the BASAs would not really look the same depending on the extent of implementation of the Yamoussoukro Decision by African states. The reality is that all these 54 states vary insofar as economic development is concerned – others are advanced, others developing, and some, economic development is fragmented or still lagging. The same applies to political stability.⁵²⁸ In other words, the African economic and political landscape is diverging in disparities, and this has repercussions on the application of the Yamoussoukro Decision because, for example, under-developed states would elect rather to direct resources to matters of national interest which have a direct bearing on the immediate socio-economic needs of its peoples, as opposed to an air transport policy.

The fragmentation of the aviation industry of Africa, the varying degrees of development thereof, cannot be considered in isolation from the history of colonisation that took place on the continent which has really shaped the regional groupings that exist today, a system of imposition of a foreign government on a sovereign state. With the exception of Ethiopia and Liberia, by 1954, the African continent had been colonised by various European countries.⁵²⁹ Button *et al* posit the argument that this fragmentation that was entrenched along arbitrary national boundaries has had an adverse impact on African citizens,⁵³⁰ leaving behind legacy air transportation patterns that are concentrated more within the regional communities than between them or with other countries and further make the point that -

The differing attitudes of the colonial powers towards their domains influenced the ways transportation was viewed and, subsequently, the ability of African states to develop their own transportation policy in the post-colonial period, although the interests of the colonial powers dominated. In terms of policy attitudes, Belgium and Portugal did not permit any political activity in their territories, the UK governed each of its territories separately – allowing a degree of self-determination on internal matters in some – while France's

⁵²⁷ as above, 234.

⁵²⁸ as above.

⁵²⁹ K Button *et al* (n 510 above) 628.

⁵³⁰ as above.

colonies were treated as an integral and indissoluble part of the metropolitan France, with entirely parallel political systems and processes.⁵³¹

It is therefore probable that the formulation of air transportation policy within African states in the post-colonial period has been influenced more by the former colonial powers who had differing political, governance and economic outlooks, than by liberal and progressive policies and most regional communities were established along common colonial and linguistic ties.⁵³² A highly general and limited comparative analysis indicates that the former British colonies seem to have fared slightly better in the development of their air transportation markets and connectivity more than the former French colonies, which speaks to the colonial attitudes that prevailed historically. Admittedly, this is a very thin positive, whereas the substantive impact of colonisation on the African air transportation market and intra-African air services is that it was severely compartmentalised and insulated. Whilst Njoya⁵³³ characterises this impediment as the 'dependency on former colonial powers', it is rather correct to say that it is the influence of colonial domains, and not dependency.

Incidental to the heterogenous nature of the African continent, the African air transportation market has also had to contend with poor, almost absurd route connectivity and high air fares, rendering travel by air to be an exclusive mode of transportation. To highlight and decry the low levels of intra-African air connectivity, Brown explains this encumbrance thus:

Currently, complicated and convoluted air service routes are commonplace across Africa. A flight from Algeria to Cameroon would require a passenger to board an aircraft and leave North Africa heading to Istanbul, Turkey and then return to West Africa. A direct flight would take 3.5 hours, the same distance as going from Atlanta, Georgia to Phoenix, Arizona, or a trip from London, England to Athens, Greece. One would expect to take a direct flight, but if not a direct flight, then certainly a passenger would not expect to go from Atlanta to Europe to double-back to Phoenix, or to travel from London to Athens via Moscow!⁵³⁴

⁵³¹ as above.

⁵³² Njoya (n 66 above) 15.

⁵³³ n 66 above, 14.

⁵³⁴ Brown (n 27 above) 234.

In other words, to travel within Africa by air, one must leave Africa, fly to Europe and then return into Africa. This invariably makes the trip far longer and the fare higher and would be a real deterrence for potential consumers wishing to travel within Africa by air, impacting on other economic sectors such as tourism. An air route structure of this nature does not augur well for implementation of the Yamoussoukro Decision and in fact, takes business out of the continent to non-African air carriers. To elucidate the lack of business or economic sense, an airfare from Algeria to Cameroon is 80% more expensive than a trip from London to Athens.⁵³⁵ A return flight from Maputo, Mozambique to Johannesburg, South Africa is another example of an economically irregular price structure: the return flight is 163% more expensive than a return from Durban to Johannesburg, notwithstanding that the distance between the country-pairs is similar to that between the city-pairs.⁵³⁶ This package of convoluted air route structures and high fares hinder the development and growth of the African air transportation market.

The REC formations nonetheless continue to lead their respective member states in all matters political and economic. The initiatives and legal instruments which have been adopted at a regional level by some of the RECs for the liberalisation of air transportation services bear testament to the efforts to surmount the colonialism syndrome. The strongly entrenched diversity of Africa and her peoples will not easily dissipate; however, African governments should not allow it to be a constraint to the implementation of a liberalisation policy that will benefit and unify the continent and the intra-African air route connectivity has improved significantly and matured over time, with a view to ultimately achieve continent-wide policy harmonisation.

⁵³⁵ as above, 235.

⁵³⁶ O Mhlanga & JN Steyn (n 500 above) 14.

2.3 The lack of knowledge and the weakness of institutional structures

The implementation of the Yamoussoukro Decision will have a positive influence on other economic sectors such as trade, hospitality, and tourism amongst others and one of the factors that pose a hindrance to the full implementation of the Yamoussoukro Decision is the lack of knowledge and appreciation of the said resultant economic effects. The Yamoussoukro Decision was viewed by African governments as a policy framework that will open up the market to the detriment of national carriers and smaller airlines. Coming from fragmented existence, continuous knowledge-sharing of liberalisation of the air transportation market to governments and other stakeholders, is critical in order to mend the appreciation of the full liberalisation of the African skies, to be aligned amongst the African governments. In this respect, the Yamoussoukro Decision establishes a Monitoring Body in terms of Article 9 thereof, which consists of three sub-structures which are: the Abuja Treaty Sub-Committee on Air Transport,⁵³⁷ a Monitoring Body comprised of representatives of the ECA, AU, AFCAC and AFRAA,⁵³⁸ and the AFCAC as the Executing Agency for the Yamoussoukro Decision.⁵³⁹ In terms of Article 9.1, it is the Sub-Committee on Air Transport that is mandated to implement the Yamoussoukro Decision. The function of the Monitoring Body is to follow-up on implementation of the Decision. It is unclear to what extent the Sub-Committee on Air Transport has been strengthened to implement the Yamoussoukro Decision as it appears that the RECs have been doing so independently, without the involvement of the Sub-Committee. This Sub-Committee is comprised of African Ministers responsible for air transportation, which is correct as the decision to implement the Yamoussoukro Decision must commence at the political end and cascades to the supporting technocrats and administrators.

⁵³⁷ Art 9.1 provides:

“Pursuant to paragraph 4 of Article 25 of the Abuja Treaty, a Sub-Committee on Air Transport of the Committee on Transport, Communications and Tourism is hereby established which shall be responsible, inter alia, for the overall supervision, follow-up and implementation of this Decision.”

⁵³⁸ Art 9.2 provides –

“A Monitoring Body composed of representatives of the ECA, OAU, AFCAC and AFRAA which shall be assisted, as the case may be, by representatives of sub-regional organizations, is hereby established to assist the Sub-Committee on Air Transport composed of African Ministers Responsible for Civil Aviation in the follow-up of the implementation of this Decision”

⁵³⁹ Although the AFCAC is not named as the executing agency in Article 9.4, it was appointed by the AU to be the executing agency for the Yamoussoukro Decision. Its principal responsibilities are to direct and manage the liberalised aviation industry of Africa, with the authority to formulate and enforce appropriate rules and regulations for fair competition in the sector and to safeguard the rights of consumers.

The Monitoring Body is established to aid the Sub-Committee in following up on implementation of the Yamoussoukro Decision and although that is somewhat vague, it appears that the responsibility of the Monitoring Body is to provide oversight on the activities of the Sub-Committee and hold it accountable. The AU in this regard, as one of the organisations in the Monitoring Body, must take the lead. The history of liberalisation of the African air transportation market, as discussed in this study, shows that the AU has relied heavily on the ECA, an agency of the UN understandably so as this was a novel concept on the continent. However, the AU is now well-positioned, empowered and informed to lead Africa to liberalisation of its air transportation market whilst taking guidance from other jurisdictions and markets in the international community.

The AFCAC was appointed as the Executing Agency to ensure that the Yamoussoukro Decision is implemented successfully, as per Article 9.4, and manage and supervise the liberalised air transportation industry; however, Africa is not quite there yet. The AFCAC is also empowered as the Executing Agency, in terms of Article 9.5, to formulate and enforce competition rules for the implementation of the Yamoussoukro Decision, which baldly directs that designated airlines shall be given fair opportunity on a non-discriminatory basis.⁵⁴⁰ Whilst this may be the case, as at the time of the adoption of the Yamoussoukro Decision and its coming into effect, no competition rules had been put in place by either the AFCAC or the AU to give expression to this provision to enable the market to operate within a single economic market;⁵⁴¹ this has been done at the regional levels instead. When markets are liberalised, competition increases (which is good for consumers) and regulation thereof, becomes highly crucial. Mhlanga and Steyn draw a very important distinction between Africa and Europe that, Europe established the Directorate General for Competition which enforces a single set of competition rules within the Community and no such continental authority exists in Africa.⁵⁴² Consequently, a single set of competition laws are applicable for air services in the European aviation market whereas, competition rules and norms for intra-African air transportation services are the subject of treaties

⁵⁴⁰ Refer to Article 7 of the Yamoussoukro Decision.

⁵⁴¹ O Mhlanga and JN Steyn (n 500 above) 13.

⁵⁴² as above.

inter se states,⁵⁴³ and each competition authority carries the national interests of its air services market. Some of the by-products of the liberalisation air services are, *inter-alia*, mergers, takeovers, and alliances in response to the deregulated market and thus, a level continental playing field is required because anti-competitive conduct is an antithesis of the spirit of liberalisation. The need for harmonisation, uniformity and certainty of this sphere cannot be over-emphasised.

A further and glaring institutional weakness identified in the Yamoussoukro Decision is that none of the structures established therein are empowered to mete out enforcement action for State Parties which fail to implement the Yamoussoukro Decision, which is binding on the signatories. This omission, whether intentional or negligent, essentially enables State Parties to exercise discretion and potentially renders the binding nature of the Decision to be ineffective. It would have been far more potent, for purposes of implementation, to combine the binding nature of the Yamoussoukro Decision with sanctions for non-compliance. The delayed execution of the Decision in full may also be influenced by the lack reciprocity of privileges between states and that is where enforcement could be useful. Privileges such as the fifth freedom are not easily granted by State Parties. One of the shortcomings of the Monitoring Body is that it relies on the willingness of states to co-operate because it does not, on its own, have any enforcement authority.⁵⁴⁴ It is nevertheless understood that the omission of such provisions may have been deliberately done in consideration of the raw novelty of liberalisation of the air transportation market in Africa at the time, even though it had been done in the US and EU, and so as not to breed discouragement of the uptake of the Yamoussoukro Decision amongst state parties; however, perhaps the time is ripe for state parties to consider the inclusion of enforcement mechanisms in the Yamoussoukro Decision – the document is 22 years old and it would be difficult, today, to still characterise liberalisation as a novel concept to African governments. It is suggested that the Monitoring Body and its sub-structures that are established in the Yamoussoukro Decision continue to provide knowledge to State Parties and stakeholders about liberalisation, the purpose of the

⁵⁴³ as above.

⁵⁴⁴ O Mhlanga & JN Steyn (n 500 above) 14.

Decision and its impact, where the need arises or where weaknesses are identified and strengthen their institutional ties.

2.4 Non-physical barriers

The removal of non-physical barriers is important to attain the set goal of economic integration and by extension, the unrestricted movement of capital, goods and persons. It is an objective that is repeatedly advocated for in all the regional treaties. Liberalisation envisages an Africa where such barriers do not exist so as to ease the physical movement by air. Non-physical barriers entail, *inter alia*, aspects such as immigration restrictions and foreign exchange control which have a direct bearing on the movement of people and goods. The easing or elimination of non-physical barriers is also important for trade, which is integral to economic growth. Regional trade and exporting trade opportunities are boosted when non-physical barriers are eliminated from the supply chain.⁵⁴⁵ The ease of trade also influences the investment decisions of the private sector⁵⁴⁶ and other international investors. Investors pay particular attention to the ease with which they are able to establish and conduct business operations in a state. If African states are going to create a single aviation market, related laws such as immigration should similarly assimilate to accommodate the effective application and implementation of the Yamoussoukro Decision without of course compromising legality;⁵⁴⁷ in an ideal world, it should be a synchronised lawmaking process.

Travel within the SADC states for non-SADC citizens requires that a visa be obtained, which has an impact on the ease of travel and may well influence the desire of the potential traveller if visa procedures are cumbersome, time-consuming, and expensive. Intervistas also underscores the inequality of visa requirements by way of example of South Africa which requires transit visas for some African nationals and

⁵⁴⁵ ICAO/TAG/WB Development Forum “Maximising Civil Aviation’s Economic Contribution: Safe, Secure and Sustainable Air Transport in Open Skies – Challenges and Potential” Montreal, Canada 24-26 May 2006 – *Implementation of the Yamoussoukro Decision: Progressing or Stalled*, Paper presented by Ethiopia, 2 <https://www.icao.int> (accessed 22 May 2021).

⁵⁴⁶ as above.

⁵⁴⁷ O Mhlanga & JN Steyn (n 500 above) 12.

yet travellers from Europe and the US do not require visas to enter South Africa. The CEMAC and EAC groupings have made meaningful progress in improving the movement of people across their regional borders by instituting a regional passport⁵⁴⁸ and this should serve as an example to other regional groupings, to eventually achieve borderless movement of people across the length and breadth of the continent.

2.5 Limited skilled personnel and safety oversight

Air transportation operations are highly technical in nature and require appropriately skilled and trained personnel, for both the operator and the regulator. Financial resources are required to attract and retain competent technical skills within the aviation sector, and this is a challenge for some African states. The scarcity of such personnel in Africa, which has a direct bearing on the levels of aviation safety and security, has an impact on the liberalisation of the air transportation market, and on the consolidation of the aviation industry of Africa. Liberalisation of air transportation services is expected to grow the sector and more engineers, pilots, inspectors are required to meet the demands of the sector as it grows. Technical personnel also need to constantly go for training, revalidation, proficiency and the like to keep them current on their skillset, which is normally a regulatory requirement; thus, it is a profession where training and learning never ceases and there must be financial resources for same. This entire value-chain is important for air safety, effective oversight and management. In the retention of skilled personnel, at times Africa has to compete with attractive remuneration packages offered to skilled personnel by countries of the Middle East.⁵⁴⁹

Generally, civil aviation authorities in Sub-Saharan Africa are underfunded,⁵⁵⁰ and therefore, they are unable to fulfil their duties of safety and security oversight due to a shortage in the capacity of safety inspectors. In some states, the funding of civil aviation authorities is not adequate, and in many cases, the revenue received by civil

⁵⁴⁸ as above, 15.

⁵⁴⁹ O Mhlanga & JN Steyn (n 500 above) 13.

⁵⁵⁰ Bofinger (n 509) above 6.

aviation authorities, such as overflight charges, is paid over the national treasury.⁵⁵¹ The civil aviation authority therefore still relies on allocations from the state for the funding of its mandate. The limited financial resources have a direct impact on the recruitment of safety inspectors, capacity and other related aspects such as training, which ultimately comes to bear on the safety levels, standards and accident rate on the continent. The International Air Transport Association (IATA) has identified poor regulatory oversight as the greatest threat to air safety in Africa, followed by deficient safety management systems and inadequate flight crew training and proficiency. Poor safety levels will definitely stunt the growth of Africa's air transport market size, because it will deter the public from travelling by air. There is unanimity amongst scholars that regulatory oversight in Sub-Saharan Africa is, unfortunately, poor.⁵⁵²

Safety remains the foremost priority even when air services are liberalised, and it is required to be in conformance with the safety levels set by the ICAO. This requirement is underscored in Article 6.9 (f) of the Yamoussoukro Decision which requires conformance to and maintenance of the ICAO standards. The importance of safety arises again in Article 6.10 which entitles a State Party to revoke, suspend, or limit the authorisation to operation of a designated airline of another State Party if it fails to meet the ICAO safety and security standards. Article 6.12⁵⁵³ of the Yamoussoukro Decision also re-affirms State Parties to their obligations to comply with the safety and security standards of the ICAO – a re-affirmation of their obligations that are set out in the Chicago Convention. Accordingly, appropriately qualified flight operations inspectors are required to oversee and verify that designated airlines are indeed compliant with the safety and security standards put in place by ICAO; therefore, the application and upholding of aviation safety standards is intrinsic to safety oversight,

⁵⁵¹ as above.

⁵⁵² See O Mhlanga & JN Steyn (n 500 above) 13; Bofinger (n 509 above) 47; Brown (n 86 above) 237; Schlumberger (n 16 above) 174.

⁵⁵³ Art 6.12 provides –

- (a) The State Parties re-affirm their obligations to each other to protect the security of civil aviation against acts of unlawful interference. The State Parties will conform to the provisions of the various conventions on air safety in accordance with ICAO provisions and especially with Annex 17 of the Chicago Convention on International Civil Aviation.
- (b) Each State Party shall give consideration to any request from the other State Party for special security measures to meet a particular threat.
- (c) The State Parties re-affirm their obligations to comply with the civil aviation safety standards and practices recommended by ICAO.”

these two functions cannot be divorced from each other. Schlumberger asserts that the impact of poor safety levels –

...results in more expensive insurance premiums and the inability to develop code sharing and other business arrangements. It also scares away potentially high-yield international customers and potential private sector investors.⁵⁵⁴

In response to this shortfall in capacity for safety oversight duties, the regions embarked on and adopted programmes such as the Cooperative Development of Operational Safety and Continuing Airworthiness Projects (COSCAPS) wherein regional organisations pool resources from individual states and the civil aviation authorities train and share qualified technical personnel such as flight inspectors, for oversight duties. In most regional treaties, states agree to cooperate on the pooling of human resources to attain their objective and COSCAPS is one such programme. Similar initiatives have proved successful in regions such as Latin America and are sure to yield similar results for Africa, as long as the regions continue to co-operate. The EAC, similar to the EU, has also pooled its resources for purposes of oversight and it formed the East African Civil Aviation Authority with the support of the US Department of Transportation.⁵⁵⁵ The authority is headquartered in Arusha in Tanzania and is the main source of technical expertise for the oversight of air transportation in the region. It is even more imperative for Africa to pool its technical resources so as to make certain that no one country is left behind on account of its safety levels in order to achieve full liberalisation and ensure that it invests in the training of such personnel.

The air carriers and states involved in international air transportation normally subject the effectiveness of their safety oversight and management systems to independent, internationally recognised, and accepted assessments conducted by the following international organisations, as a means to convey to passengers and other states that their air transportation is safe:

- The International Safety Audit (IOSA) Program of IATA: this assessment audits individual airlines and is compulsory for all airline members registered with

⁵⁵⁴ Schlumberger (n 16 above) 174.

⁵⁵⁵ as above, 45.

IATA. Non-IATA members subject themselves to this audit as well to obtain credibility of their certification.⁵⁵⁶

- The International Aviation Safety Assessment Audit (IASA) of the FAA: this assessment has a limited scope as it is applicable to countries that operate direct flights to the US only.⁵⁵⁷ A state must, upon assessment, obtain a rating of category 1 to fly new routes directly to the United States; a country that obtains a category 2 rating is not permitted to increase its capacity, although existing flights are allowed to continue.⁵⁵⁸ The IASA audit outcome categories 1 and 2 denote 'pass' and 'fail', respectively.
- The Universal Safety Oversight Audit Programme (USOAP) of the ICAO: ICAO USOAP audit is targeted at states and is conducted every three years to appraise the implementation of standards and recommended practices as set in the annexes of ICAO; it is really an exercise that scrutinises the regulatory machine of a state as administered by the aeronautical authority. The acceptable minimum for implementation for the USOAP audit is at least 75 to 80 percent.⁵⁵⁹
- The EU Blacklist: this audit programme targets both airlines, which fly to Europe and their country of registry and relies on tools such as safety ramp checks. The EU instituted this audit programme pursuant to an increase in the occurrence of safety-related incidents and accidents and enforces the prohibition of blacklisted carriers from entering Europe.⁵⁶⁰ In some instances, the ban is *en masse* for blacklisted airlines that are registered and certified in some African states; exceptions are however made for aircraft from prohibited airlines whose aircraft are exclusively maintained in Europe.⁵⁶¹ As at November

⁵⁵⁶ Bofinger (n 509 above) 49.

⁵⁵⁷ as above.

⁵⁵⁸ as above.

⁵⁵⁹ as above.

⁵⁶⁰ as above, 51.

⁵⁶¹ as above.

2022, air carriers registered in twelve African states⁵⁶² were listed on the Air Safety List of the EU as being banned from flying into Europe. The EU has however been accused of lacking transparency in the manner in which it applies its airline safety bans,⁵⁶³ and it is more a reflection of lack of confidence in the safety oversight of African regulatory authorities, on the part of the EU⁵⁶⁴ in circumstances where some of the affected airlines have strong safety records. The accusation has been taken as far as to say that the EU is keeping African airlines on the list to give advantage to European operators in Africa.⁵⁶⁵ Whatever the case may be, the prohibition on some African airlines to fly into Europe poses an obstacle to the growth of the African air transport whereas the glaring anomaly of Africa's intercontinental air transport market is that a substantial amount of the traffic to and from Africa is transported by non-African carriers. While the EU The Air Safety List is purposed to safeguard safety, where safety concerns have been addressed by the affected African carriers, the ban ought to be accordingly lifted.

The nature of operations in civil aviation authorities is to execute the mandate of safety and security oversight and regulation. As a means to ameliorate the difficulty of oversight capacity, it is recommended that they also put focus into the development of staff retention policies, especially in relation to technically skilled personnel such as safety inspectors⁵⁶⁶ and undertake remuneration benchmarking exercises in order to be able to at least compete in the global market and continuously subject the state regulatory oversight system to international evaluations to improve on safety levels and conditions, increase the liberalisation of the internal African air transport market and be able to compete in the international aviation market too.

⁵⁶² As drawn from Annex A to the Air Safety List of the Union, these are: Air Zimbabwe; all air carriers certified by Angola with the exception of TAAG Angola Airlines, and Heli Malongo; all air carriers certified by Congo Brazzaville; all air carriers certified the Democratic Republic of Congo; all air carriers certified by Djibouti; all air carriers certified by Equatorial Guinea; all air carriers certified by Eritrea; all air carriers certified by Liberia; all air carriers certified by Libya; all air carriers certified by Sao Tome and Principe; all air carriers certified by Sierra Leone; and all air carriers certified by Sierra Leone, <https://transport.ec.europa.eu> (accessed 17 January 2023).

⁵⁶³ n 234 above, 34.

⁵⁶⁴ as above.

⁵⁶⁵ Pirie (n 520 above) 13.

⁵⁶⁶ The estimation was that at least 22,000 skilled workers will be needed in the aviation sector by 2022.

Although more emphasis is placed on capacity for safety and security oversight and regulation, it is trite that skilled and competent personnel are also equally important to run and manage the business of an air service operator, particularly for scheduled services where aspects such as on-time services, the ease of purchasing tickets, financial management, the recruitment of appropriately trained cabin crew and adherence to regulatory requirements, are but some of the critical considerations. Regional communities such as the ECOWAS have edified the significance of competent management to operate a designated airline by including it as a requirement in its air transport policy, as part of its liberalisation strategy. Enterprises such as flag carriers, through the involvement of government as the sole or majority shareholder, will at times impose or influence the personnel to be recruited for the airline, despite the lack of qualifications or experience. However, in respect of technical airline staff who are referred to as post holders, the ICAO has in place standards and the regulatory requirements are stipulated, and such is normally overseen and approved by the civil aviation authority as part of the certification process. Absent personnel who are technically, financially, administratively adequately qualified and experienced to run and manage a mammoth task such an air service, specifically a commercial one, then liberalisation of the air transport market will be hampered.

2.6 Aging aircraft and maintenance facilities

To compete in the international air transportation markets, air service operators must have reliable, quality aircraft that are in service. Even in economy-class, passengers want comfortable seats, good in-flight service and cleanliness in the aircraft and aircraft that do not emit noise while airborne. The acquisition of aircraft, whether by way of purchase or lease, requires substantial financial resources, in circumstances where, resources for African carriers are very limited. Both in Northern and Sub-Saharan Africa, carriers use the Boeing and Airbus jets for air services, but the complaint is that they are old,⁵⁶⁷ and this has adverse ramifications for maintenance costs. The date when some the aircraft were first flown goes back to as far as, for

⁵⁶⁷ Rhoades (n 9 above) 8.

example, 1954,⁵⁶⁸ 1963⁵⁶⁹ and 1969⁵⁷⁰ and that they are still in use, is a cause for concern.

With the demand that comes with a liberalised air transport industry, the ageing fleet would struggle to meet the increase in traffic. Although the Yamoussoukro Decision is not prescriptive about the type of aircraft to be used by designated airlines unless it has a bearing on environmental, safety or technical considerations,⁵⁷¹ ageing aircraft often do not meet the noise restrictions imposed in other countries and are therefore not eligible to land at many international airports,⁵⁷² and that in itself is an adverse restriction for an air transportation market that is trying to grow because it means the routes that can be served, are limited. Pirie however counters that it is generally the small African operators which are precluded from flying to and from Europe owing to the failure to pass the ICAO safety audits,⁵⁷³ which invariably results in reputational damage to the brand of those airlines. Increased financial investment is required to acquire new airline fleets and it is often very difficult to come by. Investors would want to see a growing air services sector to finance it, because it provides a level of assurance that there will be returns on investment.

The leasing of aircraft, as an alternative to purchasing it, is considered as an option that can bring meaningful yields to African airlines as it enables business expansion and they can provide more flexible air services and opportunities for the new entrants to the market.⁵⁷⁴ However, the determination of the airworthiness integrity of leased aircraft is very important for safety and African states should establish a clear regulatory regime for the safety oversight of leased aircraft, and should ensure that the responsibility for safety oversight is clearly articulated in the regulations and that leased aircraft meet the minimum international safety standards by including such terms and conditions in their BASAs.

⁵⁶⁸ B-707.

⁵⁶⁹ B-727.

⁵⁷⁰ B-747.

⁵⁷¹ Refer to Art 5.1.

⁵⁷² Rhoades (n 9 above) 13.

⁵⁷³ Pirie (n 520 above) 12.

⁵⁷⁴ n 8 above, 90.

Maintenance is an *essentialia* to the operation of aircraft, it forms part of the safety oversight checklist. Ageing aircraft would require regular and thorough maintenance. Absent proper, scheduled maintenance, it is safe to say that an aircraft is a high risk to life and limb. The maintenance regime of aircraft is very strict and if done according to the manufacturer's manual, it follows very specific intervals tied to the flight hours of the aircraft. Maintenance requires dedicated facilities and again, appropriately trained, and skilled engineers. Routine maintenance checks are conducted prior to an aircraft taking-off, each time it lands and whenever a flight is terminated,⁵⁷⁵ known as A, B or C checks using specified procedures and tools. These maintenance checks dictate which items of the aircraft must be checked at the specified interval, whether it is the airframe or avionics components, and aircraft need not be taken out of service for such routine checks. If an aircraft is used for international air services, it requires that the operator have maintenance facilities or be contracted to an aircraft maintenance organisation that has maintenance bases outside of the state of origin, in order to satisfy maintenance requirements from anywhere.

2.7 Airline co-operation

Airline co-operation in Africa is not a widespread practice and markets are few and some are small. Air carriers predominantly operate in silos – it is, if you will, the microcosm of the macrocosm of the heterogeneous composition of the continent. The Yamoussoukro Declaration of 1988 was adopted for this very purpose, to cultivate airline co-operation and integration in Africa, as a means to enhance the movement of peoples and goods within Africa but it unfortunately never gained any meaningful traction in implementation. Pan-African airline co-operation would bode well for the total implementation of the Yamoussoukro Decision as that would enhance the air connectivity networks on the continent, and possibly encourage the move away from bilateral agreements in Africa. Article 11.3⁵⁷⁶ of the Yamoussoukro Decision permits designated airlines from different State Parties to conclude commercial arrangements such as blocked-space, code-sharing, franchising or aircraft leasing and takes it no

⁵⁷⁵ Rhoades (n 9 above) 13.

⁵⁷⁶ Article 11.3 provides:

“In operating the authorized services on the agreed routes, a designated airline of one State Party may enter into cooperative marketing arrangements such as blocked-spaced, code sharing, franchising or leasing arrangement, with an airline or airlines of the other State Party.”

further than that. It is not clear whether the omission of the objectives of the Yamoussoukro Declaration were by design or negligence, but the sense is that, by virtue of adoption of the Yamoussoukro Decision, which is an all-encompassing policy framework, airlines would follow suit as a means to an end of achieving a continentally liberalised air transportation market.

One of the challenges in Africa, as it concerns airline co-operation, is that most routes are too thin to be profitable and airlines should ideally be able to operate in multiple destinations simultaneously, to and beyond city-pair routes and to any intermediate points.⁵⁷⁷ However, airline co-operation in Africa is very weak, particularly at the hubs⁵⁷⁸ and co-operation is more limited to code-sharing. Four of the airlines in Africa are affiliated to global air alliances⁵⁷⁹ and probably aren't too affected about the lack of co-operation of air carriers on the continent; however, the same cannot be said about the smaller regional or domestic air carriers. The African Airlines Association (AFRAA) should take the lead and encourage African airlines to pursue greater co-operation in operations so as to fulfil the objectives of the Yamoussoukro Decision and create a more interconnected Africa. AFRAA is one of the sub-structures of the Monitoring Body in Article 9 of the Yamoussoukro Decision tasked with aiding the Sub-Committee on Air Transport in following up on the implementation of the Decision. Perhaps fear lingers amongst African airlines that co-operation may result in reduced profit margins or dominance, but effective competition authorities will safeguard that the co-operation is done within fair competition regulatory parameters.

2.8 Capacity of airport infrastructure

A liberalised air transport market is anticipated to usher in increased traffic volumes at airports, and therefore, airports must be installed with facilities that are sufficiently adequate to receive the traffic both in the form of passengers and air carriers. Airport

⁵⁷⁷ Njoya (n 66 above) 15.

⁵⁷⁸ as above.

⁵⁷⁹ EgyptAir, Ethiopian Airlines and South African Airways are members of the Star Alliance and Kenya Airways is a member of SkyTeam Alliance. Kenya Airways has a regional carrier, Precisionair of Tanzania in which it holds 41 percent equity shares and Ethiopian Airlines holds 49 percent equity shares in ASKY.

infrastructure refers to the airside, which includes runway length and condition, airport parking space, air traffic control, taxiways, and apron space; and to the landside services which include passenger terminal capacity and access to terminals.⁵⁸⁰

The assertion by Gwilliam is that the airside infrastructure of airports in Africa has potential capacity,⁵⁸¹ and is of more quality in the airports serving higher traffic volumes such as Johannesburg, Nairobi, Cairo and Tangier.⁵⁸² The quality levels of airside infrastructure therefore vary. The assertion suggests that there are aspects of deficiency in airside infrastructure of concern which present constraints to the flow of traffic at airports in Africa, and in landside infrastructure. The specific areas of concern are considered hereunder.

2.8.1 Runway Design

One of the limitations to airside infrastructure is runway capacity due to the low-cost design⁵⁸³ utilised by airport planners [own emphasis] and in practical terms, this means that upon landing, an aircraft must use a turning bay at the end of the runway, turn around, and taxi back up the runway to the apron, usually located in the centre and that is where the aircraft gets parked, loaded and unloaded, re-fuelled and passengers board. This kind of runway design would work if the scheduling between the departure and landing of aircraft provides enough time for all the ancillary activities to take place or the airport has low levels of traffic;⁵⁸⁴ however, if it is not the case, it can cause the runway to be occupied by aircraft for an extended period of time and impede the movement of traffic if the apron is congested. The low-cost design sees too much happening on the apron which is time-consuming and in scheduled air services, time and punctuality are critical. Airports with low volumes of traffic are therefore not negatively impacted by this kind of runway design. It is suggested that, to ameliorate this problem, airports construct a new taxiway that runs parallel to the old one, onto

⁵⁸⁰ Bofinger (n 509 above) 29.

⁵⁸¹ K Gwilliam *Africa's Transport Infrastructure: Mainstreaming Maintenance and Management* (2011) 142.

⁵⁸² Bofinger (n 509 above) 30.

⁵⁸³ Gwilliam (n 581 above) 142.

⁵⁸⁴ as above; Bofinger (n 509 above) 31.

which aircraft move at the end of the runway which is a solution that has been widely implemented in North Africa.⁵⁸⁵ In this way, short-timed intervals between departing and arriving flights is manageable. A liberalised air transport market requires that the movement of aircraft is timed in such a way so as to avoid congestion and any incidents at the apron.

Gwilliam also raises narrow peak periods of aircraft arrivals as an additional constraint to airports, which places pressure on both runways and terminals⁵⁸⁶ because it results in there being an influx of passengers at the airport after disembarkation. Efficient schedule planning and management is required, in this regard, and is paramount for a liberalised air transportation sector.

2.8.2 Air Traffic Control and Navigation

Air traffic control (ATC) and navigation is a critical aspect of air safety, and is reliant on systems installations at the airports or in structures *en route* the airport. This refers to the surveillance technology that is utilised to guide the aircraft when airborne and when landing and taking-off and to be able to locate its position in the air. The Eastern corridor of Africa, from South Africa right up to Egypt, possesses the most ATC installations,⁵⁸⁷ which includes other states such as Kenya, Morocco, Algeria and Tunisia. Ethiopia, an important hub on the continent, lacks adequate coverage.⁵⁸⁸ In some parts of Africa, the installations are too old and are too expensive to repair.⁵⁸⁹ Most airports that receive more than 1 million passenger utilise instrument landing systems (ILS).

Radar surveillance technology enables the air traffic control centre to locate the aircraft in its airspace and the location can be accurate to 30 meters if the aircraft uses the global positioning system (GPS) to assess its position.⁵⁹⁰ The GPS aids in the

⁵⁸⁵ as above.

⁵⁸⁶ Gwilliam (n 581 above) 143.

⁵⁸⁷ as above, 141.

⁵⁸⁸ as above.

⁵⁸⁹ This is the case with regards to Malawi.

⁵⁹⁰ Bofinger (n 509 above) 41.

separation of aircraft and in situational awareness for navigation.⁵⁹¹ However, automatic dependent surveillance-broadcast (ADS-B) technology is proving to be a more advanced and less costly air surveillance system than radars.⁵⁹² The assertion is not really that the ATC infrastructure in Africa is not adequate or essential but according to Bofinger, it is beneficial⁵⁹³ in that it:

- Provides a controller with an aircraft position at all times, even if that controller is not communicating with the aircraft;
- Locates the area of an accident much faster and more accurately than a traditional radar;
- Allows much denser traffic, which gives controllers the freedom to allow aircraft to fly more fuel-efficient routes and approaches;
- Allows flying during bad weather, such as the rainy season which is prevalent in many countries; and
- Allows the pilot to see other aircraft in the vicinity, and provides other important information, such as weather updates.⁵⁹⁴

Ground-based navigational systems, such as ILS, are few in Africa as they are expensive to install and maintain. They usually require to be calibrated at annual intervals which also attracts costs and satellite technology such ADS-B and GPS can be considered as a replacement where maintenance proves to be a financial challenge.

2.8.3 Terminal Capacity

On the landside infrastructure, insufficient passenger terminal capacity presents a challenge to the potential inflows of traffic from a liberalised air transportation market. The design of terminals is dependent on the forecasted traffic and growth assumptions. The observation is that several terminals at airports in Africa are

⁵⁹¹ as above.

⁵⁹² as above.

⁵⁹³ as above.

⁵⁹⁴ as above, 42.

operating at or above design capacity,⁵⁹⁵ which is a problem because it means passengers are not accommodated properly. In a liberalised market, passenger traffic is expected to increase at airports and therefore, airport terminals must be sized accordingly to receive and manage the increased passenger traffic and avoid overcrowding and density.

Gwilliam however cautions that the decision to upgrade airport terminals must be a determination based on a case-by-case assessment;⁵⁹⁶ and not on a blanket approach basis. The traffic patterns and forecasted growth are important factors to be considered by terminal planners.

2.8.4 High airport charges

Airport charges impact greatly on the cost of air fares as it is a cost that is passed onto the passenger, and this serves as a deterrent on liberalisation of the air transport services market. In Africa, airport charges are generally high although they vary widely by airport and aircraft. Ghana, Cameroon and Côte d'Ivoire have been identified as the countries with particularly high airport charges.⁵⁹⁷ When compared with charges at Frankfurt Main International Airport, African airport charges came out 30 to 40 percent higher than those at Frankfurt Airport, which is quite a substantial difference. Bofinger reasons that higher airport charges are not surprising in developing countries since few airports, if any, in Sub-Saharan Africa have any other means of generating revenue as in developed countries.⁵⁹⁸ In developed countries, enterprises such as car rental are one of the most important streams of revenue for airports. O.R Tambo International Airport in Johannesburg, for example, has lounges which offers passengers high-end hospitality services whilst awaiting to board their flight. African airports are however heavily reliant on airside and passenger charges and these charges may adjust upwards substantially with the aircraft size.⁵⁹⁹

⁵⁹⁵ Gwilliam (n 581 above) 143.

⁵⁹⁶ as above.

⁵⁹⁷ Bofinger (n 509 above) 34; Gwilliam (n 581 above) 146.

⁵⁹⁸ Bofinger (n 509 above) 35.

⁵⁹⁹ as above.

2.9 Legal harmonisation and convergence

The fragmented composition and manner of co-operation in Africa cuts across many other areas, including that of the regulatory sphere. Many, if not all of the REC treaties under analysis in this study record, as one of the policy objectives, policy harmonisation; states are cognisant that the effective implementation of their inaugural regional treaties and attainment of the objectives therein requires elimination of policy differences and harmonisation of policies. Harmonisation signifies unity and uniformity. The same is applicable to regulatory harmonisation which involves the removal of diverse domestic regulations, alignment of bilateral and multilateral agreements with the Yamoussoukro Decision principles⁶⁰⁰ on important aspects such as capacity, frequency, tariff, right of establishment and designation, competition and safety and security oversight. A broad view of the existing variations needing harmonisation are presented hereunder.

2.9.1 Diversity of national regulations

Whilst each REC has adopted laws and policies to respond to the Yamoussoukro Decision, the diversity of national aeronautical laws does not feature in the imperatives of regulatory harmonisation and co-ordination of subregional and continental initiatives and programmes. Harmonisation is still limited to the RECs without the future view to establish continental regulatory laws which will facilitate a fluid implementation of the Yamoussoukro Decision.

2.9.2 Market access

While in the main, regional market access policies are aligned to the Yamoussoukro Decision, other RECs still apply some restrictions such as the requirement to approve air tariffs prior (BAG, COMESA); others may apply restrictions to capacity. Same is reflective of markets that still have a protectionist outlook to liberalisation and should

⁶⁰⁰ n 8 above, 87.

be eliminated in the pursuit of an ‘open skies’⁶⁰¹ framework otherwise Africa will persist with “closed skies”.

2.9.3 Cabotage

The right of cabotage is not treated the same from one REC to another. For instance, in COMESA, in terms of the Legal Notice, it is held in abeyance until the implementation of Phase II where all restrictions are removed. The Banjul Accord has omitted it from its policy and in other legal instruments, cabotage is granted but its application is limited.⁶⁰² Cabotage is possibly regarded as a threat to competition within the domestic air services market, but it could prove beneficial to allow it so as to create more route networks where air services are scarce.

2.9.4 Ownership and eligibility criteria

Most regional air transport regulations and policies prescribe that an airline must be owned by the state or nationals of the state. Other conditions direct that the headquarters of the airline be located in the state of origin, as one of the criterion of ownership or that the majority of personnel employed by the air carrier be nationals of the state of registry. The employment of majority of the personnel from the state of origin, as an eligibility criterion, is a labour protection mechanism and is commendable. The limitation of ownership of a commercial airline to the state or nationals of the state is a matter of national pride but may serve to exclude private parties who want to participate in the commercial air services sector. The most important consideration and for state security reasons, is really control of the airline – a state or its nationals may own an airline in circumstances where it is in fact controlled by a third party.⁶⁰³ Control is where the real power lies as it the seat of decision-making. It is recommended that control be used as a determinant rather.

⁶⁰¹ as above.

⁶⁰² as above.

⁶⁰³ as above.

2.9.5 Dispute resolution mechanism

It is inevitable that reformation to the air transportation sector, such as liberalisation, will give rise to some form of disputes amongst stakeholders which need to be settled, preferably without need to approach courts. The competition stakes are high and profit margins are likely to be impacted upon. Article 8.1⁶⁰⁴ of the Yamoussoukro Decision directs State Parties to resolve disputes by way of negotiation, in the first instance. If State Parties fail to settle a dispute by way of negotiation within 21 days, either party may refer the matter for arbitration in accordance with Appendix 2 of the Yamoussoukro Decision.⁶⁰⁵ It is a rather bare dispute resolution provision lacking structure: State Parties are left to their own devices to negotiate settlement without the aid of an independent third party. These disputes may take a complex commercial form and individuals with such expertise should be roped in to assist with the dispute.

2.9.5 Protection of consumers

The Yamoussoukro Decision is silent on the protection of consumer rights, leaving consumer rights vulnerable to commercial enterprises. Regional communities have instead developed their own standards as it relates to consumer interests. Consumer rights entail a range of issues such as code-sharing, refunds for air tickets, conditions of conveyance, liability provisions, misplaced baggage, denied boarding and passengers with special needs. It is submitted that, in general, African passengers are not properly informed of their rights⁶⁰⁶ which renders the commercial relationship one-sided; they are also usually absent in the aviation dialogue,⁶⁰⁷ but simply consume the services. Liberalisation will undo monopolies and dominance in the sector and bring in a variation of services, competition and efficiency and it is important that consumers are informed of their rights and those rights are similarly enforceable. The

⁶⁰⁴ Art 8.1 provides:

“If any dispute arises between State Parties relating to the interpretation or application of this Decision, the State Parties concerned shall in the first place endeavor to settle the dispute by negotiation.”

⁶⁰⁵ Refer to Art 8.2 of the Yamoussoukro Decision.

⁶⁰⁶ Gwilliam (n 581 above) 88.

⁶⁰⁷ as above.

objective of liberalisation is not targeted at amassing profits for business at the cost of consumer rights.

The quality of services offered by African airlines is viewed by the ECA as not meeting the expectations of consumers, bemoaning the lack of accountability for delayed flights and cancellations and the lack of information related to a carrier's commercial and operational terms and conditions.⁶⁰⁸ Consequently, African airlines have not seen the need to improve their service levels and provide full information on the rights of consumers.

2.10 Political instability and security

As Africa emerged from the system of colonialism and gained independence in the 1960s, African leaders had to grapple with the transition from being under control and now taking control of the political reins and the attendant transition. Peace and stability became the two major challenges in the ascendance to the thrones of political and economic power. Even though, over time, conflicts in Africa have subsided considerably and the continent is largely and consistently enjoying political stability, it still experiences outbreaks of political turmoil and economic theorists are *ad idem* that political instability is a serious malaise for economic performance and growth and the implementation of macroeconomic policies.⁶⁰⁹ Economic theory places political stability as a condition precedent for economic development and growth⁶¹⁰ and one would add that political stability is also essential for policy formulation which informs the trajectory of economic development and growth. Outbreaks of violence and regime change are a cause for the interruption of growth and future uncertainty.

⁶⁰⁸ as above.

⁶⁰⁹ IMF Working Paper prepared by A Aisen & FJ Veiga "How Does Political Instability Affect Economic Growth?" WP/11/12, January 2011, 3 <https://www.imf.org> (accessed 02 February 2023); Z Chtouki & R Raouf 'The impact of political stability on economic performance in Africa: Evidence from 40 countries' (2009) 1(4) *International Journal of Economics & Management Research* 36 <https://revues.imist.ma> (accessed 02 February 2023); AA Goldsmith Does political stability hinder economic development? Mancur Olson's theory & the Third World. *Comparative Politics*, 19(4), 473.

⁶¹⁰ Z Chtouki & R Raouf (n 609 above) 37. There is, however, a counter-theory by Mancur Olson that questions the role of political stability in economic growth. He suggests that the contrary may be true to popular belief – that stable societies with unchanged borders & an entrenched political regime may in the long-term be resistant to change.

Political disturbances can take the form of military coups d'états, civil riots, religious-based insurgencies, or labour unrest carried out by such collectives and targeted at the government of the day and may result in what Aisen and Veiga⁶¹¹ refer to as 'cabinet change': the installation of a new head of state and ministers. The decade between 1960 and 1970 in Africa was particularly marred by coups d'états as the power struggles ensued. In Africa, there are an astounding 146 different rebellion groups⁶¹², with the Democratic Republic of Congo having the most at 36.⁶¹³ This indicates that liberal democracy in Africa is prone to vulnerability.

The deep heterogeneity of Africa and her peoples along religious and ethnic lines, wealth in natural commodities and poor governance on the part of the state have been identified as some of the catalysts of political ructions. Okechukwu Ibeanu gives a different perspective on this matter and, over and above the high levels of poverty and wealth and abundance of natural resources, he interestingly attributes the fault for persistent political upheavals in Africa to the stratification of the African society and the petty bourgeoisie of the continent.⁶¹⁴ He argues his position thus:

I propose that the failure of petty bourgeoisie state making is the root of debilitating challenges to its rule, and its character as a class makes it increasingly incapable of containing those challenges. The result is therefore worsening political instability...As a class, it is no longer simply an auxiliary group that manages its own projects, but is politically pertinent. In contemporary capitalist societies, particularly those usually classified as developing, the petty bourgeoisie, although not the dominant class, is oftentimes the determinant class.⁶¹⁵

The line of reasoning in this argument is supportive of the socialist theory that the community must all share in the economic spoils, and not only a few and failure to do

⁶¹¹ A Aisen & FJ Veiga (n 609 above) 4.

⁶¹² O Ibeanu "Political Instability & the Challenge of Democratization in Africa: A Conceptual Analysis" m Centre for Democracy & Development, 2 <https://www.africapolitical.org> (accessed 02 February 2023).

⁶¹³ as above, 5.

⁶¹⁴ as above, 16.

⁶¹⁵ as above, 20.

so, will eventually result in political and civil unrest. Sharp and deep differences in religious ideology have also prompted political destabilisation in Africa.

The presence of political instability means that the security of the state is endangered and thus, no economic activity is likely to take place, including travelling whether by air, or any other mode of transportation for that matter. Potential travellers and tourists will be deterred from visiting a conflict-ridden country, and even for some time after such conflict has been settled simply because previously hostile environments are insecure. Therefore, political instability has long-term ramifications beyond the actual turmoil itself.

In light of the foregoing, the liberalisation of the intra-Africa air transportation market may come under threat because the Yamoussoukro Decision will not be able to take full expression in a climate where there is uncertainty about political stability. The policy framework is about forging greater air interconnectivity amongst African states and requires the presence of social cohesion and tolerance on the continent. It is difficult, even impossible, for the executive arm or implementing agency of government to implement policy in a destabilised environment as national priorities change in order to respond to the aggression meted out on the state.

2.11 Conclusion

The hindrances to absolute implementation of the Yamoussoukro Decision are substantive, rooted mainly in the effects of the history of colonialism on the continent. A socially and politically fragmented Africa will battle to converge to fully liberalise the air transportation market; there exist no signs of aeropolitics in Africa. The air transportation infrastructure in some parts of Africa is currently inadequate, and this in the absence of the complete implementation of the Yamoussoukro Decision and so is oversight capacity – it is hard to imagine the situation when complete liberalisation as envisaged in the Yamoussoukro Decision takes effect on the entire continent. Governments do not prioritise the funding of the regulatory authorities which causes a deficiency in the oversight function. The protectionist postures of African governments

towards flag carriers, sometimes ailing ones, will stunt the aims of the Yamoussoukro Decision and simultaneously drain the state fiscus, unnecessarily.

Notwithstanding the progress made on the continent, at regional levels, to implement the Yamoussoukro Decision, a range of issues have been identified as causing the delay of complete liberalisation of the African skies. These issues are, however, not without potential solutions which are proposed in the last chapter of this study.

CHAPTER SIX

Expediting air transportation liberalisation in Africa: The African Union launches the Single African Air Transport Market

1 Introduction

The Single African Air Transport Market (SAATM) is one of the twelve priority flagship projects under the AU Agenda 2063,⁶¹⁶ which is in essence a strategic framework document for the inclusive growth and sustainable development of Africa and her resources, for the benefit of all her peoples. The delayed uptake and execution of the ideals of the Yamoussoukro Decision and attendant challenges required of the AU to adopt measures to accelerate the liberalisation of intra-African air transportation and to pronounce itself boldly and resolutely on the formation of a single aviation market, aligned to other continental and regional international civil aviation markets around the world. The Heads of State and Governments of the AU were concerned about the slow pace of implementation of the Yamoussoukro Decision adopted a Declaration on the Establishment of SAATM by 2017.⁶¹⁷ The SAATM is a clarion call to and commitment on the part of State Parties to fully implement the Yamoussoukro Decision, create a common aviation area in Africa and it further addresses some of the areas which posed impediments to the execution of the Yamoussoukro Decision. The SAATM also serves as an impetus to the integration imperatives of the African

⁶¹⁶ AU Agenda 2063 was adopted by the Heads of State and Government during the 24th Ordinary Session of the African Union Assembly held in Addis Ababa in 2015. Other flagship projects given priority to under Agenda 2063 are:

- The African Integrated High Speed Network;
- African Commodities Strategy;
- Creation of the Continental Free Trade Area;
- The African Passport and Free Movement of People;
- Silencing the Guns by 2020;
- Implementation of the Grand Inga Dam Project;
- Creation of an Annual Consultative Platform for policy dialogue;
- Outer Space; and
- Pan-African Virtual University; and
- The Continental Financial Institutions.

⁶¹⁷ Report of the ICAO, Seventh Meeting of Directors General of Civil Aviation of Africa-Indian Ocean Region (AFI-DGCA/7) (Niamey, Niger) 20 July 2018, "Status of Implementation of the Single African Air Transport Market" (Presented by AFCAC), 1 <https://www.icao.int> (accessed 6 March 2021).

continent,⁶¹⁸ which is a recurring goal, founded in the Abuja Treaty and cascading into the treaties of the various RECs. The creation of a single, unified air transportation service under the SAATM therefore augurs well with the continental agenda of integration. The adoption of SAATM by the AU also resulted in positive legal developments for air transportation in Africa: it gave regulatory content to some areas and provisions of the Yamoussoukro Decision, such as competition, consumer protection and the powers of the AFCAC, which had lacked content and specificity. Admittedly, the SAATM is largely a restatement of and recommitment to the Yamoussoukro Decision principles however, with the adoption of the AU AU Agenda 2063, member states correctly realised that a liberalised and unified African airspace is a catalyst for economic growth in many areas, and it is that extended objective of unification of the intra-African air transportation market that renders the SAATM distinct. The SAATM embodies the ultimate consolidation of the Pan-African legal instruments for the unification of the African air transportation market, integration of its aviation economies and it is summarised by the AU thus:

The Single African Air Transport Market (“SAATM”) will ensure aviation plays a major role in connecting Africa to help support its social, economic and political integration and boost intra-Africa trade and tourism.⁶¹⁹

As explained above, the SAATM is born out of the AU Agenda 2063 as one of its flagship projects to develop Africa. Pursuant to the formulation of the SAATM objectives, the AU, working through its specialised Executing Agency, AFCAC, set targets to enable the realisation of the SAATM and filled the regulatory gaps of the Yamoussoukro Decision which were identified. This chapter will provide a background on the establishment of the SAATM, an analysis of the SAATM Handbook and other legal instruments related thereto and a discourse of the stakeholders involved in the flagship project.

⁶¹⁸ Paper by the Programme for Infrastructure Development in Africa (PIDA) “The Single African Air Transport Market – An Agenda 2063 Flagship Project”, 2, <https://www.au-pida.org> (accessed 11 January 2021).

⁶¹⁹ The SAATM Handbook (2019) 14 <https://au.int> (accessed 31 January 2023).

2 Background: AU Agenda 2063 and the SAATM Solemn Commitment

2.1 Agenda 2063

During the commemoration of the fiftieth anniversary of the AU in 2013, the leadership of the AU expressed the aspiration to give more gravitas to the integration and socioeconomic development agenda of the African continent, as expressed in the Abuja Treaty. Under Agenda 2063, the Heads of State and Government re-dedicated themselves, by means of a Solemn Commitment, to the accelerated development of Africa, guided by a vision to build an integrated, prosperous and peaceful Africa that claims its place in the international area.⁶²⁰ It was on this occasion where the AU Agenda 2063 (Agenda 2063) was expanded and flagship projects identified to enable Africa to change its economic, development and integration status, one of which, is the SAATM. On the integration of the continent, one of the undertakings recorded in the AU 50th Anniversary Solemn Commitment⁶²¹ and which directly underscores the objectives of the SAATM project is to –

- (ii) Accelerate action on the ultimate establishment of a united and integrated Africa, through the implementation of our common continental governance, democracy and human rights frameworks. Move with speed towards the integration and merger of the Regional Economic Communities as the building blocks of the Union.⁶²²

Agenda 2063 is, in essence, a long-term⁶²³ blueprint operational framework document of the African continent to accelerate the attainment of the socioeconomic, political and developmental goals of Africa. One of the targets of Agenda 2063 is ‘internal coherence and coordination to the continental, regional and national frameworks and

⁶²⁰ Agenda 2063, Background Note 01, 2, https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf (accessed 20 May 2020).

⁶²¹ AU 50th Anniversary Solemn Declaration, au.int/documents/20130613/50th-anniversary-solemn-declaration-2013 (accessed 12 March 2023).

⁶²² as above 3.

⁶²³ Although Agenda 2063 is targeting 2063 for the achievement of its objectives, it is a rolling plan of long, medium and short-term plans spanning over a period of 50 years.

plans adopted by the AU, RECs and Members states plans and strategies'⁶²⁴ – this speaks directly to the harmonisation of all national and regional policies and plans under the hand of the AU and this harmonisation activity under a singular institution, in this case, the AU, is proffered as one of the unique differences from past continental initiatives in the Agenda 2063 Background Note thus:

For the first time all continental and regional initiatives have been brought under one umbrella. The integration is expected to enhance consistency, remove policy over laps and redundancies and create space for the management of diversity and uniqueness in the AU.⁶²⁵

Indeed, this difference is a notable and remarkable milestone for Africa and its integration agenda and for the liberalisation of the air transportation services market. One of the other priority projects of Agenda 2063 is the African Passport and Free Movement of People⁶²⁶ that entails the creation of a common African passport to ensure the unrestricted flow of people within the continent and is congruent with the establishment of a single African sky in terms of SAATM priority project and works *in tandem* with same. This policy model for the movement of people is on par with the likes of those being utilised in the EU.

Agenda 2063 also delineates the roles and responsibilities of the relevant stakeholders at national, regional and continental level, to drive and implement the priority flagship projects, to achieve the goals of Agenda 2063 and the AFCAC, as a specialist implementation agency of the AU for the Yamoussoukro Decision, plays a critical role of implementation, monitoring and evaluation of Agenda 2063,⁶²⁷ in this regard and serves as a conduit for consultations between the AU Commission and the RECs. Agenda 2063 also places emphasis on the public participation of the African citizenry such that they are the process owners and receive cogent communication on the progress and outcomes of the plan⁶²⁸ and it is submitted that this implementation

⁶²⁴ n 620 above.

⁶²⁵ as above, 5.

⁶²⁶ as above, 12.

⁶²⁷ as above, 15.

⁶²⁸ as above, 16.

strategy of the AU will invariably attract and garner the support of the people. The Solemn Commitment concludes with a pledge⁶²⁹ to articulate the ideals expressed therein in the national development plans of member states through a people-driven process. Therefore, it is patently evident that Agenda 2063 and by extension, its flagship projects such as the SAATM, are intended to be anthropocentric in nature. The pledge to incorporate the ideals of the Solemn Commitment into the national development plans of member states also gives credence to the broader agenda of policy harmonisation that the African continent is pursuing. It being a creature of Agenda 2063, what follows is an evaluation of the establishment of the SAATM.

2.2 The establishment of the SAATM

With framework agreements in place such as the Yamoussoukro Declaration and later the Yamoussoukro Decision, which unambiguously and firmly planted the seed of liberalisation within the African air transportation services market, it begs the question: why was the SAATM established?

Insight to the response to that question can be found in the AU Declaration on the Establishment of a Single African Air Transport Market⁶³⁰ (SAATM Declaration) of January 2015. The Heads of State and Government record, in the introductory remarks of the SAATM Declaration⁶³¹ that they are –

Mindful of the Decision Assembly/AU/Dec.394 (XVIII) adopted by the Assembly during its 18th Ordinary Session held in Addis Ababa, Ethiopia, on 29th and 30th January 2012 on boosting intra-African Trade and Fast Tracking the Continental Free Trade Area;

Concerned by the slow pace in implementing the Yamoussoukro Decision on the liberalisation of air transport markets in Africa;

⁶²⁹ The pledge provides:

“We pledge to articulate the above ideals and goals in our national development plans and in the development of the Continental Agenda 2063, through a people-driven process for the realization of our vision for an integrated, people-centred, prosperous Africa at peace with itself.”

⁶³⁰ Doc. EX.CL/871 Assembly/AU/Decl.1 (XXIV) Assembly of the African Union, Twenty-Fourth Ordinary Session - Declaration on the Establishment of A Single African Air Transport Market), 30-31 January 2015, Addis Ababa, Ethiopia, www.au.int (accessed 3 March 2023).

⁶³¹ as above, 1.

Aware of the political will show[n] by a number of States in spearheading the liberalisation of the air transport markets throughout the continent and the need to encourage others to follow suit;

These excerpts are telling that the concerns and considerations that informed the establishment of the SAATM by the AU are the slow pace of implementation of the Yamoussoukro Decision, a discussion which has already been appraised in the preceding chapter. Secondly, intra-African trade under the AfCFTA was a consideration. Transport and commercial trade are interoperative and extremely complementary spheres of the economy and are critical developmental blocks for a functional economic system. Lastly, the dearth in political will and the need to acquaint non-participating African states with the liberalisation of the air transportation markets also played a role in the establishment of the SAATM. In consideration of these aspects of the African air transport market, the member states declared to:⁶³²

1. Ensure the establishment of a Single African Air Transport Market for African airlines by 1st January 2017;
2. Support the initiative of Championing States to open their respective air transport markets immediately and without conditions;
3. Develop binding guidelines for negotiation of air services agreements between African States and Third Parties;
4. Encourage African airlines to enter into cooperation agreements amongst themselves;
5. Accelerate the ratification of the Constitution of the African Civil Aviation Commission (AFCAC);
6. Eliminate all obstacles that may hinder the achievement of the objectives of the AU Agenda 2063 on boosting intra-African Trade and Fast Tracking the Continental Free Trade Area as regard to air transport industry;

⁶³² as above, 2.

7. Provide resources to AFCAC to adequately carry out its activities as a Specialised Agency on aviation matters and as an Executing Agency of the Yamoussoukro Decision;
8. Promote the development of regional and continental aviation infrastructure and services in a holistic manner based on the policies and programmes of Regional Economic Communities (RECs) and through the Programme for Infrastructure Development in Africa (PIDA);
9. Facilitate air connectivity by implementing the regulatory texts of the Yamoussoukro Declaration;
10. Harmonise legislation, promote free movement, remove all barriers and improve safety and security in air transport operations;
11. Encourage the establishment of regional safety and security oversight, strengthen search and rescue as well as accident investigation organisations;
12. Integrate in all national civil aviation programme activities to combat and prevent pandemics;
13. Take specific measures to ensure the sustainable financing and appropriate management of the air transport sub sector and to create enabling conditions for national and foreign private investments;
14. Ratify and speed up, the implementation of international conventions relating to aviation safety, security and the protection of the environment as well as regional agreements on market access, facilitation of transport of passengers and cargo by air;
15. Promote and facilitate establishment of regional training institutions for technical and professional staff in the different civil aviation [authorities];
16. Pursue the creation of a Human resources development fund for the civil aviation sector in Africa on the basis of the joint endeavour between AFCAC and ICAO;
17. Promote research and development programmes for aviation infrastructure and air transport services in Africa;

18. Ensure that Member States of the African Union and Regional Economic Communities strengthen inter-African and continental cooperation in the air transport sub sector; and
19. Call upon the United Nations and Economic Commission for Africa, the African Development Bank, the European Union, the World Bank and other development partners to support the implementation of the Single African Air Transport Market under AU Agenda 2063.

These nineteen declarations comprise the founding tenets of the SAATM and reflect a holistic and clearly articulated approach to the liberalisation and unification of the African air transportation market. The declarations speak to issues ranging from binding guidelines for the negotiation of air services agreements, the financing and capacitation of AFCAC, aviation safety and security and calling for support from other international organisations to support the AU in its efforts to implement the SAATM. Although the First Declaration calls for the establishment of the SAATM by 1 January 2017, it was actually established and launched in January 2018 during the 30th Ordinary Summit of the AU Assembly of Heads States and Government in Addis Ababa, Ethiopia.⁶³³ The SAATM Declaration is definitely capable of accomplishment through the collective political willpower of AU member states. In fact, some of the declarations, such as the formation of regional safety and security organisations, and the harmonisation of legislation,⁶³⁴ albeit at a regional level, and the improvement of safety and security in air transportation operations⁶³⁵ have taken form or are high on the radar of member states. The inclusion of the pooling of financial resources for the development of regional and continental aviation infrastructure and services to be channelled through RECs and the Programme for Infrastructure Development in Africa (PIDA),⁶³⁶ must be applauded. Air transportation operations are not about the aircraft alone; there are great dependencies on the availability of suitable infrastructure too, which requires funding. In the course of adopting the establishment of SAATM, the

⁶³³ The SAATM Handbook (n 619 above) 5.

⁶³⁴ Refer to para 11 of the SAATM Declaration (n 630 above).

⁶³⁵ as above, refer to para 10.

⁶³⁶ as above, refer to para 8.

AU Assembly emphasised the critical role of the SAATM in boosting intra-African trade,⁶³⁷ in anticipation of the adoption of the AfCFTA Treaty.

The SAATM Declaration is a sober document to guide the AU in the establishment and eventual achievement of the SAATM. However, implementation thereof is indispensable to its materialisation. Constantinos is correct that the complete implementation of the Yamoussoukro Decision will evolve the African air transportation market into a common aviation area⁶³⁸ as opposed to its current segmented form; that would be its logical effective conclusion although it is not expressed as such in the Yamoussoukro Decision. The SAATM serves to give added impetus to and give direction on that particular path.

Pursuant to the SAATM Declaration, eleven member states championed the Declaration by the signing the Solemn Commitment to commence the actualisation of the creation of SAATM,⁶³⁹ namely: Benin, Cape Verde, Democratic Republic of Congo, Côte d'Ivoire, Egypt, Ethiopia, Kenya, Nigeria, Rwanda, South Africa and Zimbabwe. This initial group of Champion Member States constituted the Ministerial Working Group (MWG) responsible for following up on the progress of the establishment of the SAATM, providing guidance thereon and supporting advocacy efforts to other member states to urge them to sign the Solemn Commitment and join the African single air transportation market.⁶⁴⁰ The Champion Member States were basically tasked with the responsibility of driving the single market creation and urging other member states to follow suit. This low number in a community of 54 states is again a display of hesitation or lack of understanding of the SAATM however, over time and through the advocacy of AFCAC, AU Commission (AUC), AFRAA and the MWG,⁶⁴¹ the number of member states who are signatories to the Solemn Commitment has increased to 35, namely: Benin, Burkina Faso, Botswana, Cameroon, Cape Verde, Central African Republic, Republic of Congo, Côte d'Ivoire, Congo Brazzaville, Chad, Egypt, Ethiopia,

⁶³⁷ n 617 above, 1.

⁶³⁸ Costantinos (n 69 above) 3.

⁶³⁹ as above. These member states constituted what is referred as the Ministerial Working Group.

⁶⁴⁰ Paper PIDA (n 618 above) 4; n 617 above, 2. The MWG is technically supported by aviation experts from other countries, the AUC, AFCAC, RECs and other key stakeholders who assist the MWG in preparation for its meetings. The MWG is not closed off to joining by other Member States who elect to later join the SAATM.

⁶⁴¹ n 617 above, 2.

Equatorial Guinea, Gabon, Gambia, Ghana, Guinea Conakry, Guinea Bissau, Kenya, Lesotho, Liberia, Mali, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sierra Leone, Senegal, South Africa, Eswatini, Togo, Zambia and Zimbabwe.⁶⁴² According to AFRAA and notwithstanding the concern of the display of low uptake, these 34 signatories constitute more than 61% of the AU Member States, their total combined population is more than 816 million people, they collectively account for 70% of the African population and, their combined gross domestic product (GDP) exceeded USD 1,700 billion in 2018, a number equal to more than 80% of Africa's total GDP.⁶⁴³ An assertion repeated in this study is that the true reflection of the effectiveness of any legal or policy instrument and the political will underlying same, lies in its implementation. The boldness of the SAATM and its intentions is a watershed moment in the history of the African air transportation market, notwithstanding that such models and policies have been in place in other jurisdictions for a long time – perhaps the journey has been slightly longer for Africa. It is therefore vital to analyse the regulatory framework and texts adopted and any other measures taken by the AU to realise the establishment of a single sky for Africa's air transportation services, the SAATM. The analysis shall follow in that sequence.

2.2.1 Regulatory Framework for the SAATM

(i) *The African Civil Aviation Policy*

The overarching and concise regulatory framework document guiding the development of the African civil aviation industry as a whole is the African Civil Aviation Policy⁶⁴⁴ (AFCAP), adopted by the Second Session of the AU Conference of Ministers Responsible for Transport in November 2011.⁶⁴⁵ It is a comprehensive document from

⁶⁴² as above.

⁶⁴³ "The Single African Air Transport Market: Towards a Virtuous Cycle of Air Transport Development in Africa" Paper by AFRAA and AFCAC, 19, <https://afraa.org/wp-content/uploads/2019/11/%E2%80%A2Single-African-Air-Transport-2019.pdf> (accessed 2 February 2021).

⁶⁴⁴ The African Civil Aviation Policy, EX.CL/699(XX), Annex VI, <https://afcac.org/en/images/2019/Documents/AFCAP.pdf> (accessed 19 February 2021).

⁶⁴⁵ Second Session of the African Union Conference of Ministers Responsible for Transport, 21 – 25 November 2011, Luanda, Angola

which the programmes, plans and agendas of the RECs, common rules, standards and regulations for air transportation are drawn and being an overarching framework document, the SAATM is also drawn from the AFCAP.

The AFCAP sets out the purpose for the policy thus:⁶⁴⁶

- 1.8.1 Despite the numerous initiatives and good efforts to improve civil aviation in Africa, overall success has been too little and too slow mainly because of lack of political will as well as institutional and procedural constraints. The initiatives are generally not well coordinated and usually have differing perspectives and objectives, which present attendant insurmountable implementation challenges. To formulate well thought out and implementable policies there is a need for a coherent policy framework which inter alia outline and solicit the necessary political commitment.
- 1.8.2 Africa should therefore have an African Civil Aviation Policy (AFCAP) which provides a framework and the platform for the formulation, collaboration and integration of national and multinational initiatives/programmes in various aspects of civil aviation.
- 1.8.3 AFCAP should be an overarching framework document that enlists and consolidates the political commitment of African states to work together through agreed roadmap with the purpose of positioning Africa's air transport in the global economy. The policy must provide for the appropriate empowerment of national and regional technical bodies to enable them to carry out their responsibilities effectively.
- 1.8.4 National policy decision-makers will use the AFCAP as a guide for the development of national and regional policies thereby fostering harmonisation. It will assist Africa to respond to the intricacies of globalisation by forging a paradigm shift in focus, from national to common regional market, from inter-state to intra-African operations; from regional competition to global competition.

https://au.int/sites/default/files/newsevents/workingdocuments/29705-wd-au-tpt-exp-2a2-draft_african_common_civil_aviation_policy-eng.pdf (accessed 19 February 2021)

⁶⁴⁶ AFCAP (n 644 above) 10.

This policy purpose statement is all-encompassing: it acknowledges the fragmented air transportation regulatory environment that prevails in Africa and the attendant problems with such an approach; the AFCAP, *inter alia*, further sets the tone for the future of the African air transportation market, which is that of a paradigm shift from common regional markets to competing, as a continent, in the global markets. Should same be achieved, Africa shall be identified by other global players and competitors as a single market instead of being identified on the strength of nationality or regional disposition, as it is done in current day. The former outlook, which is the aim of the AU and its member states, will render to Africa to be a strengthened and powerful competitor in the international civil aviation market. The AFCAP covers technical air transportation issues such as aviation financing, air navigation services and meteorology, safety and security, environmental protection, human resource development, airport development and management. The AFCAP takes cognisance of African integration, accentuating the desire to unify the continent and its peoples and foster economic integration.⁶⁴⁷

Liberalisation of the air transportation industry is included as one of the policy contemplations of the AFCAP, in terms of which, the objective is to -

...develop a liberalised and competitive air transport industry that responds promptly to the dictates of the market, technological developments and global trends; and also establish a common African air transport market through the full implementation of the Yamoussoukro Decision.⁶⁴⁸

It is clear that, according to the AFCAP, the means to a liberalised, competitive and advanced air transportation sector in Africa is through the full implementation of the Yamoussoukro Decision. On closer scrutiny, this policy objective broadens the scope of the Yamoussoukro Decision to establish a 'common African air transport market' whereas the text of the Yamoussoukro Decision does not explicitly take it that far but articulates it as the 'gradual liberalisation' of intra-Africa air transport services.⁶⁴⁹ The

⁶⁴⁷ as above, 7.

⁶⁴⁸ as above, 20.

⁶⁴⁹ Refer to Art 2 of the Yamoussoukro Decision.

policy statement of AFCAP on liberalisation sets forth that, 'There shall be a liberalised, competitive and common air transport market in Africa'.

The language employed in this policy statement is unequivocally peremptory, connoting that the establishment of a liberalised, competitive and common aviation market in Africa is not discretionary for member states. It would appear that the policymakers have been deliberate about the language employed herein and elected not to utilise soft words such as 'foster', 'promote', or 'encourage', by way of example. The AFCAP also outlines the strategies that will be applied to accomplish the stated policy objective, which are:

- (i) Member States shall ensure the full implementation of the Yamoussoukro Decision
- (ii) AFCAC as the Executing Agency of the Yamoussoukro Decision (YD) shall work with the States and Regional Economic Communities (RECs) to ensure the full implementation of the YD;
- (iii) Member States shall ensure that all Air Transport Policies are consistent with the Yamoussoukro Decision;
- (iv) Member States shall remove and/or relax all barriers like Immigration, Customs etc, for free movement of people and goods within the continent;
- (v) Member States shall encourage cooperation among African airlines;
- (vi) Member States shall encourage Private Sector investments, partnerships and full participation in Air Transport business;
- (vii) Member States shall ensure infrastructural development to address the current and anticipated traffic growth;
- (viii) Fares and tariffs among member States shall be liberalised. The respective Civil Aviation Authorities shall ensure that airlines do not engage in anti-trust and predatory practices.

Save for the policy strategy that speaks to the liberalisation of tariffs and fares, the strategies within the AFCAP are replicated in the AU Assembly SAATM Solemn Declaration of 2015 discussed above. It is submitted that the latter portion of this strategy, that of placing the responsibility of antitrust and predatory practices of airlines at the door of the civil aviation authorities, is flawed. That ought to be the mandate of competition authorities. Notwithstanding same, the coherence between the SAATM

Declaration and the AFCAP is visible, and it lays out a clear policy line of command for the liberalisation and unification of the African air transportation sector.

Over and above the overarching AFCAP, the MWG approved three regulatory texts in terms of the provisions of the Yamoussoukro Decision in 2014 related to: (a) competition rules; (b) the powers and functions of the Executing Agency, the AFCAC; and (c) consumer protection.⁶⁵⁰ Article 12.4⁶⁵¹ of the Yamoussoukro Decision empowers the competent organs of the AEC, in this case the relevant organs recognised in the Yamoussoukro Decision, to adopt relevant annexes which, in terms of the said provision, form an integral part of the Yamoussoukro Decision. These regulations give depth and substance to those particular provisions of the Yamoussoukro Decision, which in their original form, have a specificity deficit. These texts, known as the Regulatory and Institutional Texts for the Implementation of the Yamoussoukro Decision and Framework Towards the Establishment of a Single African Air Transport Market, were later adopted by the Sectoral Technical Committee on Transport, Energy and Tourism in March 2017,⁶⁵² all with the view presumably to close the hanging regulatory gaps and present to member states a comprehensive liberalisation package. These texts are surveyed in turn.

(ii) *The Regulations on Competition in Air Transport Services Within Africa*⁶⁵³

Entitled Annex 5 to the Yamoussoukro Decision, the Competition Regulations serve to ensure that there is fair opportunity for eligible and designated African airlines, on a non-discriminatory premise, to effectively compete in the air transportation services

⁶⁵⁰ n 618 above, 4.

⁶⁵¹ Art 12.4 provides:

“Relevant annexes adopted by the competent organs of the African Economic Community shall form an integral part of this Decision.”

⁶⁵² n 618 above, 6.

⁶⁵³ Regulatory and Institutional Texts for the Implementation of the Yamoussoukro Decision and Framework Towards the Establishment of a Single African Air Transport Market, Annex 5 to the Yamoussoukro Decision, Assembly/AU/Dec 676 (XXX) – Decision on Legal Instruments, https://au.int/sites/default/files/treaties/37308-treaty-yamoussoukro_decision_regulatory_texts_e.pdf (accessed 20 March 2023).

sector within Africa.⁶⁵⁴ Article 2, paragraph 2⁶⁵⁵ of the Competition Regulations provide that the scope of application thereof is for scheduled and non-scheduled intra-African air transportation services and for anticompetitive practices within the regional economic communities and Africa as a whole. It is wisdom on the part of the lawmakers to make specific mention of the applicability of the Competition Regulations to the RECs, so as to ensure that there is no confusion on the part of RECs which have a legal identity of their own otherwise, it would be futile to have these competition regulations in place and defeat Africa's objective of uniformity and consistency in regulation.

The Competition Regulations, similar to other competition laws, prohibit practices which undermine fair competition in aviation services.⁶⁵⁶ The Competition Regulations expressly place a focus on the prohibition of practices and decisions by airlines which negatively affect intra-African air transportation services, articulated in the following manner:

...To this end, State Parties shall undertake to ensure that any agreement between airlines, any decision taken by an association of airlines and any concerted practice which negatively affects the liberalization air transport services within the continent of Africa and which has as its object or effect the prevention, restriction or distortion of competition within the continent of Africa, is prohibited.⁶⁵⁷

In terms of this regulatory provision, there is duty on State Parties to ensure that airlines do not engage in practices or conduct that negatively impact on liberalisation of air transportation services within the African continent, and to invalidate same, if such conduct is identified. The Competition Regulations, in addition to prohibiting anticompetitive conduct and practices, also deem same illegal.⁶⁵⁸

⁶⁵⁴ Refer to the Preamble of the Regulations, para 9.

⁶⁵⁵ Art 2, para 2, which is drawn from Article 7.1 of the Yamoussoukro Decision, provides:

"This Regulation shall apply to scheduled and non-scheduled intra-Africa air transport services within the State Parties, including any practice, agreement or conduct thereto which might have an anti-competitive effect within the separate and joint territories of the regional economic communities and within the entire African continent."

⁶⁵⁶ Regulatory and Institutional Texts (n 633 above) art 3, para 1.

⁶⁵⁷ as above.

⁶⁵⁸ Refer to art 3, para 2.

Mindful of the prevailing circumstances of many, if not most African states, the lawmakers interestingly in Article 6⁶⁵⁹ prohibit the granting of a state subsidy by any State Party or REC which may distort competition. Liberalisation creates a free market that responds to services that offer an attractive price or quality services with an attractive price. Flag carriers are largely accustomed to a protected market in their favour, and the purpose of this regulatory provision is surely to ensure that flag carriers are not subsidised on artificial grounds so as to cope with the effects of a free market. A counterargument that may be possibly raised in relation to this provision is that it could be deemed as an encroachment on the sovereignty of states, to the extent that it places restrictions on the granting of subsidies. It also raises the question (which this inquiry does not attempt to answer) on how State Parties will be able to determine whether the granting of subsidy may distort or threaten to distort competition. The Competition Regulations, notwithstanding the prohibition, regulate the implementation of state subsidies in air transportation operations in terms of Appendix A to the Competition Regulations, known as the Guidelines and Procedures for the Implementation of the Regulations on Competition in Air Transport Services Within Africa (Guidelines and Procedures) and provide clarity on Article 6 as follows:⁶⁶⁰

The following shall apply to the implementation of State subsidies under the terms of Articles 6 of the Competition Regulations:

- (a) in the context of granting or denying subsidies, State Parties shall not discriminate between publicly owned, state-owned and privately-owned airlines;
- (b) a State Party may grant a subsidy to an airline, provided that it is for airline restructuring purposes, or in extraordinary circumstances beyond the control of the airline, including acts of war; and
- (c) The prohibition on subsidies does not prevent the operation by a State Party of an essential air services programme or of public service obligations, where certain air services cannot be operated profitably;

⁶⁵⁹ Art 6, para 1 provides:

“These Regulations prohibit the granting of any subsidy to any State Party or regional economic community which distorts or threatens to distort competition.”

⁶⁶⁰ Refer to art 2 of the Guidelines and Procedures.

- (d) Where the relevant authority finds that a subsidy has been granted illegally by a State Party or is about to be given by a State Party, it may issue a cease and desist order against the State Party in question; and
- (e) Where the relevant authority finds that a subsidy, illegally given by a State Party, has already been paid in fact, it may order that the moneys given as illegal subsidy be paid back to the State Party in question, in whole or in part.

There is a tangible and concerted effort in this respect, to deter State Parties from granting subsidies to airlines, unless if it is for the purposes of restructuring or for reasons beyond the control of the airline; all to cultivate a competitive air transportation market in Africa. It follows that the repercussions of the COVID-19 pandemic on the air transportation sector, which will be explored later in this research, may well be categorised as ‘extraordinary circumstances’ that fall beyond the control of air services operators.

The Competition Regulations contain standard terms targeted at the curbing of anticompetitive practices, and exemptions therefrom. In terms of Article 8⁶⁶¹ of the Competition Regulations, the Executing Agency, which is the AFCAC insofar as the Yamoussoukro Decision is concerned, is in charge of the implementation and supervision of the regulations. Accordingly, the AFCAC is the competition authority for air transportation operations on the African continent. The Competition Regulations and the detailed Guidelines and Procedures for their implementation will stand the continent in good stead in furtherance of the establishment and realisation of the SAATM.

⁶⁶¹ Art 8 provides:

“The Executing Agency shall be responsible for supervising and implementing these regulations and shall be responsible for:

- a) implementing measures to increase transparency in the air transport sector;
- b) implementing measures to develop public awareness of the provisions of these Regulations;
- c) investigating and evaluating alleged violations of these regulations;
- d) granting, refusing or revoking exemptions in terms of Art 7;
- e) reviewing legislation or administrative measures of Member States in terms of Art 5;
- f) reporting to CAMT on any matter relating to the application of these Regulations; and
- g) performing any other function assigned to it under these Regulations.”

(iii) Regulations on the Protection of Consumers of Air Transport Services⁶⁶²

Consumer protection within the air services sector in Africa does not feature prominently in either the Yamoussoukro Declaration or the Yamoussoukro Decision, save to curtly state in the Yamoussoukro Decision that ‘the Executing Agency will also ensure that consumer rights are protected’.⁶⁶³ It appears to be an aspect that did not receive much attention or was considered to be not so important, presumably owing to the fact that the African air transportation market was historically closed, small and protected and therefore airlines did not deem it important to inform consumers about their rights in the consumption of the service. However, it cannot be that, in any industry, one consumes a paid service or product and does not have reciprocal rights to protection if there exist aspects about that service or product that are unsatisfactory or do not meet industry standards. State Parties take cognisance of this in the Preamble to the Consumer Protection Regulations and capture their concerns, amongst others, accordingly:

CONSIDERING the need to speed-up the full implementation of the Yamoussoukro Decision with a view to giving a boost to the operations of African airlines and other air transport service providers and effectively meeting the challenges of globalisation of international air transport;

OBSERVING the need to strike a balance between the rights of airlines to operate efficiently in a liberalised and increasingly competitive market and the right of the consumer to be assured of sufficient protection and information of his rights;

NOTING that passengers suffer considerable delays, overbookings, flight cancellations and often live in uncertainties;

⁶⁶² Regulatory and Institutional Texts for the Implementation of the Yamoussoukro Decision and Framework Towards the Establishment of a Single African Air Transport Market, Annex 6 to the Yamoussoukro Decision, Assembly/AU/Dec 676 (XXX) – Decision on Legal Instruments, https://au.int/sites/default/files/treaties/37308-treaty-yamoussoukro_decision_regulatory_texts_e.pdf (accessed 20 March 2023).

⁶⁶³ Refer to Art 9.6 of the Yamoussoukro Decision.

CONCERNED that the increasingly liberalised environment requires the protection of consumers on the African continent.

There is, herein, an admission by State Parties, that air transportation services in Africa have material shortcomings and in a liberalised environment, consumers need protection for the value of their money spent.

Article 4⁶⁶⁴ of the Consumer Protection Regulations provides that the objective of the regulations is to protect the consumer of air transportation services against unfair treatment and lack of inadequate information. The Consumer Regulations prescribes to the air transportation industry, the rights of consumers within Africa,⁶⁶⁵ protection against unfair treatment in the consumption of air transportation services. The Consumer Protection Regulations also prescribe a basis for the compensation of consumers in the event of a breach of their rights by air service operators.⁶⁶⁶

The Consumer Protection Regulations are also orientated in line with the Competition Regulations as they prohibit unfair and deceptive practices and discrimination.⁶⁶⁷ In terms of the Consumer Protection Regulations, air service operators are required to take out and maintain third-party insurance cover,⁶⁶⁸ and provide information to consumers.⁶⁶⁹

⁶⁶⁴ Art 4 provides:

“The objective of these Regulations is to protect the consumer of air transport services provided in the territories of state parties of the Yamoussoukro Decision from suffering unfair treatment in the provision of services and lack of or inadequate information on services provided leading to a poor treatment.”

⁶⁶⁵ Refer to art 6 & 11 of the Consumer Protection Regulations.

⁶⁶⁶ Refer to arts 21 to 23 of the Consumer Protection Regulations.

⁶⁶⁷ Refer to arts 6 & 9 of the Consumer Protection Regulations.

⁶⁶⁸ Refer to art 8 of the Consumer Protection Regulations.

⁶⁶⁹ Refer to art 11 of the Consumer Protection Regulations.

(iv) Regulations on the Powers, Functions and Operations of the Executing Agency of the Yamoussoukro Decision⁶⁷⁰

Notwithstanding that State Parties, as individual members of the AU have adopted the preceding regulations on competition and consumer protection, there must be a single body that is dedicated to the overseeing and application of these regulations in order to accomplish uniformity, harmonisation and the establishment of the SAATM in light of the fact that these regulatory texts are applicable to the entire continent, and not only to some states or RECs. The creation of an African Air Transport Executing Agency is sanctioned in terms of Article 9.4⁶⁷¹ of the Yamoussoukro Decision and it stated that it will be responsible for, *inter alia*, the supervision and management of the liberalised air transportation sector of Africa.

Accordingly, in terms of Article 5, paragraph 1⁶⁷² of the Regulations on the Powers and Functions and Operations of the Executing Agency of the Yamoussoukro Decision (Powers, Functions and Operations Regulations), known also as Annex 4 to the Yamoussoukro Decision, the AFCAC is appointed as the Executing Agency of the Yamoussoukro Decision and is entrusted with the responsibility to implement the Yamoussoukro Decision. The key objective of the Powers, Functions and Operations Regulations and the guiding principles are articulated in this manner:

1. The key objective of this Regulation is to empower AFCAC as the Executing Agency (Hereinafter Executing Agency or Agency) and enable it to supervise and manage the liberalisation of air transport in Africa and the effective implementation of the Decision and its implementing rules and regulations.

⁶⁷⁰ Regulatory and Institutional Texts for the Implementation of the Yamoussoukro Decision and Framework Towards the Establishment of a Single African Air Transport Market, Annex 4 to the Yamoussoukro Decision, Assembly/AU/Dec 676 (XXX) – Decision on Legal Instruments, https://au.int/sites/default/files/treaties/37308-treaty-yamoussoukro_decision_regulatory_texts_e.pdf [accessed 20 March 2023].

⁶⁷¹ Art 9.4 of provides:

“To ensure successful implementation of the Decision, an African Air Transport Executing Agency will be established as soon as possible. The principal responsibility will include *inter alia* the supervision and management of Africa’s liberalized air transport industry.”

⁶⁷² Art 5, para 1 provides:

“For the purpose of implementing the Yamoussoukro Decision and in particular paragraph 4 of Article 9 thereof, the African Civil Aviation Commission is entrusted with the responsibility of the Executing Agency and charged to supervise and manage and enforce the liberalization of African air transportation.”

2. To achieve this objective the Executing Agency, the State Parties, Organs of the African Union and of the Decision, the regional economic communities and airlines shall be guided by the following basic principles:
 - a. All air transport activities undertaken on the African continent shall aim at achieving smooth, safe, comfortable and efficient intra-African travel.
 - b. All air transport activities shall be conducted in the interest of the consumer and whose interests shall be considered as protected by all stakeholders.
 - c. Airlines shall be encouraged to operate profitably with least operating cost, preferably utilising all logical fifth freedom routes and assisted to identify potentially attractive routes based on long term focused economic activities in different localities of Africa.
 - d. Maximum utilisation of airport slots and airports infrastructure and services during the day and thereby encourage economic activities at and around all African airports.
 - e. Active cooperation between eligible airlines and multiple establishment in different regional economic communities.
The consideration of liberalised routes as a public good held for the use of and interest of the African continent.

The Powers, Functions and Operations Regulations are evidently designed to firstly, give solid authority to the AFCAC within a legal instrument, and concurrently detail the parameters of those powers and the functions and operations of the Executing Agency in execution of its mandate in the Yamoussoukro Decision, guided by the principles of the Yamoussoukro Decision such the granting of fifth freedoms and using liberalisation to advance safe, smooth and efficient air travel within Africa.

To reiterate the point made that AFCAC is responsible for the implementation of the competition and consumer regulations, Article 5⁶⁷³ of the Powers, Functions and Operations Regulations prescribe that it is the function of the AFCAC to enforce same.

⁶⁷³ Art 5, para 2, subpara d provides that the responsibility of the Executing Agency is to:
“Conduct studies, monitor and enforce competition and consumer protection rules;”

AFCAC is also assigned the duty to see to it that there is compliance with the safety and security standards of ICAO,⁶⁷⁴ effectively being rendered a safety and security oversight body also. A notable and important power granted to the AFCAC in the Powers, Functions and Operations Regulations, in Article 16 thereof, is that of determining the appropriate sanctions for breaches of the Yamoussoukro Decision and its related rules and regulations –

1. The Agency may determine the appropriate sanctions to be imposed for breaches of the Yamoussoukro Decision and its implementing rules and regulations.

This provision is a demonstration of the determination of the AU to both achieve and expedite the liberalisation of the internal African air transportation market. The enforcement mechanisms and sanctions are not given detail to in the Powers, Functions and Operations Regulations but prescribes that the Executing Agency shall adopt Regulations to give effect to same.⁶⁷⁵

2.2.2 Aviation safety and security under the SAATM

The Yamoussoukro Decision compels State Parties, as they liberalise their air transportation markets, to adhere to the aviation safety and security SARPs as recommended by the ICAO from time to time and the various international conventions related thereto.⁶⁷⁶ It is too one of the eligibility criteria, in terms of Article 6.9 (f) thereof, for designation of an airline. Safety and security in civil aviation cannot be compromised nor lowered, otherwise liberalisation itself will be an exercise in futility. It can be viewed as the unchanging and non-negotiable constant within a changing market in a liberalised environment. The AFCAP, as the overarching and guiding framework document for the regulation of the SAATM, similarly highlights the importance of aviation safety and states that ‘All member States have a statutory

⁶⁷⁴ Refer to art 5, para 2, subpara e.

⁶⁷⁵ Art 16, para 2 provides:

“The Agency shall submit a Regulation on sanctions to be imposed under the Yamoussoukro Decision and its Implementing Regulations to the relevant organs of the African Union.”

⁶⁷⁶ Refer to art 6.12 of the Yamoussoukro Decision.

responsibility to ensure and enhance aviation safety'.⁶⁷⁷ It is a two-fold responsibility on State Parties to ensure and enhance safety in air transportation operations. The AFCAP also accurately recognises that autonomous and effective civil aviation authorities are essential to realise safe and secure operations in aviation,⁶⁷⁸ alternatively State Parties should collaborate and form Regional Safety Oversight Organisations, where oversight capacity is lacking. The AFCAP unequivocally places the responsibility of safety management in the hands of the regulators and the industry operators⁶⁷⁹ with the former being responsible for regulation and oversight and the latter, compliance and implementation. To this end, the AFCAP policy statement on aviation safety places a duty on member states to guarantee that:

...Civil Aviation Authorities have full powers and independence to carry out effective safety oversight and regulation of the aviation industry.⁶⁸⁰

The significance of an independent civil aviation regulator vested with all the powers, cannot be overemphasised as safety is such a critical element in air transportation services, and it greatly impacts on the standing of a state in the international civil aviation coterie. The aeronautical authorities are established to oversee a much of mammoth and specialised task as part and parcel of core government administration. In support of the improvement of aviation safety levels in Africa, the member states adopted the Abuja Declaration on Aviation Safety in Africa (Abuja Declaration), Annex 1 to the AFCAP,⁶⁸¹ which is a recordal of concerns by member states regarding the restrictions imposed by the EU on African airlines and the associated negative economic effects of such restrictions, the inconsistent implementation of the Yamoussoukro Decision, lack of competent aviation personnel in Africa to oversight safety and, inadequate financial resources to enhance aviation safety in Africa. The

⁶⁷⁷ Refer to clause 8.0.1 of the AFCAP.

⁶⁷⁸ Clause 8.0.3 provides:

“Effective and autonomous civil aviation authorities are essential for achieving safe and secure air transport in the continent. In order to optimise resources, States collaborate to establish Regional Safety Oversight Organisations (RSOOs) and Regional Accident Investigation (RAIAs).”

⁶⁷⁹ Refer to clause 8.0.4 of the AFCAP.

⁶⁸⁰ Refer to clause 8.1.3.1 of the AFCAP.

⁶⁸¹ Abuja Declaration on Aviation Safety in Africa, AU/ MIN/ AT/Rpt. (IV), Annex 1 to the AFCAP, Ministerial Conference on Aviation Safety in Africa, 16-20 July 2012, Abuja Nigeria, 2.

Abuja Declaration also makes several commitments to the improvement of safety in Africa.

Similarly, insofar as it relates to aviation security, the AFCAP commits member states to the implementation of adequate security measures at airports in line with the provisions of ICAO Annex 17 to the Chicago Convention.⁶⁸² In terms of clause 9.1.21 of the AFCAP, member states must take all the necessary steps, in co-operation with international partners that are consistent with all laws, international conventions and the ICAO SARPs to safeguard and enhance aviation security. Therefore, member states may collaborate with other international role players within aviation security to prevent unlawful interference in civil aviation.

Save to state that safe air travel within Africa shall be used as one of the guiding principles by the AFCAC in the execution of the Yamoussoukro Decision and its Regulatory Texts in pursuance of the formation of the SAATM⁶⁸³ and that one of the functions of AFCAC is to ensure compliance with the ICAO safety and security standards,⁶⁸⁴ the Regulatory Framework for the SAATM does not make mention of much else insofar as safety and security is concerned. The RECs rely on their regional agreements and arrangements in this respect; however, the ICAO issues uniform standards and practices for the entire industry and these must therefore be the guiding tool and nothing else.

2.2.3 Other measures adopted for implementation of the SAATM

In executing its challenging and multipronged mandate to manage the liberalisation of the African air transportation sector, implement the Yamoussoukro Decision and the SAATM, the AFCAC introduced non-legislative measures to fulfil this mandate.

⁶⁸² Clause 9.0.1 of the AFCAP provides:

“States are responsible for ensuring the implementation of adequate security measures at airports pursuant to the provisions of ICAO Annex 17 to the Convention on International Civil Aviation. States may delegate the task of providing individual security functions to such agencies as airport entities, air carriers and local police.”

⁶⁸³ Refer to art 3 of the Powers, Functions and Operations Regulations.

⁶⁸⁴ Refer to art 5 of the Powers, Functions and Operations Regulations.

Understandably so, as the AFCAC has to manage participating and hesitant member states carefully and objectively. These additional measures that are utilised for the implementation of the SAATM are visited in turn.

(i) Concrete measures

The AFCAC put in place what are referred to as the eight concrete measures, as a way to create an effective yet standard approach to be followed by individual member states for the realisation of the SAATM as a priority project of AU Agenda 2063. Standardisation is certainly key in carrying out a project of this magnitude because unwarranted or unreasonable inconsistency may well disrupt or delay implementation. According to these concrete measures, States:⁶⁸⁵

1. Shall publish or gazette in accordance with their national laws that they are committed to the immediate implementation of the Yamoussoukro Decision under the Solemn Commitment Declaration adopted in terms of the AU Agenda 2053. States shall also publish or gazette that named signatory States of the Declaration of Solemn Commitment have been notified of their action under point 2 below.
2. Shall notify other State Parties and especially signatories to the Declaration of Solemn Commitment that their skies are liberalised in line with the Yamoussoukro Decision.
3. Shall review BASAs to ensure their conformity with the Yamoussoukro Decision in the following manner: (i) the removal of all restrictions on traffic rights under the third, fourth and fifth freedoms of the air, frequencies, air fares and capacity and (ii) ensure that all national laws, Regulations, Rules, Policies, conform to the express provisions of the Yamoussoukro Decision.
4. Shall propose to the Executing Agency (AFCAC) at least one airline established in their state for international air service for consideration under the eligibility criteria article 6.9 of the Yamoussoukro Decision. The proposed airline can also be from another State Party or a multi-national African airline in accordance with Article 6 of the Yamoussoukro Decision.

⁶⁸⁵ n 28 above, 17.

5. Shall immediately constitute their National Implementation Committees for the Yamoussoukro Decision and the establishment of a Single African Air Transport Market, designate a dedicated focal point and notify the RECs and the Executing Agency.
6. Are encouraged to organise public awareness activities/advocacy on the Yamoussoukro Decision and the Single African Air Transport Market.
7. Shall celebrate the Yamoussoukro Decision on the anniversary of its signing on the 14th of November as part of advocacy for the promotion of the AU Agenda 2063 in consultation with AFCAC.
8. Shall sign the Memorandum of Implementation of the Yamoussoukro Declaration, adopted in May 2018 by the Ministerial Working Group on the establishment of a Single African Air Transport Market.

These concrete measures are varying national state interventions to enable the Yamoussoukro Decision and by extension, the SAATM, to be placed onto the priorities of the national agenda and into the national laws of member states, ranging from gazetting to the review of BASAs to conform to the Yamoussoukro Decision. The concrete measures are chiefly aimed at publicising the commitment of states to the Yamoussoukro Decision and SAATM and commitment also to the implementation thereof. It directs states to communicate to other states that they are signatories to the Solemn Commitment and that their skies are liberalised, with a view that if it ensues within a regional grouping, it will permeate throughout the African continent. The seventh intervention directing states to celebrate the signing of the Yamoussoukro Decision on the 14th of November is intended to serve as a reminder to member states about their commitment to the Yamoussoukro Decision. The concrete measure to raise public awareness and advocacy on the Yamoussoukro Decision and the SAATM is consistent with the AU Agenda 2063 of public participation, enhanced communication and ensuring that African peoples own the priority projects of the AU Agenda 2063. It is the knowledge of the Yamoussoukro Decision and SAATM that will make the African citizenry accept it and aid member states in the implementation thereof.

The concrete measures, when closely studied, are engineered to give member states guided 'marching orders' as it were, as implementation of the Yamoussoukro Decision

commences at and must be embraced at the national level; much mention of the Yamoussoukro Decision is made, and many more African states are signatories to the Yamoussoukro Decision than they are to the Declaration of Solemn Commitment to the SAATM. Placing emphasis on the Yamoussoukro Decision will invariably and inevitably advance the establishment of the SAATM; the two are innately related. When considered holistically, the Yamoussoukro Decision forms the formidable policy framework edifice for the operationalisation of the SAATM.

(ii) Prioritised Action Plan

The SAATM Prioritised Action Plan (PAP) has six pillars to it (the actions), with each pillar attached to objectives to stimulate the aims and operationalisation of the SAATM involving all relevant stakeholders. The PAP was given definition in 2018 and same is presented in the table⁶⁸⁶ below –

| Pillar | Objective |
|---|--|
| 1. Advocacy for effective operationalization of the SAATM | <ul style="list-style-type: none"> ● Develop and implement effective advocacy and implementation strategies. ● More states to subscribe to the SAATM by 2019. ● SAATM Member States to implement SAATM “concrete measures |
| 2. Enhancing the SAATM Regulatory Text - harmonisation and domestication of existing text | <ul style="list-style-type: none"> ● Ensure the availability of appropriate regulations for the oversight of the SAATM. ● Member States and RECs are to be sensitised on the Regulatory Texts. |

⁶⁸⁶ The SAATM Handbook (n 619 above) 12.

| | |
|--|--|
| <p>3. Operationalisation of the SAATM – focus on the operationalisation of the Executing Agency</p> | <ul style="list-style-type: none"> ● Facilitate the execution of a continent-wide study on benefits of aviation to Africa’s socio-economic landscape and audio-visual material. ● Capacity-strengthening of implementing entities. ● Facilitate airline cooperation and adoption of SAATM harmonisation of policies on aeronautical related taxes and charges and other non-tariff barriers. ● Monitoring and evaluation of the SAATM. |
| <p>4. Planning for future growth: aviation infrastructure</p> | <ul style="list-style-type: none"> ● Planning for future traffic growth. ● The Single African Sky architecture is established. |
| <p>5. Enhancing safety and security – ensuring all countries attain the minimum standard (at least 60% Effective Implementation)</p> | <ul style="list-style-type: none"> ● All SAATM countries meet the Abuja aviation safety targets. ● The Windhoek security and facilitation targets are implemented. ● Improve continental safety oversight. ● All airlines to meet minimum safety standards. |
| <p>6. Financing of the aviation industry</p> | <ul style="list-style-type: none"> ● Access to sustainable financing. ● Feasibility for the creation of a leasing platform for African airlines. |

The PAP does not allocate the actions to specific stakeholders who are involved in the implementation of the SAATM; notwithstanding same, it mentions that it involves all stakeholders which includes the AUC, AFRAA, ICAO, EU, World Bank, and African Development Bank.⁶⁸⁷ It is a multidisciplinary and collaborative effort. It would appear however that the difference between the concrete measures and the PAP is that the concrete measures delineate the duties of the state and government, whereas the PAP has its dependencies on the Executing Agency and other role players like the financial institutions which feature prominently in the African aviation landscape such as the African Development Bank and the World Bank to finance the infrastructural requirements of the African air transportation industry which is duly forecasted to grow under the SAATM. It is a reasonable and well-considered implementation strategy that complements the eight concrete measures, balances the responsibilities amongst the stakeholders and creates a focal execution point for all involved.

(iii) Memorandum of Implementation

The Memorandum of Implementation (Moi) is another form of intervention that was introduced into the establishment of the SAATM during the Fourth meeting of the MWG which took place in Lomé, Togo on 28 May 2018. The meeting addressed critical issues for the effective functioning of the SAATM one of which include the harmonisation of all BASAs *inter se* member states of the SAATM, to eliminate inconsistencies and restrictions that are misaligned to the Yamoussoukro Decision.⁶⁸⁸ It will be recalled that review of BASAs to conform to the Yamoussoukro Decision is one the eight concrete measures discussed above, for actioning by signatory states, to remove restrictions on traffic rights right up to and including the fifth freedom, frequency and capacity and the harmonisation of national laws and regulations with the provisions of the Yamoussoukro Decision. The emphasis of this exercise is to

⁶⁸⁷ Presentation by Angeline Simana (Director of Air Transport (AFCAC) 'The Single African Air Transport Market (SAATM) Implementation of Concrete Measures: Challenges and Progress' 22nd – 24th July 2019, Kigali, Rwanda, https://afcac.org/en/images/2019/Meetings/July/kigali/afcac_pptx2.pdf (accessed 19 September 2021).

⁶⁸⁸ Other issues of importance that were discussed at this meeting are: review of implementation of the Prioritised Action Plan for the operation of the SAATM; adoption and signing of a Memorandum of Understanding (MOU) on the operationalisation of SAATM; dissemination and capacity building on the Yamoussoukro Decision Regulatory Texts; and the election of the next Bureau of the Ministerial Working Group.

create a common legal framework and standards for critical matters such as access, frequency, capacity and traffic rights in BASAs. To this end, the Ministers committed to harmonisation of the BASAs for the operationalisation of the SAATM by adopting the Mol that stipulates the removal of any term and conditions in air service agreements that are not in conformance with the Yamoussoukro Decision,⁶⁸⁹ as a sign of this commitment.

Eighteen signatory states of the SAATM signed the Mol:⁶⁹⁰ Benin, Burkina Faso, Cape Verde, Central African Republic, Congo, Côte d'Ivoire, Ethiopia, Gambia, Ghana, Guinea, Liberia, Mali, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone and Togo. It is correct that the air service agreements are targeted because it shall prove to be in vain to harmonise national laws and regulations for air transportation services to conform to the Yamoussoukro Decision whilst the actual contractual instruments are not similarly aligned to the Yamoussoukro Decision. It is thus important to ensure there is coherence with the Yamoussoukro Decision at both the statutory and contractual levels to achieve the fruitful establishment of the SAATM, which will ensure that the African skies are opened widely and for all of Africa to benefit.

2.3 The establishment of SAATM: Challenges and Progress

It is trite that an undertaking of this nature and magnitude such as the SAATM, that will mark a new turning point in the trajectory and posture of the African aviation market to be defined by openness and liberalisation, will be confronted with challenges. The SAATM essentially consolidates the Yamoussoukro Declaration and Decision and expands thereon to link it to the objectives of the Abuja Treaty to create the AEC, and in this regard, to be achieved through a segment of the economy being the air transportation market by creating a single continental market in Africa, liberalising air transportation on the continent and thereby, cultivating economic integration.

⁶⁸⁹ The SAATM Handbook (n 619 above) 14; Paper by AFRAA and AFCAC (n 643 above) 9.

⁶⁹⁰ as above.

However, as of May 2022, AFCAC, as the Executing Agency for the Yamoussoukro Decision, reported⁶⁹¹ that the implementation of the SAATM is faced with these challenges –

- High taxes, charges and fees on aviation in Africa accounting for a great portion of air fare prices and in turn, harming competition;
- Operating costs for airlines are very high, mainly owing to costs for fuel, ground handling services, aircraft maintenance, etc;
- There is limited access to financing for the development of African airlines (be it purchasing or leasing aircraft);
- Restrictive immigration policies – 75% of the African population require a visa to travel within Africa, of which more than 40% of African states require a traditional visa (no eVisa or visa on arrival is available);
- The pace in the implementation of liberalised measures as outlined in Yamoussoukro Decision is unequal, even as between states that have signed the Solemn Commitment and the Mol;
- There is limited development in air transportation infrastructure, especially of secondary points of entry that complement the main airports in the capital cities or other prominent cities;
- Multisector collaboration (Tourism, Finance, Health, Agriculture, Education, etc.) is not yet coherent; and
- Human capacity development [and retention] for the African air transportation sector.

Some of these challenges have been considered in preceding discussions elsewhere in this study. Be that as it may, the literature points to that in Africa, there is not only a fear of liberalising the air transportation services market but also of relaxing immigration requirements for movement of peoples within Africa. This paper does not attempt to delve into economic analyses, however, transport, movement of people,

⁶⁹¹ “SAATM, a New Deal for Sustainable Air Transport in Africa” presented by AFCAC, May 2022, 5, <https://www.icao.int/WACAF/Documents/AFI%20WEEK/AFI%20WEEK%207/AFI%20Symposium/7th%20AFI%20Aviation%20Week%20-%20AFCAC%20-%20SAATM%20a%20new%20deal%20for%20a%20sustainable%20air%20transport%20in%20Africa.pdf> (accessed 25 March 2023); The SAATM Handbook (n 619 above) 8.

trade and economic integration and growth are inextricably interwoven variables: a restriction on any one variable creates an incompatible economic model, adversely stunts the progression of the other variables, and may potentially reverse any gains made. It has also been accurately identified by the AFCAC that the accomplishment of the implementation of the SAATM necessitates multisector collaboration amongst as the air transportation industry feeds into various other economic sectors. For example, tourism has a role in the promotion, supporting and monitoring the implementation of the air transportation growth strategy and the air service development strategy because the more people move and are able to move with ease within Africa, the greater the benefits to the tourism industry. African airlines also have to cooperate to maximise the opportunities presented by the SAATM.

AFRAA on the other hand, an important stakeholder in the establishment of the SAATM as the representative for African airlines, reported that the following challenges still need to be addressed:⁶⁹²

- Reluctance to sign the Solemn Commitment and the MoI;
- The delay in implementing the reporting on Concrete Measures by signatory states;
- Complex local procedures that delay in the signing of the MoI;
- The benefits of the SAATM not fully understood and not embraced;
- Protectionism for fear of the wellbeing of national carriers either being vulnerable or not ready for the SAATM;
- Protectionism – in the form of restrictions to granting of traffic rights on specific routes and protecting slots;
- Granting limited frequencies and restricted capacity;
- Unfair and restrictive existing air services agreements;
- Stifling of low cost carriers;
- High operating costs due to unconventional taxes; and
- Reluctance by member states to review restrictive BASAs.

⁶⁹² Paper by AFRAA and AFCAC (n 643 above) 10.

The reluctance of member states to sign up to SAATM is vivid in the initial number of states, eleven to be exact, which signed the Solemn Commitment. It would nonetheless be unfair to characterise this reluctance as deliberate on the part of member states – it is borne out of fear of the unknown, unfamiliar territory, so to speak and hence the other reluctance to review their restrictive BASAs. With advocacy by dedicated organs of the Yamoussoukro Decision and SAATM such as AFCAC, AFRAA and the MWG, more states have come on board with an appreciation of the SAATM, its intentions and benefits. With ongoing and committed advocacy and awareness by these dedicated organs, state reluctance shall subside and the other obstacles that inhibit the growth of the African air transport market will be met with, it is hoped, a renewed depth of understanding.

2.4 Conclusion

The establishment of the SAATM under the AU is a catalytic turning point in the history, development and growth of the African air transportation market. Indeed, it may not be hailed as innovative because common aviation areas and single airspaces have been long in existence the world over, but it has definitely brought the continent to be on par with international aviation markets. Internally, the SAATM, underpinned by the Yamoussoukro Decision will change the face of aviation in Africa positively and progressively. The benefits to be yielded will ensure that Africa creates the continent that is envisioned in the AU Agenda 2063, realises economic and social integration, and becomes enriched and developed from within.

The Framework and Regulatory Text for the establishment of the SAATM give comprehensive detail and guidance to the execution of the Yamoussoukro Decision. The powers and functions of the AFCAC are better articulated in the relevant Regulatory Text and so are other important regulatory factors such as competition and consumer protection, which are accorded a very vague mention in the Yamoussoukro Decision itself. The review of the BASAs and conformance thereof with the Yamoussoukro Decision are far more pronounced under the SAATM interventions, as a means to augment the provisions of the Yamoussoukro Decision. It is also

comforting that AFCAC has been given enforcement powers for member states that do not comply with the Yamoussoukro Decision. It however remains to be seen whether those powers will be exercised. The SAATM and its associated interventions, regulatory or otherwise, displays Africa's resolute determination to still implement the Yamoussoukro Decision.

Whilst it is appreciated that sovereignty is indissoluble and that the attitudes of states cannot be regulated, the AFCAC and other important stakeholders must be adequately resourced and empowered to carry out their advocacy and monitoring duties with regards to the execution and application of the Yamoussoukro Decision and SAATM. The Executing Agency requires that support. Civil aviation authorities play a critical role too of safety and security oversight, so that African air services remain compliant to international standards and practices, as recommended by the ICAO. One of the goals of AU Agenda 2063 is to see Africa taking its rightful place in the international arena and to get there, Africa must exhibit that it is equal to the task of satisfying the international safety and security norms and standards of air transportation. Financial institutions such as the World Bank and the African Development Bank are important actors in the financing and development of aviation infrastructure. In a continent where some economies are comparatively under-developed, the allocation of national resources to air transportation infrastructure needs, may not be treated as a priority.

Harmonisation and creating uniformity are imperative for the successful implementation of the SAATM because it translates into equal and fair treatment (at worst, a perception thereof) which is necessary for accession to the SAATM by member states. The hidden victory within the SAATM is that the embracing of SAATM is an implementation of the Yamoussoukro Decision because the SAATM is grounded in the Yamoussoukro Decision. One of the fundamental pillars of AU Agenda 2063 is harmonisation. The harmonisation of regulations, national agendas and programmes of member states and RECs and restrictive BASAs to align them to the Yamoussoukro Decision, is sure to put Africa on the right path to attain cohesion in the creation of a single and unified air transportation market.

CHAPTER SEVEN

The adoption of the African Continental Free Trade Area Agreement: A boost to the Yamoussoukro Decision and SAATM?

1 Introduction

The pursuit of the formation of the AEC that is crystallised under the Abuja Treaty finds expression again in the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement). One of the objectives of the Abuja Treaty is to promote, *inter alia*, economic development and integration of the African continent.⁶⁹³ Similar to the SAATM, the AfCFTA Agreement is another of the twelve priority flagship projects being pioneered under AU Agenda 2063,⁶⁹⁴ which, as explained, is a definitive strategic framework masterplan with long-term, medium-term and short-term goals for the development and growth of the African continent to be attained by year 2063. In its Background Note⁶⁹⁵ on Agenda 2063, the AU states that the creation of the African continental free trade area is purposed at –

...significantly accelerating the growth of intra-African trade and use trade more effectively as an engine of growth and sustainable development. It includes doubling of intra-African trade by 2022, strengthen Africa's common voice and policy space

⁶⁹³ Art 4I(a) of the Abuja Treaty provides:

“The objectives of the Community shall be to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development;”

⁶⁹⁴ AU Agenda 2063 was adopted by the Heads of State and Government during the 24th Ordinary Session of the African Union Assembly held in Addis Ababa in 2015. Other flagship projects given priority to under Agenda 2063 are:

- The African Integrated High Speed Network;
- African Commodities Strategy;
- Creation of the Continental Free Trade Area;
- The Pan-African E University;
- The African Passport & Free Movement of People;
- Silencing the Guns by 2020;
- Implementation of the Grand Inga Dam Project;
- Creation of an Annual Consultative Platform for policy dialogue;
- Outer Space;
- Pan-African Virtual University; &
- The Continental Financial Institutions.

⁶⁹⁵ n 620 above.

in global trade negotiations and establish the financial institutions within agreed upon timeframes.⁶⁹⁶

In its Decision on the Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area of 2012,⁶⁹⁷ the AU resolved to establish the Continental Free Trade Area by year 2017.⁶⁹⁸ In actioning this decision, in March 2018, at the 10th Extraordinary Summit of Heads of State and Government of the AU,⁶⁹⁹ 44 AU member states signed the AfCFTA Agreement, thereby establishing the largest trade area in the world.⁷⁰⁰ The free trade area of Africa is established in terms of Article 2 of the Agreement which provides that, “The African Continental Free Trade Area (hereinafter referred to as “the AfCFTA) is hereby established”. It merits mentioning that, pursuant to the signing of the Agreement, the AfCFTA Agreement bears that quintessential trait that is the resilience of Africa in that, notwithstanding the world being unexpectedly beset with COVID-19 in 2020 and the attendant restrictions imposed by governments in response thereto, in January 2021, inaugural trading under the AfCFTA Agreement commenced between South Africa and Ghana, with a consignment of goods being shipped to South Africa.⁷⁰¹ The establishment of the AfCFTA was not an easy feat for the continent, and Wamkele Mene, the Secretary-General of the AfCFTA Secretariat similarly recognised that ‘AfCFTA is going to be difficult’⁷⁰², with Abrego *et al* labelling

⁶⁹⁶ as above, 12.

⁶⁹⁷ Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area, Doc. EX.CL/700 (XX), Assembly/Au/Dec.394 (XVIII), 1, https://au.int/sites/default/files/documents/32454-doc-decision_on_boosting_intra-african_trade_-_english_-_july_2012.pdf (accessed 30 March 2023).

⁶⁹⁸ This specific part of Decision reads –

“The Assembly,

...

4. DECIDES that the CFTA should be operationalized by the indicative date of 2017, based on the framework, Roadmap & Architecture, with the following milestones:

...

iv) Establishment of the Continental Free Trade Area (CFTA) by 2017 with the option to review the target date according to progress made.”

⁶⁹⁹ The meeting took place on 21 March 2018 in Kigali, Rwanda.

⁷⁰⁰ World Bank ‘African Continental Free Trade Area: Economic & Distributional Effects’ (2020) 11, <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area.pdf> (accessed 31 March 2023). As of July 2020, 54 of the AU Member States had signed the AfCFTA agreement; Eritrea is the only state which has not signed the agreement & 40 states have ratified the agreement.

⁷⁰¹ V Songwe, J Macleod, & Karingi, N Stephen ‘The African Continental Free Trade Area: A historical moment for development in Africa’ (2021) 8(2) *Journal of African Trade* 12, <https://hdl.handle.net/10419/267547> (accessed 31 March 2023).

⁷⁰² V Songwe *et al* (n 701 above) 13.

it as the “most ambitious initiative”⁷⁰³ of the several regional economic integration collectives that have been formed in Africa over the years, but it has been done.

The creation of the AfCFTA essentially translates into a liberalised, single market trade dispensation within Africa as it seeks to utilise a “common voice and policy space” with international trade partners and eliminate regional trade agreements. It is irrefutable that intra-African trade and an instrument that is designed to aid same will bear much fruit for Africa and bring about socio-economic upliftment and development of her peoples and the eradication of dire poverty on the continent. It is a remarkable and highly progressive step for the internal African trade market, hailed by Simo as a ‘paradigm shift and a commitment to a deeper integration of the continent’⁷⁰⁴ and it is indeed so. These sentiments are substantiated in Article 3(a) of the AfCFTA Agreement accordingly:

The general objectives of the AfCFTA are to: create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063;

During the negotiation of the founding of the free trade area, member states negotiated free trade for both goods and services, a model employed by the World Trade Organisation (WTO) and thereby renders the AfCFTA Agreement regionally commensurate with the General Agreement on Tariffs and Trade⁷⁰⁵ (GATT) and General Agreement on Trade in Services⁷⁰⁶ (GATS) of the WTO. Article 2(b) of the AfCFTA Agreement expresses that one of its objectives is to create a liberalised market for goods and services and the inclusion of ‘services’ in the AfCFTA becomes important for air transportation services and how this particular service is treated in the

⁷⁰³ L Abrego, M Alejandra, T GURSOY, GP Nicholls, & H Perez-Saiz “The African Continental Free Trade Agreement: Welfare Gains Estimates from a General Equilibrium Model” IMF Working Paper WP/19/124, May 2019, 3, <https://www.imf.org-media/Files/Publications/WP/2019/WPIEA2019124.ashx> (accessed 31 March 2023).

⁷⁰⁴ YR Simo ‘Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility’ (2020) 23 *Journal of International Economic Law* 65 <https://academic.oup.com/jiel/article/23/1/65/5627761> (accessed 31 March 2023).

⁷⁰⁵ The GATT came into force on 1 January 1948.

⁷⁰⁶ The GATS came into force in January 1995.

Agreement, which, through the analysis, will reveal that the trade of air transport services is severely restricted.

It is however equally imperative to also examine the text of the GATS insofar as air transportation services are concerned, it being the agreement of the WTO on trade in services, to assess policy congruence on trade in air transportation, taking into account that Africa is a member of the WTO. This chapter will therefore commence with broad and brief general remarks regarding the GATS with an accentuation on the Annex on air transport services. This will be followed by an exploration of the provisions of the AfCFTA Agreement and in so doing, illuminate the position of the AfCFTA Agreement on trade in air transportation services. In the final, the chapter will deduce on the extent to which the AfCFTA Agreement, a seminal policy document for economic integration in Africa, aids the Yamoussoukro Decision, and by extension, the SAATM and liberalisation of the air transportation market of Africa.

2 The GATS and Air Transport Services

The GATS⁷⁰⁷ came into force in 1995 under the authority of the WTO and pursuant to what is commonly referred to as the WTO Uruguay Round, subsequent to more than 10 years of preparations and negotiations.⁷⁰⁸ Unlike the GATT, which became effective in 1948, the negotiation of trade tariffs for services is not a fluid a task as it is for goods. Prior thereto, trade in services was on the periphery of the international trade regime and the GATS ushered in a multilateral framework agreement on the principles and rules for trade in services.⁷⁰⁹

The GATS is structured on three main principles for trade in services, namely: transparency, progressive liberalisation⁷¹⁰ and mutually advantageous trade while

⁷⁰⁷General Agreement on Trade in Services, https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm (accessed 31 March 2023).

⁷⁰⁸ IATA Discussion Paper "Liberalisation of Air Transport and the GATS" Geneva, October 1999, 1, <https://www.wto.org> (accessed 5 August 2022).

⁷⁰⁹ as above.

⁷¹⁰ The second recital of the Preamble to the GATS reads:

respecting national policy objectives.⁷¹¹ These principles are expounded in Article II and Article III of the GATS. Article II explains the Most-Favoured-Nation-Treatment (MFN) postulation therein, aimed at mutually advantageous treatment of member states, thus:

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service supplier of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A member may maintain a measure inconsistent with paragraph 1 provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

The provision safeguards the opportunity of third countries to gain access service markets of member states where there is already an existence of services and service suppliers in place, whilst also directing that access should be immediate and unconditional unless an exemption has been granted on such service. The transparency of trade arrangements and agreements and all relevant measures of general application shall be published for public knowledge, in terms of Article II⁷¹²

“Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trade partners & the development of countries;”

⁷¹¹ The fourth recital of the Preamble to the GATS reads:

“Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;”

⁷¹² Art II of the GATS provides:

“1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

amongst other mandatory measures encapsulated in the provision for transparency in trade in services.

It is also critical to present the definition of 'service' within the GATS to understand what can be traded, which is defined as 'the supply of a service'⁷¹³ in the following fashion -

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

The parameters of the definition of the term 'service' is very broad and appears as if the member states deliberately abstained from appending an explicit definition of 'service' as a trade within the agreement, but rather opted to define the manner in which it can be supplied. The ambit of the definition caters for various trade in services scenarios that may ensue or prevail and is quite inclusive. The GATS however makes the exception that any service rendered in the exercise of governmental authority is excluded from the purview of the definition of 'service' as defined in the GATS,⁷¹⁴ which

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit which such enquiry points are to be established may be agreed upon for individual country Members. Enquiry points need not be depositories of laws regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement."

⁷¹³ Refer to Art I, subpara 2 of the GATS.

⁷¹⁴ Art I, subpara 3(b) provides:

"services" includes any service in any sector except services supplied in the exercise of governmental authority;"

is further described in the GATS as any service that is not provided on a commercial basis nor in competition with any service suppliers.⁷¹⁵

In light of the foregoing and as indicated above, air transport services are treated exceptionally by the GATS, captured in an Annex which encompasses the provisions on the exceptional treatment of air transportation services, which is considered hereunder. The ensuing analysis will reveal that aviation services are covered only partially by the GATS.

2.1 The Annex on Air Transport Services⁷¹⁶

The isolation of air transportation services within the GATS elicits an inquiry as to why exceptional and/or limited treatment is reserved for this area of trade by member states, and it is important to give the background perspective and rationale underscoring this posture adopted by the member states, at least insofar as economic regulation is concerned.

During the process of the Uruguay Round of negotiations, negotiators were cognisant that international air transportation was already governed by a long-established and complex system of bilateral services agreements, based on reciprocal rights informed by fair and equal opportunity between contracting states.⁷¹⁷ The system of economic regulation that was already in place had proved to be sufficiently receptive to consumers' needs and cultivated the growth of the international air transportation sector.⁷¹⁸ At the same time, the trade system in place within the international air transportation services market had demonstrated that it was able to accommodate global operations of some 185 countries (compared to 135 WTO Member States), ranging from large commercial air operators to small airlines, servicing over 185 billion

⁷¹⁵ Art I, subpara 3(c) provides –

“a service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”

⁷¹⁶ n 707 above, 307.

⁷¹⁷ IATA Discussion Paper (n 708 above) 1.

⁷¹⁸ as above.

passenger per annum.⁷¹⁹ In other words, the system in place proved to be functional for the purpose of running the international aviation market and possibly, another view is that the negotiators were wary to alter this mammoth architecture of bilateral and multilateral agreements and cause sudden disruption to international air travel.

IATA argues that a further consideration for the limitation of scope with regards to air transportation services in the GATS was that of the principle of MFN entrenched within the GATS.⁷²⁰ Within the bilateral agreement system, privileges are accorded on the basis of reciprocity whereas the dictates of the MFN in the GATS is that member states are to be immediately and unconditionally accorded treatment granted to services and service suppliers of any other member state. In practical terms, any member state would have to be granted market access and air traffic rights immediately and unconditionally, and this would be at odds with the spirit of the heavily regulated BASAs as they are entered into by and between like-minded state parties. It is submitted that this line of thought that informed the limitation of the coverage of the GATS insofar as air transportation services are concerned, in the modern-day age of liberalisation of the air transportation sector and open skies agreements, would be regarded to be somewhat regressive. The plausible concern is that, if MFN was applied to the air transportation sector, states that were not willing to reciprocate the privileges would unfairly benefit from liberalisation.⁷²¹ The counter-argument to make in this respect is that, when placed under scrutiny, the principle of MFN is concerned with fair opportunity and participation within the market and not interference with pre-existing trade agreements or according undeserved advantage to a state, as it may be perceived. However, Simo holds a differing view, which is that the MFN principle is only relevant if the granting state actually treats the third state more favourably than it treats the beneficiary state; otherwise it is of limited practical significance.⁷²² Notwithstanding same, it has been the unequivocal precedent that trade exchange in the air transportation sector is done on the strength of harmonious minds and wills

⁷¹⁹ as above.

⁷²⁰ as above, 2.

⁷²¹ as above, 3

⁷²² Simo (n 704 above) 81.

and, Smithies accordingly concedes that applying MFN to the industry would be difficult.⁷²³

Despite the vehement opposition to the MFN principle to the international air transportation market, it is worth considering whether the Chicago Convention, the cornerstone treaty of international air transportation, already contemplated the application of the principle to international civil aviation, *albeit* it is not pronounced as eloquently as it is in the GATS and did not take it as far as the MFN principle. The third recital of the Preamble of the Chicago Convention reads:

Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity...

Be that as it may, states and airlines alike harboured a further concern during the negotiations that applying the GATS to the air transportation industry may result in a dual economic regulatory system, which was undesirable. There was general consensus amongst member states that the ICAO, as the competent agency of the UN mandated to oversee and standardise the rules of the air, was best placed to take into consideration the particular needs, characteristics and regulatory arrangements of the international aviation sector.⁷²⁴ There is ample support for this perspective in Article 44 of the Chicago Convention which delineates the objectives of the ICAO, some of which are to,

...develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- (a) Insure the safe and orderly growth of international civil aviation throughout the world;

...

⁷²³ R Smithies 'Air Transport and the General Agreement on Trade in Services (GATS)' (1995) 2(2) *Journal of Air Transport Management* 124 <https://www.sciencedirect.com/science/article/abs/pii/0969699795000321> (accessed 31 March 2023).

⁷²⁴ n 708 above, 3.

- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
...
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate airlines;
- (g) Avoid discrimination between contracting States;
...
- (i) Promote generally the development of all aspects of international civil aeronautics.

Indeed, these objectives assigned to the ICAO signify that the organisation is fully charged with all the responsibilities related to international civil aviation, especially Article 44(i) which may be viewed as a “catch-all” objective, essentially precluding any other organisation from the activities of international civil aviation, be it principal or ancillary activities. In view of these apprehensions, it was decided to exclude air transportation from the scope of application of the GATS, to a substantial extent, barring the exceptions, all of which is elaborated in the Annex on Air Transport (Annex). Paragraph 1 of the Annex explains the parameters of the application of the Annex to air transportation thus:

This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member’s obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement.

The provision evinces the deliberate use of broad language by the drafters, such as ‘ancillary services’, so as to cover all services that may be possibly related to trade in air transportation services; member states have also built into this provision the assurance that contractual commitments under bilateral and multilateral agreements in place are not disturbed. It is noteworthy that the provision is silent on the application of the Annex on future air services agreements that member states may enter into –

probably also done purposively, in appreciation of the bilateral and multilateral arrangements within the air transportation services sector. Paragraph 2 of the Annex sets out the specific areas in air transportation that are excluded from the ambit of the GATS as follows –

The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:

- (a) traffic rights, however granted; or
- (b) services directly related to the exercise of traffic rights,

except as provided in paragraph 3 of this Annex.

3. The Agreement shall apply to measures affecting:

- (a) aircraft repair and maintenance services;
- (b) the selling and marketing of air transport services;
- (c) computer reservation system (CRS) services.

The exclusion applies to traffic rights, irrespective of how they were granted, and services directly related to the exercise of such traffic rights. It is certainly a wide exclusion in circumstances where traffic rights are the very grain of the international air transportation market. The second exception to trade in air transportation services, being that of ‘services directly related to the exercise of traffic rights’ is ambiguous and can be construed to be anything and makes itself vulnerable to judicial review for interpretation; the WTO Secretariat Background Note on Air Transport Services⁷²⁵ acknowledges that the absence of the inverse, a definition of rights not directly related to the exercise of air traffic rights, creates uncertainty. Assistance can be sought from the definition of ‘traffic rights’ in the Annex which means -

⁷²⁵ World Trade Organization Council for Trade in Services, Background Note by the Secretariat, S/C/W/59, 5 November 1988, 2
https://www.wto.org/english/tratop_e/serv_e/transport_e/review2_e.htm (accessed 14 April 2023).

...the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire, from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.⁷²⁶

‘Traffic rights’ therefore refers to all things related to capacity, frequency, tariffs, criteria for market access, referred to as sometimes as ‘*hard rights*’, which are the basic authorisations necessary to actually conduct flights to and from another country.⁷²⁷ In order to further unpack the limitations within the secondary exception, it is necessary to refer to Paragraph 3 of the Annex which stipulates that three ancillary services, or the “positive list”⁷²⁸ of services that are tradeable under the GATS, namely: aircraft repair and maintenance, the selling and marketing of air services and computer reservation services – viewed as ‘*soft rights*’ or the ‘doing-business’ activities that are necessary for the conduct of air services.⁷²⁹ The WTO Secretariat Background Note⁷³⁰ on air transportation services however posits that, notwithstanding these three services being an exception to the limitations in the Annex, the covered or allowable services are regarded as also being “directly related” to the exercise of traffic rights. Notwithstanding, most of these air transportation services which are covered by the GATS are to be found in most, if not all, air transportation treaties and policies and form part of the liberalisation of the regional or national air transportation markets. The services covered under the GATS are also given definition to, in the Annex.⁷³¹

⁷²⁶ Refer to para 6 (d) of the Annex.

⁷²⁷ as above; R Smithies (n 723 above) 124.

⁷²⁸ WTO Background Note (n 725 above) 2.

⁷²⁹ as above, 4; R Smithies (n 723 above) 124.

⁷³⁰ n 725 above, 1.

⁷³¹ Para 6 of the Annex provides –

- (a) “Aircraft repair and maintenance services” mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.
- (b) “Selling and marketing of air transport services” mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.
- (c) “Computer reservation system (CRS) services” mean services provided by computerised systems that contain information about the air carriers’ schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.”

With reference once again to the Chicago Convention and if the application of the GATS to air traffic rights had to be advocated for, Article 6⁷³² of the Chicago Convention prescribes that scheduled air services may be operated over and into the territory of a contracting state only with the special permission or other authorisation of that State, and in accordance with the terms and conditions of such permission or authorisation; the form of that special permission or authorisation for traffic rights is however not specified nor prescribed in the Convention whether it must be in the form of an air services agreement or under a multilateral trade in services agreement, one such as the GATS. This is nonetheless not within the scope of this study and serves only to pique interest in such an argument.

Notwithstanding the limitations to trade in the air transportation sector, and broad as they may be, the Annex is not closed to the possibility of expanding the scope of services that may be covered under the GATS; paragraph 5⁷³³ of the Annex states clearly that the Council for Trade in Services shall review developments in the air transport sector *vis-à-vis* the application of the GATS to the sector, at every interval of at least five years.

The above analysis seeks to provide context on the treatment of air transportation services under the WTO and GATS. The AfCFTA Agreement, being the regional free trade area agreement of Africa, also has a Protocol on trade in services and air transportation services are similarly isolated therein, mirroring the provisions of the GATS. An examination of the AfCFTA and the associated Protocol on services, specifically in the air transportation sector, follows.

⁷³² Art 6 of the Chicago Convention provides:

“No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorisation.”

⁷³³ Para 5 of the Annex provides:

“The Council for Trade in Services shall review, periodically, at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.”

3 Broad overview of the AfCFTA Agreement

The creation of the AfCFTA is a conglomeration of the pre-existing regional free trade area agreements on the continent, with one its principles being that the free trade areas of RECs are the building blocs for the AfCFTA⁷³⁴ - a principle that is espoused too in the Yamoussoukro Decision.⁷³⁵ As aforementioned, it is founded on the vision of the Abuja Treaty to create an economically integrated Africa and ultimately a single African Economic Community. The Agreement is built on eight general objective pillars laid out in Article 3⁷³⁶ which are: the formation of a single, common market for trade; the creation of a liberalised market for the trade of goods and services; the movement of capital and natural persons; the eventual establishment of a continental customs Union; the promotion and attainment of sustainable socioeconomic advancement; enhancement of competition among the African economies; the promotion of industrialisation; and resolution the challenges related to multiple and overlapping regional memberships by state parties.

In order to satisfy these general objectives, State Parties commit to specific undertakings and that they shall:⁷³⁷

- (a) progressively eliminate tariffs and non-tariff barriers to trade in goods;
- (b) progressively liberalise trade in services;
- (c) cooperate on investment, intellectual property rights and competition policy;
- (d) cooperate on all trade-related areas;
- (e) cooperate on customs matters and the implementation of trade

⁷³⁴ Art 5(b) of the AfCFTA Agreement provides that it shall be governed by “RECs’ Free Trade Areas (FTAs) as building blocs for the AfCFTA;”

⁷³⁵ Article 12.2 of the Yamoussoukro Decision motivates subregional & regional organisations to pursue and deepen their efforts in the implementation of the Decision.

⁷³⁶ Refer to Art(a) to (f).

⁷³⁷ Refer to Art 4.

facilitation measures;

- (f) establish a mechanism for the settlement of disputes concerning their rights and obligations; and
- (g) establish and maintain an institutional framework for the implementation and administration of the AfCFTA.

The scope of the AfCFTA Agreement therefore includes coverage for trade in both goods and services, including investment, intellectual property rights and competition policy⁷³⁸ and unequivocally articulates that the removal of barriers and liberalisation of trade in services must be undertaken in a progressive fashion. It is also the language of the Yamoussoukro Decision that liberalisation of intra-African air transport services must be 'gradual'.⁷³⁹ The employment of this language within the African treaties to pace liberalisation is emblematic of the heterogenous character of Africa, alluded to in preceding chapters in this study. The term "Progressive Liberalisation" is however explained in the AfCFTA Protocol on Trade in Services⁷⁴⁰ that it entails that –

1. State Parties shall undertake successive rounds of negotiations based on the principle of progressive liberalisation accompanied by the development of regulatory cooperation, and sectoral disciplines, taking into account the objectives of the 1991 Abuja Treaty that aim to strengthen integration at the regional and continental levels in all fields of trade, and in line with the general principle of progressivity towards achievement of the ultimate goal of the African Economic Community.
2. State Parties shall negotiate sector specific obligations through the development of regulatory frameworks for each of the sectors, as necessary, taking account of the best practices and *acquis* from the RECs, as well as the negotiated agreement on sectors for regulatory cooperation...
3. The liberalisation process shall focus on the progressive elimination of the adverse effects of measures on trade in services as a means of providing effective market access with a view to boosting intra-African trade in services.

⁷³⁸ Refer to art 6.

⁷³⁹ Refer to art 2 of the Yamoussoukro Decision.

⁷⁴⁰ Refer to art 18 of the Protocol.

Similar to the GATS, transparency through publication of commitments and statutory or administrative measures adopted, is mandatory under the AfCFTA.⁷⁴¹ State Parties are also directed to uphold continental preferences when implementing the AfCFTA Agreement, by granting preferences to each other that are no less favourable to third parties⁷⁴² – in other words, the application of the MFN principle on a continental scale *vis-à-vis* international trade partners. The AfCFTA Agreement interestingly does not allow reservations to be made to the Agreement,⁷⁴³ implying that implementation of the Agreement by State Parties is inescapable.

The detail of trade in goods and services under AfCFTA Agreement is contained in separate Protocols dedicated to same, and the particulars of trade in air transportation services is arranged in the Protocol on Trade in Services. A reflection on the Protocol and its management of trade in air transportation services ensues hereunder.

3.1 The Protocol on Trade in Services

Article 8 of the AfCFTA Agreement accords an unambiguous status to the Protocols and associated annexes and appendices in the following terms:

1. The Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures on the Settlement and their associated Annexes and Appendices shall, upon adoption, form an integral part of this Agreement.

⁷⁴¹ Art 16 provides:

“1. Each State Party shall promptly publish or make publicly available through accessible mediums its laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement.

2. The provisions of this Agreement shall not require any State Party to disclose confidential information which would impede law enforcement or otherwise be contrary to public interest or will prejudice the legitimate commercial interest of particular enterprises, public or private.”

⁷⁴² Refer to art 18.

⁷⁴³ Art 25 provides:

“No reservations shall be made to this Agreement.”

2. The Protocols on Trade in Goods, Trade in Services...and their associated Annexes and Appendices shall form part of the single undertaking, subject to entry into force.

Accordingly, the Agreement cannot be read nor applied in isolation from the Protocols; the Protocols serve to operationalise the free trade area of Africa. The Preamble on the Protocol on Trade in Services (Protocol) carries some significant recitals on economic integration of the African services market and the establishment of a single market and goes to the extent of acknowledging the Yamoussoukro Decision. Some of the recitals to the Preamble record that the AU is –

...

DESIROUS to create, on the basis of progressive liberalisation of trade in services, an open, rules based, transparent, inclusive and integrated single services market which provides economic, social and welfare-enhancing opportunities across all sectors for the African people;

MINDFUL of the urgent need to consolidate and build on achievements in services liberalisation and regulatory harmonisation at the Regional Economic Community (REC) and continental levels;

...

COGNISANT of the serious difficulty of the least developed, land locked, island states and vulnerable economies in view of their special economic situation and their development, trade and financial needs;

ACKNOWLEDGING the African Union Assembly Decision Assembly/AU/666 (XXX) adopted at the 30th Ordinary Session of the Assembly of Heads of State and Government of the AU, in Addis Ababa, Ethiopia on 28 January 2018 on the Establishment of a Single African Air Transport Market through the Implementation of the Yamoussoukro Decision;

FURTHER RECOGNISING the potentially significant contribution of air transport services and, in particular, the Single African Air Transport Market to boost intra-African trade and fast track the African Continental Free Trade Area (AfCFTA),

There is an observation to be illuminated here: the latter portion of this Preamble makes unequivocal reference to the SAATM and the Yamoussoukro Decision and the significance of air transportation services to intra-African trade; the drafters of the Agreement could have elected to make reference to transport in general as a catalyst for intra-African trade but were instead deliberately selective to recognise air transportation as a significant contributor to boost the development of the AfCFTA. These latter recitals respond to the question posed in this chapter in that: it is the implementation of the Yamoussoukro Decision through the SAATM which will stimulate continental trade in Africa (through the unrestricted movement of people and goods), and not that the AfCFTA Agreement will boost the implementation of the Yamoussoukro Decision and the SAATM, *per se*, now rendering the implementation of the Yamoussoukro Decision a continental imperative.

The Protocol borrows from the GATS the definition of “Trade in Services” defined as, not what it is, but rather the manner in which a service can be supplied which are:⁷⁴⁴

- i. from the territory of one State Party into the territory of any other State Party;
- ii. in the territory of one State Party to the service consumer of any other State Party; and
- iii. by a service supplier of one State Party, through commercial presence in the territory of any other State Party;
- iv. by a service supplier of one State Party, through the presence of natural persons of a State Party in the territory of any other State Party.

Article 2 which deals with the scope of application of the Protocol, specifies that the Protocol applies to measures by State Parties for trade in services.⁷⁴⁵ Services that are supplied in the exercise of governmental authority are, similarly as in the GATS,

⁷⁴⁴ Refer to art 1(p) of the Protocol.

⁷⁴⁵ Art 2, subpara 1 provides:

“This Protocol applies to measures by State Parties affecting trade in services.”

excluded from the said definition.⁷⁴⁶ Article 2 further provides that, insofar as air transportation services are concerned –

5. This protocol shall not apply to measures affecting:
 - (a) traffic rights, however granted; and
 - (b) services directly related to the exercise of air traffic rights;
6. This protocol shall apply to measures affecting:
 - (a) aircraft repair and maintenance services;
 - (b) the selling and marketing of air transport services; and
 - (c) computer reservation system (CRS) services.

Notwithstanding that the excluded and included air transportation services are a glaring duplication of those within the GATS discussed above, the lacuna in the Protocol is the definition of “traffic rights” and the definition of the tradeable air transportation services listed in subparagraph 6; one is therefore is obliged to defer to the definitions contained in the GATS in this regard, on the supposition that the Protocol is somewhat a continental codification of the GATS. Barring aircraft repair and maintenance services, Article 11.3 of the Yamoussoukro Decision already makes provision for cooperative marketing arrangements. Article 28 of the Protocol provides that an annex for the implementation of Protocol relating to air transportation services may be developed, which to date, has not been developed and that may perhaps define the excluded and covered air transportation services under the Protocol.

⁷⁴⁶ Refer to Art 2(b) and (c) of the Protocol.

4 Conclusion

The AfCFTA unquestionably marks a turning point in the development and growth of internal trade on the African continent and its economies. In fact, it is so significant to the extent the World Bank views it as one of the tools to help Africa with the challenges emanating from COVID-19,⁷⁴⁷ an argument that is presented in relation to the Yamoussoukro Decision in the succeeding chapter. The AU 2063 Agenda is certainly on course.

Air transportation services are substantially excluded from the reach of application of the AfCFTA Agreement, as in the GATS and only services in aircraft maintenance and repair, marketing and computer reservation systems are permitted to be traded as services in terms of the AfCFTA Agreement. The boost then to the implementation of the Yamoussoukro Decision and the establishment of the SAATM is that the African air transportation market must be able to keep up with a liberalised goods and services intra-African trade market to enable the fluid movement of goods, persons and investment. The limited scope of application of the Protocol to air transportation services therefore means that all matters related to the operation and conducting of air services is governed by the Yamoussoukro Decision through the SAATM, albeit the Protocol does not specifically stipulate that – it is an inference to be drawn cascading from the GATS.

The stance adopted by the AU to mirror the provisions of the GATS in the AfCFTA Agreement is a sensible one, informed by the fact that there must be synergy between the agreement of the WTO and the AfCFTA Agreement otherwise, it would cause great discord and confusion among AU member states who are signatories to both the GATS and the AfCFTA Agreement and possibly give rise to a breach of obligations in various air services agreements to which they are party to.

The AfCFTA Agreement and the Yamoussoukro Decision are inextricably intertwined as they both envisage a liberalised trade market and air transportation services market, respectively. They are therefore mutual stimulants to the economic growth

⁷⁴⁷ n 700 above, 7.

and integration of Africa. That fact that air traffic rights, and all rights related to the exercise thereof (which is inarguably a widely crafted exception) are excluded from the ambit of application of the AfCFTA Agreement does not retard the liberalisation and trade of services in that specific sector. In Africa, the Yamoussoukro Decision and its extended implementation programme, the SAATM and the BASAs which are in conformance with the principles of the Yamoussoukro Decision, are the *raison d'être* for liberalisation of the air transportation market and trading of air traffic rights.

CHAPTER EIGHT

The significance of the Yamoussoukro Decision in the recovery of the African civil aviation market post the era of the COVID-19 pandemic

1 Introduction

In the course of late 2019 going to 2020, the world was beset with the outbreak of a fatal virus that rapidly spread across the entire globe, unforeseen and the social, economic and public health ramifications thereof completely unprecedented. It is the phenomenon that is the coronavirus disease and became to be commonly known as COVID-19, caused by the severe acute respiratory syndrome coronavirus-2 (SARS-CoV-2), a novel strain of coronavirus originating from the SARS species⁷⁴⁸ which attacks the human respiratory system and sometimes, fatally so. According to health information and without delving greatly into the scientific analysis as this study is limited on same, it is spread invisibly so through the movement of people by means of physical contact, through the air or touching infected surfaces. The virus was first detected and reported from the city of Wuhan, Hubei Province, in the Republic of China in December 2019,⁷⁴⁹ yet it spread throughout the globe in under three months⁷⁵⁰ and wreaked absolute health and economic destruction in its early days.

The world came to a standstill, the environmentalists however quipped that the earth got an opportunity to breathe as people stayed at home. It was a period marked by great uncertainty and fear the world over and at the initial stages, the complete cessation of the movement of people was necessary to prevent the spread of the virus, referred to as 'stay-at-home' policies – it was a humanitarian crisis of unprecedented proportions. An intervention of this nature in the form of 'stay-at-home' policies meant

⁷⁴⁸ P Ozili & T Arun, 'Spillover of COVID-19: impact on the Global Economy' (2020) *SSRN Electronic Journal* 2 https://www.researchgate.net/publication/340236487_Spillover_of_COVID-19_impact_on_the_Global_Economy (accessed 21 October 2020).

⁷⁴⁹ SA Lone & A Ahmad 'COVID-19 pandemic – an African perspective' (2020) 9:1 *Emerging Microbes & Infections* 1302 <https://doi.org/10.1080/22221751.2020.1775132> (accessed 8 June 2023).

⁷⁵⁰ as above.

that travel by any mode of transport was temporarily suspended and as such, international air travel, its associated value chain, and ancillary industries such as tourism were severely impacted upon. Some of the nett effects of this suspension were increased flight cancellations, cancelled hotel bookings and local and international events at a high cost⁷⁵¹ to the national and global economies. The enormity and gravity of COVID-19 came to the fore when it was declared as a pandemic by the World Health Organization on 11 March 2020.⁷⁵²

At state level, governments were compelled to make critical national policy decisions within acutely limited timeframes and with ephemeral scientific information at their disposal, including competing information from other schools of medicine and science. At this juncture, governments had to place all other matters of national interest and government business on hold and prioritise its responses to the COVID-19 outbreak to protect the lives of citizens. It really was a time of intense decision-making for state leaders, working in consultation with those responsible for matters of public health.

Africa, like the rest of the world, was not spared from the spread and presence of the COVID-19 virus on the continent, albeit to varying magnitudes and it consequently impeded on the progression of flagship projects under Agenda 2063 such as the SAATM, AfCFTA and the borderless movement of people across the continent. Comparatively, Africa exhibited a significantly different and lower epidemiological profile of the COVID-19 pandemic than the United States and Europe.⁷⁵³ The objective of this chapter is to review and underscore the value of the Yamoussoukro Decision for the recovery of the African aviation industry, in the wake of COVID-19. In doing so, an analysis of the effects meted out by COVID-19 is undertaken, limited to the African air transport industry, followed by an assessment of the strategic response adopted by the ICAO for international air transportation, which cascaded to the work of the AU High Level Task Force, a formation established under the auspices of the

⁷⁵¹ P Ozili & T Arun (n 748 above) 1.

⁷⁵² Media briefing by the Director-General of the World Health Organization on COVID-19 on 11 March 2020, <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed on 9 June 2023).

⁷⁵³ X Sun, S Wandelt & A Zhang, 'Air transportation as a puzzle piece of COVID-19 in Africa?' (2022) 43 *Research in Transportation Business & Management*, 1 <https://doi.org/10.1016/j.rtbm.2022.100780> (accessed 31 January 2023).

AU and dedicated to guide and aid member states through the socioeconomic impacts of the COVID-19 outbreak. Whilst the COVID-19 virus had a global presence, for purposes of this study and to deepen relevance, the contextual and policy analysis related to COVID-19 will be largely restricted to the African continent and its air transportation market.

It is however prudent, prior thereto, to tender an elementary outline of the categories of economic impact as understood specifically within the economics of air transportation, which will enhance the understanding of the discussion on this subject-matter of the economic effects of COVID-19 *vis-à-vis* air transportation.

1.1 Direct impact

Direct impact in the sphere of air transportation represents economic activities that would not have occurred in the absence of air transportation.⁷⁵⁴ To this end, both airlines and airports are the source of direct economic impact in the industry. Vasigh *et al* summarise direct economic impact in the air transportation to include,

...the salaries of airline personnel, fuel purchased, landing fees, salaries of airport personnel...In the air transportation industry, airports provide the greatest direct impact to local economies...the direct economic impacts of air transportation for a community are usually measured based on the airport's immediate economic activity. Additionally, large aircraft manufacturers can have a huge direct economic benefit by locating their facilities in a given community or state.⁷⁵⁵

1.2 Indirect impact

Indirect economic impacts are those which usually have a causal link with the industry and represent the financial benefits derived from airline and airport activities.⁷⁵⁶ Examples provided by Vasigh *et al* of indirect economic impacts in the air

⁷⁵⁴ B Vasigh, K Fleming & T Tacker *Introduction to Air Transport Economics*, 2nd ed. (2013) 201.

⁷⁵⁵ as above.

⁷⁵⁶ as above.

transportation sector includes hotels, retail activities (for example, retail outlets at airports) restaurants, travel agencies, and car rental enterprises and provide an opposite example of the causal relationship between the indirect economic impacts and the industry that, if there were to be reduction in air travel, as there was during the COVID-19 pandemic, the hotel industry in that community would incur a decline in hotel occupancy rates as well.⁷⁵⁷ The authors further explain the difference between direct impacts and indirect impacts to be that indirect impacts originate entirely off-site, generated by air travellers who are visitors in that community⁷⁵⁸ and that the hotel industry serves as the best example of a sector that has a very strong indirect impact on the air transportation sector in that –

...Airlines provide economic benefits to the hotel industry by requiring hotel rooms for passengers who have business in, or are vacationing in a city. This increased demand for hotel accommodation in the city creates employment and may require construction of more hotels, thereby creating more economic impact. The large demand for hotel accommodation caused by air transportation is one of the major reasons why areas around major airports almost always contain many hotels.⁷⁵⁹

1.3 Induced impact

Induced economic impacts are best understood as those impacts that have a multiplier effect on employment and the sale of goods and services within the local community, generated from the direct and indirect impacts of air transportation.⁷⁶⁰ A simple example of induced impact to clarify the concept is this:

...A new airline employee who purchases a house in the local community. The builder of the house then uses this income to purchase other goods and services and the income to the suppliers of these goods and services is also spent. This framework of expenditures is the basis behind the multiplier effect; that is, one transaction leads to multiple economic transactions.⁷⁶¹

⁷⁵⁷ as above.

⁷⁵⁸ as above, 202.

⁷⁵⁹ as above.

⁷⁶⁰ as above, 203.

⁷⁶¹ as above.

In the scenario above, the induced economic impact, in varying degrees, is felt widely within the local community and actually cascades within the local community. The denser the region under consideration, the higher the multiplier effect will be.⁷⁶²

2 The socioeconomic effects of the COVID-19 virus in Africa

The first imported case of COVID-19 in Africa was reported in February 2020 in Egypt,⁷⁶³ and the spread and related fatalities gained prevalence on the continent at a comparatively and slower stage than in Europe and the US. The hypothesis advanced by Diop *et al* is that this was mainly due to Africa's young population,⁷⁶⁴ whilst other informal social arguments hypothesised that it was due to the generally warm continental temperatures. The continental regions, North, South, West, East and Central were affected to varying degrees, and according to reports of the World Health Organization (WHO), Africa remains the region least affected by the virus.⁷⁶⁵ The Republic of South Africa was however one of the countries, amongst others, that accounted for a high number of fatalities at some point of the pandemic.⁷⁶⁶ In responding to the virus, the WHO African Region office published the COVID-19 Strategic Preparedness and Response Plan (SPRP)⁷⁶⁷ which was guided by only one goal: "To ensure that all countries in the WHO African Region establish and sustain the response capacities and capabilities at national and subnational levels to contain the spread and mitigate the impact of the COVID-19 pandemic."⁷⁶⁸ One of the

⁷⁶² as above.

⁷⁶³ Report on the Strategic Response to COVID-19 in the WHO African Region, February – December 2020, World Health Organization – African Region, 13, <https://www.afro.who.int> (accessed 18 May 2023); Africa's Governance Response to COVID-19, African Union Preliminary Report, 2020, 16, https://www.au.int/sites/default/files/documents/38893-doc-covid_19_final_english.pdf (accessed 18 May 2023).

⁷⁶⁴ B Diop, M Ngom, C Biyong & J Biyong, 'The relatively young & rural population may limit the spread and severity of COVID-19 in Africa: A modelling study' (2020) *BMJ Global Health* 5 <https://doi.org/10.1136/bmjgh-2020-002699> (accessed on 19 June 2023).

⁷⁶⁵ As of December 2020, the African region accounted for 2.3% (1 856 571) of cumulative reported cases, & 2.3% (41 505) of cumulative deaths globally; X Sun *et al* in 'Air Transportation as puzzle piece of COVID-19 in Africa' in *Research in Transportation Business & Management*, 1, similarly express that Africa has reported less renal complications coming out of COVID-19.

⁷⁶⁶ Other countries included Ethiopia, Algeria, Kenya & Nigeria, all which accounted for 77% of the total active cases & 85% of total fatalities.

⁷⁶⁷ WHO African Region Report on the Strategic Response to COVID-19 (n 763 above) VIII.

⁷⁶⁸ as above.

interventions employed by governments to mitigate the spread of the virus was to impose nationwide lockdowns, close national borders to restrict the movement of people, with the exception of cargo, and encourage physical social distancing amongst people, a completely novel and unusual concept and way of living to human beings, it is submitted. Other related mitigation measures included making people work from home, closing schools, churches, places of leisure and entertainment such as restaurants. The efficacy of these interventionist measures is not within the scope of consideration this paper however, according to the WHO, Africa managed to extendedly delay the importation of COVID-19 through the prompt implementation of restrictions at points of entry.⁷⁶⁹

In some parts of Africa, the continent is already faced with other public health difficulties such as Ebola in Democratic Republic of Congo, seasonal peaks of malaria, measles, yellow fever, cholera and malnutrition, HIV/AIDS and tuberculosis⁷⁷⁰ and so, COVID-19 compounded the load on an already strained public health system in some parts. With increasing volume of hospital admissions due to the spread of COVID-19, other governments were pressured into converting large open fields such as soccer stadiums into isolation centres, which was the case in Cameroon and Nigeria.⁷⁷¹

However, it is not only the fragile public health system and/or infrastructure of the African region that was visited by the sudden hardship that is the COVID-19 virus, but with the prevalence of high levels of poverty on the continent, her economy too was afflicted. In general, there was a reverberating global contraction of the economy as the virus rapidly spread and governments scrambled to respond to the outbreak of COVID-19 to protect the lives of citizens. An appraisal of the broader macroeconomic impacts of the COVID-19 virus on Africa, as a developing region with varied levels of economic formations, is charted out below.

⁷⁶⁹ n 763 above, 11.

⁷⁷⁰ as above, 3.

⁷⁷¹ PK Ozilli 'COVID-19 in Africa: socioeconomic impact, policy response and opportunities' (2020) *International Journal of Sociology & Social Policy* 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574767 (accessed 27 July 2020).

2.1 Financial market reactions and the reduction of Chinese imports

Financial and stock markets in Africa, much like the international markets, reacted to the COVID-19 pandemic.⁷⁷² In South Africa, the shares of the Johannesburg Stock Exchange Top 40 Index where many entities that are listed there have exposure to China, slumped to 3.7% on 24 February⁷⁷³ as investors became jittery. Similarly in Morocco, upon the announcement of a confirmed COVID-19 cases in the country, the All Shares Index fell which resulted in a loss in investment equity in the stock exchange.⁷⁷⁴ In Kenya, the Nairobi Stock Exchange suspended trading on the stock market altogether on 13 March 2020, which is an equity trading rule in instances where there is a drop of more than five per cent.⁷⁷⁵

Informal trading by small scale merchants is a large sector of the African economy and there is reliance on goods imported from China, in this regard. The closure of borders as it were, had an abrupt and severe disruptive effect on the global supply chain and reduced the importation of goods from China affecting informal traders and developing markets. The upshot of this however is that more locally produced goods would have come into the market.

One other effect interwoven with the shock to the financial and stock markets is that of investors and investment in Africa. With ailing local markets, foreign direct investment for large revenue-generating projects was declined due to the COVID-19 pandemic.⁷⁷⁶ Investors themselves had to be cautious or re-channel funds in the face of the virus and its uncertainty. Thus, divestment was one of the concomitant reactions to the COVID-19 pandemic.

⁷⁷² JE Ataguba, 'COVID-19 Pandemic, a War to be Won: Understanding its Economic Implications for Africa' (2020) 18 *Applied Health Economics & Health Policy* 327 <https://doi.org/10.1007/s40258-020-00580-x> (accessed 8 June 2023).

⁷⁷³ as above, 16.

⁷⁷⁴ as above.

⁷⁷⁵ as above.

⁷⁷⁶ Ataguba (n 772 above) 1305.

2.2 The impact on oil-dependent countries and the mining sector

The sudden drop in demand for oil due to international travel restrictions, lockdowns and the imposition of ‘stay-at-home’ policies and social distancing hurt oil-dependent countries such as Algeria, Angola, Nigeria and Ghana,⁷⁷⁷ who plan national budgets largely around the crude oil commodity. With crude oil being a prime source of national revenue in these countries, the pandemic had a severe effect on the GDP of these states.⁷⁷⁸ Nigeria for example experienced a severe loss in oil revenue as it could not sell its oil stock to foreign buyers due to low demand; the Nigerian oil price per barrel was cast at USD\$57 in its 2020 budget but had to be revised down to USD\$30⁷⁷⁹ after the outbreak of the COVID-19 virus. Ataguba highlights the gravity of the attendant economic pressure in Nigeria in that: the decline in the global oil price occasioned by the COVID-19 pandemic compelled the government of Nigeria to devalue the Naira.⁷⁸⁰ Even outside of the oil-dependent countries, those other African states who rely on the export of commodities as a source of revenue would have been negatively affected by the decline in productivity and manufacturing as governments imposed the lockdowns and encouraged people to work from home. In practical and real terms, commodity production industries cannot work from home.

Africa has a large mining infrastructure, economy, and export demand. It holds a global supply chain in this regard; China is coincidentally the top investor in African mining.⁷⁸¹ The imposition of COVID-19 restrictions meant that there was a decrease in demand for commodities such as cobalt, iron ore, lithium, and steel and possibly a sitting surplus of commodities when production was halted.

⁷⁷⁷ SA Lone & A Ahmad (n 749 above) 1304; PK Ozili, (n 771 above) 18.

⁷⁷⁸ as above.

⁷⁷⁹ as above.

⁷⁸⁰ Ataguba (n 772 above) 327.

⁷⁸¹ SA Lone & A Ahmad (n 749 above) 1304.

2.3 The closure of institutions of learning

Governments identified schools as one of the places where the spread of the COVID-19 virus could thrive and consequently, a considerable number of African countries opted to temporarily close schools and tertiary institutions as a policy measure of mitigating the spread of the virus.⁷⁸² In the alternative, online learning ensued in institutions where such could be catered for. Whilst the science may have supported a decision of this nature and which this paper neither contests nor questions, it is submitted that the correctness of it in circumstances such as South Africa where education is still unequal and the presence of socioeconomic ills in some communities, really did a greater disservice to already disadvantaged learners. Online learning for instance illuminated the glaring inequalities in education in South Africa, where learners from poor public schools could not undertake online learning due to there being no electronic resources. Furthermore, the sentiments expressed by Ozili⁷⁸³ that the closure schools may lead to crime by the youth population do resonate with the South African lived experience. The less people there are on the streets, the lesser the incidents of crime. On a global outlook, United Nations Educational, Scientific, Cultural Organization (UNESCO) reported that the COVID-19 pandemic interrupted the education of at least 290.5 million students worldwide.⁷⁸⁴

2.4 The impeding of the creation of a homogenous African society

One of the challenges identified by this study as a hindrance to the implementation of the Yamoussoukro Decision across the entire continent is that of a historically heterogenous African society, along cultural, linguistic and colonial ties. The Abuja Treaty and AU Agenda 2063 are precisely targeted at the harmonisation of Africa and social and cultural integration of its peoples to eliminate this heterogeneity that has a deep ramification on the development and growth of the African continent. Policies

⁷⁸² PK Ozili (n 771 above) 19. Some of the African states which temporarily closed schools in March 2020 are: Algeria, Angola, Cameroon, Egypt, Ethiopia, Equatorial Guinea, Gabon, Ghana, Kenya, Liberia, Mauritius, Morocco, Namibia, Rwanda, Senegal, South Africa, Tanzania, Zambia & Zimbabwe.

⁷⁸³ PK Ozili (n 771 above) 19.

⁷⁸⁴ P Ozili & T Arun (n 748 above) 13.

such as social distancing and ‘stay-at-home’ have the unintended sociological impact, as opposed to an economic one, of further driving African societies apart and impeding the creation of a homogenous and integrated African society. Social events, communal meetings and other social gatherings that promote social cohesion, development and tolerance which were cancelled as a consequence of the COVID-19 pandemic, adversely affected in-person interactions amongst the African citizenries.

2.5 The impact on the air transportation industry and consequent spillover into the tourism sector

The travel restrictions and border closures that were imposed as measures in an attempt to arrest the spread and transmission of the COVID-19 pandemic had adverse consequences on domestic, regional, and international air travel and airports alike. Civil aviation was struck very hard by the COVID-19 pandemic, especially international air transportation. Most passenger airplanes flew empty at the height of coronavirus. The global aviation industry, as the nexus and driver for tourism, business, investment and a global connector in general, is highly vulnerable to public health catastrophes and COVID-19 is certainly not the first. Dube *et al*⁷⁸⁵ draw from IATA records to remind us that the aviation sector has, in the past, been exposed to other diseases, pandemics and crises such as -

the Severe Acute Respiratory Syndrome outbreak in 2003, the avian influenza H5N1 in 2006, and the swine influenza in H1N1 pandemic in 2009. Other crises that challenged the aviation industry include the oil crisis in 1973, the Iran-Iraq War in the early 80s, the Gulf crisis in the early 90s, the Asian Financial Crisis in 1997, the 9/11 terrorist attacks, and the financial crisis of 1998 and 1999.

The figures in the decline of global aviation in the initial days of the COVID-19 pandemic are high – Abate *et al* place the figure at a 50% decrease in flights globally

⁷⁸⁵ K Dube, G Nhamo & D Chikodzi ‘COVID-19 pandemic & prospects of recovery of the global aviation industry’ (2021) 92 *Journal of Air Transport Management* 1 <https://doi/10/106/j.jairtraman.2021.102022> (accessed 8 June 2023).

during April and May 2020,⁷⁸⁶ a significant dive. On a global scale, the ICAO, in its economic impact analysis of the COVID -19 pandemic on civil aviation as at December 2020 summarised the estimated numbers thus, subject to other factors such as duration, containment of the virus, and the degree passenger confidence for air travel:

The latest estimates indicate that the possible COVID-19 impact on world scheduled passenger traffic compared to Baseline (business as usual, originally-planned) would be:

Full year (Jan – Dec)

- Overall reduction of 51% of seats offered by airlines
- Overall reduction of 2,887 to 2,892 million to 2,92 million passengers
- Approx. USD 390 to 391 billion potential loss of gross passenger operating revenue of airlines

First half of 2021 (Jan – Jun)

- Overall reduction ranging from 31% to 42% of seats offered by airlines
- Overall reduction of 942 to 1,238 million passengers
- Approx. USD 139 to 179 billion potential loss of gross passenger operating revenues of airlines⁷⁸⁷

The numerical projections above certainly present a dramatic reduction in air travel and correlated factors but were not exaggerated. Upon declaration of the COVID-19 virus as a pandemic, there were 102,116 commercial flights that were airborne across the world.⁷⁸⁸ However, within three days, the flights tracked had plunged to less than 100 000 and by the end of March 2020, there were less than 40,000 flights that were tracked.⁷⁸⁹ Similarly, IATA had to revise its forecasted revenue growth for passenger and cargo in 2020 which was projected at 4.1% and 2%, respectively,⁷⁹⁰ but soon with the spread of COVID-19 and its impact on the growth of the aviation industry, these

⁷⁸⁶ M Abate, P Christidis & AJ Purwanto 'Government support to airlines in the aftermath of the COVID-19 pandemic' (2020) 89 *Journal of Air Transport Management* 1 <https://doi.org/10.1016/j.jairtraman.2020.10193> (accessed 6 June 2023).

⁷⁸⁷ ICAO Presentation "Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis" Montreal, Canada, 3 December 2020, Air Transport Bureau, 4, https://www.aaco.org/Library/Files/Uploaded%20Files/Economics/Corona%20studies/3dec%20ICAO_coronavirus_Econ-Impact_pdf (accessed 8 June 2023).

⁷⁸⁸ K Dube *et al* (n 785 above) 2.

⁷⁸⁹ as above.

⁷⁹⁰ as above.

projections had to be revised several times to reflect the reality of the COVID-19 pandemic.

In Africa, the air transportation sector supports almost eight million jobs and accounts for more than 63 billion USD of its continental economic value.⁷⁹¹ Africa is referred to as ‘aviation’s last frontier’⁷⁹² by some scholars, connoting that it is the last and strongest piece of the puzzle in the international air transport network. Sun *et al* correctly assert that considering the long-distance air connectivity from Africa to Asia, Europe and the US, the African air transportation market plays a highly critical and substantive role in its tourism sector;⁷⁹³ it is an economic sectoral relationship that Iacus *et al*⁷⁹⁴ in their analysis characterise as “catalytic” and it is really best understood in that vein. This argument can be made even endogenously without considerations of external air connectivity or routes: air transportation is an important contributor to the tourism economy within Africa in light of the poor air route network and the difficulty of travelling by road. UNCTAD refers to tourism in Africa as a “lifeline for millions of Africans”.⁷⁹⁵ It is however common cause that prior to the outbreak of COVID-19, Africa has some ailing carriers. The pandemic simply brought heightened difficulty to the sector.

For the first two months of 2020, the air network activity in Africa looked similar to that of 2019.⁷⁹⁶ However, intra-continental air service reductions were first observed in the Northern parts of Africa, in March 2020, particularly in Morocco and Tunisia.⁷⁹⁷ Sun *et al* suggest that this development is consistent with major flight restrictions that were enforced in Europe at the same time;⁷⁹⁸ however a different explanation may accord with the said flight reductions and that is, the first reported case of COVID-19 emerged

⁷⁹¹ X Sun *et al* (n 753 above) 2.

⁷⁹² E Lubbe, & S Shornikova ‘The development of African air transport’ (2017) *The Economics & Political Economy of African Air Transport* 18; Pirie (n 520) 262.

⁷⁹³ as above.

⁷⁹⁴ SM Iacus, , F Natale, C Santamaria, S Spyrtatos, & M Vespe, ‘Estimating and projecting air passenger traffic during the COVID-19 coronavirus outbreak & its socio-economic impact’ (2020) 129 *Safety Science* 13 <https://doi.org/10.1016/j.ssci.2020.104791> (accessed 2 June 2023).

⁷⁹⁵ UNCTAD “Economic development in Africa: Tourism for Transformative and Inclusive Growth (2017) <https://doi.org/10.1057/9780230297388> (accessed 19 June 2023).

⁷⁹⁶ X Sun *et al* (n 753 above) 5.

⁷⁹⁷ as above.

⁷⁹⁸ as above, 6.

from Egypt, a fellow Northern Africa state. In any case, the reduction of international flights was not something exceptional to the North African region only; inter-continental flights to Africa sustained a significant decline in March 2020.⁷⁹⁹ In the Southern part of Africa, intra-connectivity during March 2020 was still stable. The air services activity nevertheless changed drastically continent-wide in April 2020 when all intra-African flights collapsed⁸⁰⁰ as travel and movement restrictions gained traction across the continent. Of interest in this regard, is the observation by scholars that is distinctly characteristic of Africa, and that is, the response of African countries insofar as international travel restrictions is concerned, was heterogenous,⁸⁰¹ and it is indeed a recurring lamentation of this study which hopefully shall be gradually ameliorated through the ongoing implementation of AU Agenda 2063. In 2020, IATA announced that African aviation had lost \$4 billion in passenger revenue and reduction of 32% in demand, since the outbreak of COVID-19.⁸⁰² In South Africa alone, soon after the outbreak of the COVID-19 pandemic, we witnessed the unprecedented demise of South African Airways, a prominent domestic and international airline and the complete collapse of South African Express, an airline with a formidable regional presence in Africa, both owned by the state. South African Airways managed to re-emerge pursuant to a business rescue process, whereas South African Express did not and regrettably endured the full course of liquidation.⁸⁰³ These are some of the raw implications of COVID-19, resulting in severe job losses.

In its reflections to the ICAO High-Level Conference on COVID-19, the delegation of African Ministers informed the conference that the pandemic caused deep economic contraction, significant setbacks in trade and that it translated into massive losses across the African aviation value chain.⁸⁰⁴

⁷⁹⁹ as above, 10.

⁸⁰⁰ as above, 6.

⁸⁰¹ as above, 11.

⁸⁰² N Ndawana, (2020) "Coronavirus thrusts African aviation in stormy weather" *City Press*, 6 April <https://city-press-news24.com/Voices/coronavirus-thrusts-african-aviation-in-stormy-weather-20200406> (accessed 20 June 2020).

⁸⁰³ See also G Dunn, (2020) "Coronavirus pushes fragile African carriers closer to the edge" *Flight Global*, 2 June <https://www.flightglobal.com/strategy/coronavirus-pushes-fragile-african-carriers-closer-to-the-edge/138477.article> (accessed 4 June 2020).

⁸⁰⁴ Statement by African Ministers, ICAO High Level Conference on COVID-19, "African Civil Aviation Industry Resilience", 12-22 October 2021, 2, https://www.icao.int/meetings/HLCC2021/Documents/Statements/African_Ministers_Statement_01_en.pdf (accessed 23 May 2023).

Various other elements directly interconnected with the air transportation market were affected by the COVID-19 pandemic and the study attempts to present a general overview of some of those elements, from a global perspective, hereunder.

2.5.1 The impact of COVID-19 on commercial air operators

Commercial airlines are by their very nature creatures of enterprise and profit, in order to provide air services to the travelling public and the conveyance of cargo. In simplistic terms, if there are no travelling passengers, the airline cannot generate any revenue. The drastic decline in air travel caused share prices of airlines to also drop, with the most significant decline occurring between February and April 2020.⁸⁰⁵ The hardest hit share prices were for airlines in Asia, Europe, and North America. By May 2020, global airlines had shed about 49% of their market value, which is a significant percentage. The market share decline as presented are surely some of the underlying factors that would cause airlines to declare bankruptcy or lead to liquidation. A critical observation made by Dube *et al* in this regard is that all this caused substantial financial risk to airline enterprises insofar as the cost of borrowing is concerned,⁸⁰⁶ leading to disinvestments in the industry and threatening the survival of many airlines in the process. Turning the lens to the Chinese air transportation market, where the virus broke out, Cathay Pacific had to retrench 5300 employees in mid-October 2020⁸⁰⁷ to manage the depletion of its cash resources and its highly vulnerable financial state. According to Yu and Chen,⁸⁰⁸ the service reduction of Cathay Pacific plummeted by 96% at the outbreak of the pandemic – an astronomical figure indeed, and additionally impacted on regional air connectivity between Hong Kong and Singapore. It is one of those situations where, inasmuch as government subsidies

⁸⁰⁵ as above, 3.

⁸⁰⁶ as above, 4.

⁸⁰⁷ D Lee, K Magramo (2020) The coronavirus pandemic, <https://www.scmp.com/new/hong-kong/politics/article/3106365/cathay-pacific-eliminate-8500-job-posts-hk22-billion> (accessed 14 June 2023). Of the 5300 employees who were retrenched, 2000 were cabin crew and pilots.

⁸⁰⁸ M Yu & Z Chen 'The effect of aviation responses to the control of imported COVID-19 cases' (2021) 97 *Journal of Air Transport Management* 4 https://www.frmprc.gov.cn/mfa_eng/topics_665678/kjgzbdffyq/t1786310.shtml (accessed 5 June 2023).

and/or bailouts are ordinarily berated for reasons that competition gets distorted as a result, it would call for financial intervention from government.

2.5.2 The implications of COVID-19 for the air transportation market in Europe

The European aviation market was not spared from the adverse effects of COVID-19. The aviation industry endured a massive decline in revenue, with figures plunging as low as 88% in April 2020 and by the end of June, the sector was amassing less than 20% of revenue.⁸⁰⁹ In Euros, the losses were estimated to be at around € 4.5 billion,⁸¹⁰ an astronomical amount indeed. In a bid to contain the losses and in response to the downturn in demand, some airlines opted to retire some aircraft to enhance cost efficiency in their operations. British Airways retired 31 Boeing B747-400 models in mid-July 2020, four years earlier than the planned retirement year of 2024, in an effort to reduce costs related to fleet and accede to the demand to reduce carbon emissions in the air transportation industry.⁸¹¹ Lufthansa, in a similar move and in response to the decline in demand, permanently retired six A380s, seven A340-600s and five B747-400 in April 2020.⁸¹² Virgin Atlantic Airways and KLM Royal Dutch Airlines adopted the same course of action to retire some its passenger aircraft. The cascading implications of the retirement of aircraft would be that aircraft manufacturers received less to no orders for new aircraft models.

In addition to the retiring of aircraft, operators imposed self-grounding of their aircraft as the reality of the effects of the COVID-19 pandemic set in. It therefore meant that there were more aircraft idling on the ground in the hangars of airports during the early phase of the pandemic, less parking space was available and airlines incurred increased parking fees payable to airport authorities, an added expense to an already stressed aviation fiscus.

⁸⁰⁹ Dube *et al* (n 785 above) 6.

⁸¹⁰ as above.

⁸¹¹ as above.

⁸¹² M Caswell, Business Traveller (2020), <https://www.businesstraveller.com/business-travel/2020/04/07/Lufthansa-to-permanently-retire-selected-a380-a340-and-b747-aircraft/> (accessed 14 June 2023).

2.5.3 The effects of COVID-19 on ratings of US airline companies

As already highlighted, the market shares and standing of airlines came in for a great shock with the outbreak and spread of COVID-19 and the concomitant travel restrictions and bans. Dube *et al* present the situation in United States in this regard, one of the biggest players in the industry, as one of the microcosms within the greater international macrocosm that was ensuing, as follows:

In March and later again in June, Standard & Poor (S&P) downgraded most USA airlines to junk status...Airline downgrades was a testament to the high impact of COVID-19 on airline industry liquidity. American Airlines had the most dramatic downgrades, which resulted in three notches down. The United and Southwest airlines lost single notches, and the rest lost two notches each. American Airlines was left far worse off than others.⁸¹³

The downgrading by rating agencies due to the effects of the pandemic was not limited solely to airlines: the airport authorities of New Zealand and Australia were downgraded too by S&P, while the rating of aircraft manufacturing firms such as Rolls Royce was slashed to junk status.⁸¹⁴ It indeed was, for lack of a more apt industry description, a turbulent period in the aviation value chain.

2.5.4 Job losses in the aviation sector

Whilst retired aircraft may have the opportunity to be returned to service since the pandemic has subsided, travel restrictions largely lifted all over the world and international air travel levels are gradually on the incline, the same cannot be said about the workers who lost employment as a result of COVID-19. The sudden and drastic reduction in travel demand and passengers, the mitigation measures adopted by the industry to contain the cash burnout, included the retrenchment of workers *en masse*. It is trite that the aviation industry provides millions of people with employment, in various roles along the value chain. The IATA report of 2019 indicated that the global

⁸¹³ Dube *et al* (n 785 above) 8.

⁸¹⁴ as above.

aviation sector supports a total of 65.5 million jobs.⁸¹⁵ The consequent reduction in international air services due to travel restrictions that were imposed had a critical, if not detrimental impact on employment in the sector. Retrenchments were the order of the day in a bid to save the airline enterprises and mitigate the cash burnout.

The nature of employment within the international air transportation market is such that it has an indirect impact on other areas of employment which are related thereto and *lacus et al*⁸¹⁶ summarily yet comprehensively outline the jobs that were directly and indirectly impacted upon and those that experienced induced impact by COVID-19 thus -

...the direct impact is about the overall economic activity, jobs creation that directly service passengers at airlines, airports and air navigation services providers. These include check-in, baggage handling, on-site retail, cargo and catering facilities. But also include, jobs related to the manufacturing sector (those companies that produce aircraft, engines and other vital technologies). The indirect impact concerns the employment and economic activity generated by suppliers to the aviation industry: aviation fuel suppliers, etc. The induced impact is the spending of those directly or indirectly employed in the aviation sector supports additional jobs in other sectors such as retail outlets, companies producing consumer goods and a range of service industries (for example, banks, telecommunications providers and restaurants). Finally, tourism catalytic is related to air transportation activities that affect multiple sectors of the economy, especially tourism and its value chain (hotels, restaurants, etc.).⁸¹⁷

Invariably, economic contraction will lead to job losses. Tourism on its own is another whole economy that felt the astonishing effects of the COVID-19 pandemic.

Although the duration and persistence of the pandemic was unknown at its outbreak, the air transportation sector had to find ways to manage the restart and recovery of the industry, in conjunction with the newly-introduced public health measures such as

⁸¹⁵ IATA, 2019 Aviation Benefits Report, <https://www.icao.int/sustainability/Documents/AVIATION-BENEFITS-2019-web.pdf> (accessed 18 June 2023).

⁸¹⁶ SM Iacus, F Natale, C Santamaria, S Spyrtatos, & M Vespe 'Estimating & projecting air passenger traffic during the COVID-19 coronavirus outbreak and its socio-economic impact' (2020) 129 *Safety Science* 7 <https://doi.org/10.1016/j.ssci.2020.104791> (accessed 2 June 2023).

⁸¹⁷ as above, 4.

the presentation of a negative COVID-19 nucleic acid test by travellers, the wearing of masks, the decontamination of the aircraft through aerosol sprays prior to take-off, amongst others, all with the view that the pandemic shall pass and that air travel will resume once more. The ICAO, under the aegis of its Council Aviation Recovery Task Force, took the lead in formulating the guiding principles to restart international civil aviation and to aid its recovery, in the midst of COVID-19. This blueprint guideline then informed the work of the AU High Level Task Force, an AU formation that replicated the Council Aviation Recovery Task Force on the African continent, for air transportation. The work of these two substructures is examined in the succeeding discussions.

3 The ICAO Council Aviation Recovery Task Force

The ICAO Council Aviation Recovery Task Force (CART) was set up in response to the COVID-19 crisis and to guide the civil aviation community back onto a path of restart and recovery, in collaboration with representatives from member states,⁸¹⁸ international and regional aviation formations⁸¹⁹ and the industry organisations,⁸²⁰ supported by the Secretariat of the ICAO, all in a safe, secure and sustainable manner mindful of the public health risks associated with international air travel at the time, *vis-à-vis* COVID-19, particularly in circumstances when air transportation was viewed by the public health fraternity as an epidemiological facet of the virus; civil aviation played an instrumental role in the repatriation of people and later on in the pandemic timeline, the conveyance of vaccines. The competing mandates of safeguarding public health from the virus and re-opening the economy through international air travel eventually had to find a workable compromise. The *status quo* that was under severe travel restrictions could not continue indefinitely. The CART was tasked to identify and

⁸¹⁸ These states include Australia, Canada, China, Colombia, Costa Rica, Côte d'Ivoire, Saudi Arabia, Singapore, Spain, United Arab Emirates, United Kingdom, United States, & Zambia.

⁸¹⁹ These include the United Nations World Tourism Organization (UNWTO), World Health Organization (WHO), African Union Commission (AUC), European Union (EU), European Aviation Safety Agency (EASA), Arab Civil Aviation Organization (ACAO), European Civil Aviation Conference (ECAC), & Latin American Civil Aviation Commission (LACAC).

⁸²⁰ Industry included Airports Council International (ACI), Civil Air Navigation Services Organisation (CANSO), International Air Transport Association (IATA), & International Coordinating Council of Aerospace Industries Associations (ICCAIA).

recommend strategic priorities and policies to support member states and the industry based on three foundational pillars:⁸²¹

- a) coping with the challenges faced by States and the civil aviation industry due to the COVID-19 pandemic in the immediate term;
- b) facilitating the restart of aviation operations in a safe, secure, sustainable and orderly manner as soon as practicable taking into consideration the evolution of the pandemic and decisions by international and national public health authorities; and
- c) building a more resilient aviation system in the longer term.

In carefully charting the way forward for the restart and recovery of the civil aviation industry, the ICAO CART was fully cognisant that member states find themselves affected differently by the public health crisis, at different times, and so the measures adopted for the recovery of the aviation sector should be adapted and adjusted to the prevailing circumstances.⁸²² To this end, the CART adopted an international approach for the recovery and restart of international civil aviation, based on 10 key guiding principles which are explained:⁸²³

- 1) **Protect people: harmonized but flexible measures.** States and industry need to work together to put in place harmonized or mutually accepted risk-based measures to protect passengers, crew, and other staff throughout the travel experience.
- 2) **Work as one aviation team and show solidarity.** The respective plans of ICAO, States, international and regional organizations, and the industry should complement, and support each other.
- 3) **Ensure essential connectivity.** States and industry should maintain essential connectivity and global supply chains, especially to remote regions, isolated islands and other vulnerable States.

⁸²¹ International Civil Aviation Organization Council Aviation Recovery Task Force (CART) Report, Montreal, Canada, 27 May 2020, 1, <https://www.icao.int/covid/cart/Documents/CART%20Report%20Final.pdf> (accessed 23 May 2023).

⁸²² as above, 3.

⁸²³ as above, i & 2.

- 4) **Actively manage safety-, security-and health-related risks.** States and industry should use data-driven systemic approaches to manage the operational safety, security, and health-related risks in the restart and recovery phases, and adapt their measures accordingly.
- 5) **Make aviation public health measures work with aviation safety and security systems.** Health measures must be carefully assessed to avoid negatively impacting aviation safety and/or security.
- 6) **Strengthen public confidence.** States and industry need to work together, harmonizing practical measures and communicating clearly, to ensure passengers are willing to travel again.
- 7) **Distinguish restart from recovery.** Restarting the industry and supporting its recovery are distinct phases which may require different approaches and temporary measures to mitigate evolving risk.
- 8) **Support financial relief strategies to help the aviation industry.** States and financial institutions, consistent with their mandates, should consider the need to provide direct and/or indirect support in various proportionate and transparent ways. In doing so, they should safeguard fair competition and not distort markets or undermine diversity or access.
- 9) **Ensure sustainability.** Aviation is the business of connections, and a driver of economic and social recovery. States and industry should strive to ensure the economic and environmental sustainability of the aviation sector.
- 10) **Learn lessons to improve resilience.** As the world recovers, the lessons learned have to be used to make the aviation system stronger.

These principles encompass considerations of safety and security, a critical aspect in aviation, harmonisation of measures and solidarity within the global aviation industry, economic and financial relief to help the aviation industry and to learn lessons of resilience, for the future. The CART regrouped these 10 principles into four categories⁸²⁴ for perspective:

⁸²⁴ as above.

- a) **Aviation safety-related measures.** States may temporarily depart from ICAO Standards but must do so in a manner that does not compromise safety and security, and which is duly reported to ICAO. These departures should not be retained beyond the crisis.
- b) **Aviation public health-related measures.** States should establish public health procedures aligned with the guidance included in the annexed document: *Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis*. The necessity of these measures should be regularly reviewed. The measures which are no longer relevant should be discontinued when the need for their application has ceased to exist.
- c) **Security- and facilitation-related measures.** States should enhance cross-sectoral coordination by establishing a National Air Transport Facilitation Committee or equivalent, and systematically use the Passenger Health Locator Form as a reference. It is States' responsibility to maintain security across all operations by a service supplier of one State Party, through commercial presence in the territory of any other State Party.
- d) **Economic and financial measures.** These should be inclusive, targeted, proportionate, transparent, temporary and consistent with ICAO's policies, while striking an appropriate balance of interests without prejudice to fair competition.

Whilst the principles produced by the CART are really comprehensive in nature and consider every aspect of the air transportation sector within the public crisis as it were, we witnessed the pandemic encouraging harmonisation at a global scale to avoid what the CART refers to as a “global patchwork of incompatible health measures”⁸²⁵ and promoting mutual recognition of globally and regionally harmonised measures, all with the view to foster confidence in the travelling public. The CART was cognisant that consistency within the global air travel network is critical for the restart of the industry. To this end, the CART drafted a guiding document for the industry entitled ‘Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis’ a synopsis of which follows.

⁸²⁵ as above, 3.

3.1 'Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis'

In preparation of risk mitigation measures to guide and aid the restart and recovery of the air transportation industry, especially in relation to passenger traffic, *Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis* (the Take-off Guidance document), the CART was guided by the following important considerations:⁸²⁶

- a) Remain focused on fundamentals: safety, security, and efficiency;
- b) Promote public health and confidence among passengers, aviation workers, and the general public; and
- c) Recognize aviation as a driver of economic recovery.

It is trite that safety and security in air services remains a prime consideration in aviation operations and a circumvention of same will deter passengers even in the face of a health crisis such as COVID-19, and for purposes of the environment, sustainable air operations forms part of the aviation tripod too. It is further indisputable that the air transportation market is an integral segment of the economy and in *casu*, an important driver of global economic recovery from the pandemic. The considerations are reflective of the balance that the CART had to strike between the health and safety of the general public and aviation personnel, and aviation safety, security, and sustainability all with a view to restart the bruised sector.

The CART further agreed that the mitigation measures in the Take-off Guidance document should be:⁸²⁷

- implemented in a multi-layer approach commensurate to the risk level that does not compromise aviation safety and security;

⁸²⁶ International Civil Aviation Organization, Council Aviation Recovery Task Force (CART) *Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis*, Third Edition, 2, <https://www.icao.int/covid/cart/Documents.pdf> (accessed 29 June 2023).

⁸²⁷ as above, 2.

- able to capitalize on the sector’s long-standing experience and apply the same principles used for safety and security risk management. This includes monitoring compliance, reviewing the effectiveness of measures at regular intervals, and adapting measures to changing needs as well as improved methods and technologies;
- able to minimize negative operational and efficiency impacts while strengthening and promoting public confidence and aviation public health;
- consistent and harmonized to the greatest extent appropriate, yet flexible enough to respond to regional or situational risk-assessment and risk-tolerance. The acceptance of equivalent measures based on shared principles and international recognized criteria will be a fundamental enabler to restore air services on a global level;
- supported by medical evidence and consistent with public health best practices;
- non-discriminatory, evidence-based and transparent;
- cost-effective, proportionate and not undermining the equal opportunity to compete;
- highly visible and communicated effectively and clearly to the aviation community as well as the general public; and
- consistent with State obligations under the Chicago Convention and other international treaties and agreements, as well as with standards and recommended practices applicable to aviation and public health.

The above measures can be viewed as the ‘implementation guidelines’ of the Take-off mitigation measures. When read closely, these cogent implementation guidelines illustrate that the measures adopted under the Take-off Guidance document are not dictatorial in that: member states and the industry were to apply them “commensurate with the risk level” or the “situational risk-assessment and tolerance” and, considering that COVID-19 was essentially a moving and scientifically and/or medically capricious target. There is also within these implementation guidelines, the acknowledgement by the drafters that regional harmonisation of measures is key to restore confidence

in passengers and it therefore compelled the global regional groupings to act as a collective. It is correct that at the time of the restart of aviation, following the rapid outbreak of the pandemic, it was important for the industry to communicate and apply consistent mitigation measures. A further key analysis of the implementation guidelines is the inclusion of the non-distortion of competition, which is something that is repeated in the 10 key guiding principles; it is submitted that this concern is probably borne from the appreciation by the ICAO that state-owned carriers were likely to receive subsidies to alleviate the effects of the travel limitations occasioned by the COVID-19 pandemic.

The nature of the COVID-19 pandemic necessitated governments and government institutions to deviate from laws to rapidly respond to the health crisis. The Take-off Guidance document however defers to the rule of law; it states that, in the implementation of the risk mitigation measures, care must be taken to adhere to all applicable laws, regulations, standards, and requirements issued by national and international authorities,⁸²⁸ and that the risk mitigation measures are not intended to supersede or contradict such laws or requirements.⁸²⁹ The Take-off Guidance document provides detailed modules for risk mitigation measures for airport,⁸³⁰ aircraft,⁸³¹ crew⁸³² and cargo⁸³³ in the annexed Appendix. Through these international guidelines of the ICAO CART, the AU High Level Task Force was able to provide direction to the restart and recovery of Africa's air transportation industry.

4 The AU High Level Task Force

In view of the international path and counsel that had been chartered by the ICAO CART through Take-off Guidance document as a blueprint for the restart and recovery of the air transportation sector, AU member states within their regions similarly had to assess the situation of the COVID-19 pandemic and apply the risk mitigation measures

⁸²⁸ as above, Appendix, A-1.

⁸²⁹ as above.

⁸³⁰ Refer to A-6.

⁸³¹ Refer to A-21.

⁸³² Refer to A-33.

⁸³³ Refer to A-42.

within the Take-off Guidance document, piloted through the 10 key guiding principles of the CART.

Accordingly, with the desire to reactivate the continental economy, and surely with the AfCFTA Agreement now in full effect and to realise its fruit, and cognisant that aviation is one the drivers of the economy and trade, the AU established the High-Level Task Force (HLTF) on the Recovery of the African Air Transport Industry, which was set up to serve as an advisory body for Africa's campaign against COVID-19: "Saving Lives, Economies and Livelihoods"⁸³⁴ which campaign was targeted at "striking a balance between saving lives, re-opening of economies and revitalizing livelihoods within the African continent"⁸³⁵ affirmed by AU Heads of State and Government along with Chairpersons of the RECs of the AU. The ICAO CART was formed through collaborations amongst various stakeholders and in the same fashion, the HLTF was established by the AU in collaboration with the ICAO and AFCAC and is comprised of the AUC, ICAO-Regional Directorates, namely WACAF, ESAF, MID, EUR/NAT, AFRAA, IATA-Africa, ACI-Africa, CANSO-Africa, UNECA, African Representatives on the Task Force of the ICAO, RECs of the AU and Africa CDC.⁸³⁶ In the face of the COVID-19 pandemic and insofar as the recovery of aviation in African is concerned, Ayiine-Etigo and Amankwah-Amoah define the HLTF as "...the new governing mechanism and strategic stakeholder group",⁸³⁷ possibly suggesting that this new structure may momentarily outrank the AFCAC, albeit working under its coordination. Under the HLTF, a comprehensive post-COVID-19 Recovery Strategy that will innovatively identify opportunities towards the stable and sustainable recovery of the African air transportation industry was drawn up.

⁸³⁴ African Union Press Release (2021) *Multi-Sectoral Task Force on Trusted Travel and Safe Re-Opening of Borders to foster Saving Lives, Economies, & Livelihoods on the African Continent*, 24 May, https://www.africacdc.org/wp_content/uploads/2021/05/Africa_CDC_Saving_Lives_Multisectoral_Taskforce_Thematic_Press_Release_May_2021-edited-final.pdf (accessed 18 May 2023).

⁸³⁵ as above.

⁸³⁶ AFCAC Newsletter, Issue April – May 2020 *Towards the Recovery of the African Civil Aviation*, <https://www.afcac.org/en/images/2020/Newsletter/news-april20.pdf> (accessed 18 May 2023).

⁸³⁷ DA Ayiine-Etigo & J Amankwah-Amoah 'COVID-19 and Africa's aviation and tourism sectors: A new agenda for the future?' (2021) 39 *Tourism Management Perspectives* 1 <https://doi.org/10.1016/j.tmp.2021.100840> (accessed 31 January 2023).

4.1 The Relationship of HLTF to the ICAO CART

With the tone set at the international level by the ICAO CART, the HLTF drew therefrom its own guidelines for the restart, recovery, and future resilience of the African civil aviation industry. As indicated earlier in this paper, the guidance of the CART cascaded into the COVID-19 risk mitigation strategies adopted by the regions. At the outset, it is evident that the HLTF, akin to the CART, adopted a collaborative approach with multiple stakeholders, for its response to the pandemic on the aviation sector, and called for compliance with existing standards and recommended practices of the ICAO. The HLTF adopted the 10 key principles of the CART and adopted a complementary approach on safety, public health, security and facilitation, in consideration of the distinctive economic and financial circumstances of the AU member states.⁸³⁸ This approach is in line with the implementation guidelines endorsed by the CART that the situation or circumstances that are special to the region must be taken into account when applying the risk mitigation measures insofar as the critical operational areas are concerned. The HLTF made the following recommendations on certain critical aspects of the industry:⁸³⁹

(i) Financial Recommendations:

- Establishment and/or reinforcement of national plans and national facilitation committees to implement measures and recommendations of HLTF and CART reports;
- Access to sufficient financial, human resources and equipment to support operations. Establishment of a stimulus Continental fund to support the recovery plans in the short-, medium- and long-term;
- Resource mobilization by African States, financial institutions, international partners and stakeholders to contribute to the financial package to competitively reposition and enable African aviation

⁸³⁸ Presentation by Chekh Bedda, Director of Infrastructure and Energy, African Union Commission “African Aviation Recovery Conference: Restart, Recovery, Resilience of the African civil aviation sector” 3 December 2020, 3, https://www.afdb.org/sites/default/files/2020/12/07/5_auc_ied_presentation_afdb.pdf (accessed 18 May 2023).

⁸³⁹ as above, 4.

sector to survive as well as recover from the COVID-19 pandemic;
and

- Prioritization of aviation needs by Governments and strengthening of dialogue to implement the fiscal and monetary relief measures to the aviation sector.
- (ii) Technical Recommendations:
- African States should ensure that the measures designed to safeguard against the spread of the pandemic are applied to domestic operations to the extent practicable, based upon a risk assessment carried out by the relevant national authorities, including public health authorities.
- (iii) Capacity Building Recommendations:
- African States should provide the necessary support to ICAO regional programmes such as AFI Plan and AFI SECFAL Plan as well as AFCAC regional initiatives on aviation safety and security and facilitation, such as AFI-CIS and AFI-CES programmes, aimed at improving the effective implementation of ICAO Standards and Recommended Practices (SARPs) and supporting capacity building efforts in African States.
- (iv) Sustainability of Air Transport Recommendations:
- African States with the support of African air operators should allow the full liberalization of air transport services through the full implementation of the YD and SAATM in order to support immediate or gradual resumption of economic activities. African States to ensure the review of aviation related taxes and user charges to ensure compliance with ICAO policies and guidelines.

The harmonisation of entry and exit travel requirements have also significantly helped to restart the African air transportation sector. The recommendations of the HLTF are sound and are largely consistent with those of the CART; the endorsement of the Yamoussoukro Decision and SAATM as the catalysts for the restart and sustainability of the African civil aviation market looking ahead of the COVID-19 pandemic, reaffirms the significance of these instruments in the liberalisation of the African airspace: the more African skies are opened, the greater the chances of recovery and resilience for the future of African civil aviation. It is submitted that the HLTF identified an

opportunity to continue the campaign of liberalisation to the AU member states to attain more liberalised skies than prior to the outbreak of the COVID-19 crisis; it shapes the aviation industry of Africa. The Yamoussoukro Decision and its extended implementation through the SAATM are critical for the recovery of Africa's aviation industry and to gradually build its sustainability. The AFCAC strongly echoed a similar sentiment that the full operationalisation and implementation of the SAATM will play a defining role in determining the speed of recovery of the African aviation industry –

The full operationalization and implementation of the Single African Air Transport Market (SAATM) by all States subscribing to the Yamoussoukro Decision (YD) will play a defining role in determining the speed at which the African aviation industry will recover. A deepened integration within the domestic/enclosed African air transport market offers enormous opportunities for African airlines and aviation business to financially keep afloat once African States rally behind the African Union led initiative for a common approach to successfully leverage on the advantages a fully liberalized single air transport market offers participants in the economy. Africa aviation has undoubtedly an opportunity to strike the appropriate balance required within the domestic/enclosed market and keep aviation support jobs, extend the lifeline of airlines and aviation business under the SAATM umbrella.⁸⁴⁰

Without derogating from the centrality of the Yamoussoukro Decision and SAATM in the recovery and sustainability of Africa's air transport sector, which is inarguable, the HLTF and the Yamoussoukro Decision have come in for sharp criticism by Ayiine-Etigo and Amankwah-Amoah who make the argument that in its recovery and sustainability-building post-COVID-19, Africa must adopt a paradigm shift and take seriously the role of low-cost carriers (LCCs) of growing intra-Africa tourism, as the governance structure of the HLTF does not appear to adequately incorporate considerations related to intra-Africa tourism, which the scholars lay at the door of the failure of the implementation of the Yamoussoukro Decision.⁸⁴¹ Put differently, let the continuous creation of a common aviation market in Africa be accompanied by the expansion of internal tourism on the continent through the establishment and support of LCCs, as a stimulus to the recovery of the African economy at large. The aspect of

⁸⁴⁰ AFCAC Newsletter (n 836 above) 2.

⁸⁴¹ Ayiine-Etigo & Amankwah-Amoah (n 837 above) 4 & 9.

the argument of utilising LCCs, inherently indigenous operators, to cultivate tourism within Africa is certainly not without merit; however, whichever way it can be looked at, same must be preceded by African “open skies” in order to achieve greater and better air interconnectivity on the continent. It is submitted that the perceived marginalisation of intra-African tourism by the HLTF by Ayinne-Etigo and Amankwah-Amoah is probably not deliberate, as the immediate target was to restart and recovery the African aviation sector and the suggestion made of the prioritisation of LCCs is definitely a critical strategy for the sustainability of the sector for the future. It is also an observation of this study that, whereas in the EU and US, liberalisation has birthed a number of LCCs, in Africa, the picture is however acutely different which then renders the cost of air fares to be high. The complementary implementation of the SAATM and the AfCFTA Agreement, specifically the Protocol on the free movement of people and removal of visa restrictions, may serve to ameliorate this situation.

5 Conclusion

The COVID-19 pandemic has not spared its adverse effects on any aviation community and of importance, was the re-emergence of the sector from the devastating and unprecedented collapse in an instant. Invariably, if air interconnectivity is lost or severely interrupted at the international level, Africa was going to be impacted upon and within the continent too, travel restrictions were imposed. The work of the ICAO CART enabled the AU HLTF to forge a path to the restart and recovery of Africa’s civil aviation sector and the leadership of the AU must receive an applause in this regard. The greater focus, however, must be on sustainability of the sector as that will at least ingrain resilience should the industry face another economic upheaval.

The recovery and resilience of the African air transportation market is a continuous undertaking. Nonetheless, same cannot be done in isolation from a thorough implementation and operationalisation of the Yamoussoukro Decision and SAATM; that will give more opportunities to the development of aviation businesses, create more air route networks, and ultimately create more employment in the aviation sector. It is indeed a full economic package that will lend itself to indirect and induced

economic impacts for African communities. Furthermore, there is an incontrovertible connection between the SAATM and the AfCFTA Agreement in the economics of Africa and the realisation of AU Agenda 2063 and the AEC envisaged under the Abuja Treaty. Accordingly, the Yamoussoukro Decision as implemented through the SAATM, even with its delayed pace of implementation and criticisms, remains the key to the recovery of the African aviation industry post the COVID-19 pandemic. Until such time it has been completely implemented by African states, it is premature to characterise the Yamoussoukro Decision as a 'failed' air transportation policy of Africa.

Conclusion: Summary, Key Findings, Recommendations and Perspectives

This chapter serves as a reflection on the main issues and observations raised in the preceding chapters. Furthermore, a few recommendations are made to complete the liberalisation of civil aviation in Africa, within its recovery from the COVID-19 pandemic and into the future.

1.1 Reflections

1.1.1 The Abuja Treaty as the cornerstone of the integration of Africa

The economic, social, and cultural integration of Africa is borne from and rooted in the Abuja Treaty, which envisions the creation of an African Economic Community. Accordingly, the Yamoussoukro Declaration and Decision are manifestations of the same with respect to civil aviation in Africa. The creation of the AEC is not different from what the European Community did to create the EU. The Abuja Treaty is recorded as the founding treaty across all the air transportation policies of the different African regions, signalling its acceptance, embracement and acknowledgement of its significance for the betterment of Africa and her people; and creates a meaningful goal for African states and governments. Although adopted in 1991 by the OAU (the latter-day AU), the Abuja Treaty remains, to date, the blueprint for the formulation of the policy for the future of Africa, shaping Africa into a market that can compete with the rest of the world, informed by the Lagos Plan of Action. Whether economic integration in Africa has been accomplished is an area of debate and study on its own. Ultimately, the purpose of the policymakers is to converge the supranational composition of Africa such that it speaks and competes as a collective on matters of the economy with the international community. It aims at gradually fostering a homogenous African society, which will create an empowered African continent. The EAC region is a sterling and foremost example of homogeneity on the African continent and proof that integration is not a fallacy.

The focus of the Yamoussoukro Declaration was the co-operation and eventual integration of African airlines, to improve air transportation services in Africa and air connectivity. Notwithstanding that it did not gain the desired traction on implementation, the intent of the policy was to forge increased unity and co-operation among African air operators, and air network coherence really. With the help of UNECA and the establishment of the UNCTAD Programmes, the Yamoussoukro Decision emerged which, although it is entitled the 'The Decision to implement the Yamoussoukro Declaration', ushered in a wider scope to airline cooperation and integration and was squarely aligned to the air transportation policy reformations taking place in international jurisdictions such as in the European Community and the US. Liberalisation in Africa became unavoidable and no longer capable of delay because, a closed internal air transportation market would not be able to respond to and compete with the intercontinental aviation markets. Although airspace liberalisation in Africa commenced at a comparatively much later stage, the Yamoussoukro Declaration and Decision are a clear policy expression of the Abuja Treaty, at least to a segment of the economy being the air transportation market. The ECA echoes these sentiments just from the singular perspective of air transportation regulation in Africa, thus:

"The Decision has started an evolutionary process that has far reaching implications for the liberalization of intra-African air transport. The Decision, when fully implemented, will replace the current fragmented regulatory regime by a unified system that gives airlines commercial opportunities on an equal basis and ensures that their activities will be governed by a common body of aviation rules."⁸⁴²

Furthermore, intra-Africa liberalisation or the creation of 'open skies' in Africa would have the extended effect of cultivating social and cultural integration as more Africans move around freely within the continent, further enriching the objectives of the Abuja Treaty as envisaged.

The Abuja Treaty has since been codified into AU Agenda 2063 by the AU with short, medium and long-term project milestones to achieve the Africa that furthers the

⁸⁴² n 8 above, 47.

livelihoods of its citizens whilst participating in the global arena as one collective. Africa has been described as aviation's 'last frontier' by scholars, implying that it is firstly, a formidable economic force for the continent and secondly, is the last piece of the puzzle for achieving more success in the international air transportation network.

1.1.2 The seats of power still reside in the regional formations within Africa

Subsequent to physical decolonisation and the acquisition of independence, African states sought and found strength in the regional organisations which were formed along colonial, language and cultural ties, for example, Western and Central African regions are comprised of former French colonies. It is in the common history, language, and identity that the RECs were formed and are the primary governments, if you will, as states interface on matters of the continent. RECs continue to occupy a powerful position in the political arena of Africa, setting the agenda and position for their respective geographical area; so critical are the RECs that the Yamoussoukro Decision identifies them as important stakeholders for the implementation of the Yamoussoukro Decision⁸⁴³ and fulfilment of its objective. Nonetheless, for successful implementation of the Yamoussoukro Decision, it is not the regional dominance that matters, it is harmonisation of air transportation and immigration policies so that the travelling experience within Africa is seamless.

1.1.3 The Yamoussoukro Decision remains the seminal policy framework for air transportation liberalisation in Africa and intra-Africa liberalisation is not yet complete

The establishment of the SAATM is rooted in the Yamoussoukro Decision and is really a detailed programme of execution of the Yamoussoukro Decision; the Yamoussoukro Decision is thus the nexus of the SAATM. The SAATM has effectively brought the objectives of the Yamoussoukro Decision, liberalisation of intra-Africa air services, under the umbrella of a single air transportation market in Africa and thereby

⁸⁴³ Refer to Art 12.2 of the Yamoussoukro Decision.

strengthens the drive towards liberalisation. The SAATM is the unifying programme of the continent, reconciling liberalisation with the greater future purpose of creating a common aviation market in Africa and bring Africa on par with similar models such as in the EU. It creates a common goal amongst member states of the AU. The landscape of air transportation policies in Africa presents a varied picture: whereas the policies of some RECs are fully compliant with the Yamoussoukro Decision (i.e., WAEMU), some RECs have since taken a decision to rather align their BASAs with the Yamoussoukro Decision, which to date, is still a hanging matter (i.e., EAC), and other states simply opted for liberal air services agreements in terms of which, traditional restrictions on capacity, frequency and tariffs are lifted. This is indicative that implementation of the Yamoussoukro Decision is at diverse stages and is diverse in form. It is, therefore, the assertion of this study that intra-African liberalisation is currently incomplete and effective implementation will lead to reduced air tariffs as a result of increased competition, improvement in trade and tourism and better global co-operation on commercial aspects of air transportation.

The completion of intra-African liberalisation will be completed through the heightened recognition and empowerment of the Yamoussoukro Decision by individual states within the domestic law and policy arena, meaningful enforcement mechanisms for non-compliance with state obligations under the Decision and harmonisation of regional air transportation policies and implementing regulations. Gwilliam asserts that more focus should be placed on the development of regional agreements consistent with the Yamoussoukro Decision and that the domestic markets be liberalised immediately.⁸⁴⁴

1.1.4 The implementation of the Yamoussoukro Decision is critical for the attainment of the goals of the AfCFTA Agreement

The AfCFTA Agreement is a landmark trade treaty, which is envisaged to take Africa to greater economic heights. Trade of whatever nature, however, cannot be optimally

⁸⁴⁴ Gwilliam (n 581 above) 177.

realised in isolation from another significant sphere of the economy which is transport. Hence the AfCFTA is fully appreciative that the implementation of the Yamoussoukro Decision and SAATM will significantly boost internal trade on the continent and achieve the creation of a single African trade area because the schemes of both policies are squarely aligned: a single Africa insofar as trade and the air transportation market are concerned. The exclusion of the trade of air traffic rights and services directly related to the exercise of traffic rights from the Protocol on Trade in Services of the AfCFTA Agreement, is commensurate with current international practice and essentially defers this strand of air transportation services to the Yamoussoukro Decision. The flagship project of AU Agenda 2063 relating to the free movement of people within Africa is equally important to the fulfilment of the objectives of the AfCFTA Agreement.

2.1 Key Findings and Recommendations

2.1.1 There must a shift in the political mindset of African governments

The political will to embrace and implement the Yamoussoukro Decision is the point of departure in addressing the impediments that slow the pace of implementation of the Decision. The Chicago Convention reinforces the principle that signatories to the treaty are sovereign; however, states and regions which have liberalised their air transportation services understand that for functional air route connectivity which stimulates economic growth, it is necessary not to have a myopic or rigid outlook of sovereignty. During and subsequent to colonisation, African states were closed to one another, existing in silos and later forged relations along colonial, language, and cultural identity, amongst others, thereby entrenching heterogeneity on the continent. The SAATM structures continue to utilise persuasion and the dissemination of information to encourage member states to implement the Yamoussoukro Decision by signing the instruments of the SAATM. Understandably, states with weak carriers or little to no aviation activity may view the Yamoussoukro Decision as a benefit for other member states with active aviation sectors, but it is submitted there will be value to be derived from a liberalised airspace and increased air traffic within such communities

in the form of indirect and induced economic impacts, as illustrated in the preceding chapter.

The Yamoussoukro Decision talks about ‘gradual’ liberalisation of intra-Africa scheduled services; in other words, the trepidation of hesitant or unsure African states is catered for in the occurrence of liberalisation in gradual doses, and not as in the US where the deregulation was immediate and swift. There has, nonetheless, been a shift of mindset in African governments: the AU Agenda 2063 and the SAATM bear testament to same. It simply needs to be sustained and the focus to be on increased execution of the targets guiding the programmes and in so doing, Africa will gradually overcome malevolent diversity.

2.1.2 Improve aviation safety oversight

Safety is a chief consideration and requirement for any air traveller and where safety regulation and oversight are porous, it deters potential international passengers and investors. Building adequate and competent safety and security regulatory and oversight capacity in Africa is important. The growth of liberalisation of the African air transportation market is stunted by the region’s poor safety record, because one of the criteria for a carrier to be eligible for designation under the Decision is that it must maintain air safety standards equal to those set by the ICAO⁸⁴⁵ and this therefore means, a designating or receiving State Party must be in a position to regulate and enforce these standards accordingly. An adequate and functional safety oversight apparatus will attract investors for the aviation infrastructure of Africa, knowing that their investment will yield returns. Schlumberger is correct to state that the poor levels of safety are an impediment to the consolidation of Africa’s transportation market, which would make air travel more cost-effective and affordable.⁸⁴⁶ There is, within Article 6.12 of the Yamoussoukro Decision, an in-built affirmation by State Parties to one another insofar as safety and security is concerned to safeguard the maintenance and adherence to the ICAO safety and security standards and practices:

⁸⁴⁵ Refer to Art 6.9(f) of the Yamoussoukro Decision.

⁸⁴⁶ Schlumberger (n 16 above) 174.

- (a) The State Parties re-affirm their obligations to each other to protect the security of civil aviation against acts of unlawful interference. The State Parties will conform to the provisions of the various conventions on air safety in accordance with ICAO provisions and especially with Annex 17 of the Chicago Convention on International Civil Aviation.
- (b) Each State Party shall give consideration to any request from the other State Party for special security measures to meet a particular threat.
- (c) The State Parties re-affirm their obligation to comply with the civil aviation safety standards and practices recommended by ICAO.

Schlumberger asserts that the right given to one State Party to designate a carrier to another State Party in terms of Article 6.1 of the Yamoussoukro Decision requires that mutual trust be engendered amongst State Parties that the safety standards are satisfied irrespective of the state of registry.⁸⁴⁷ Whilst this may be the ideal posture to rapidly advance the implementation of the Yamoussoukro Decision, it cannot be supported. Aviation safety is not a matter of mutual trust, but rather one of verification or inspection. State Parties must be entitled to verify that safety standards are being fulfilled. Article 6.4 of the Yamoussoukro Decision makes provision for the authorisation and licensing processes of designated carriers in terms of the national laws of the receiving State Party, through which processes it will be scrutinised whether safety standards are being met.

It is recommended that, where a different situation prevails, the civil aviation authorities be granted autonomy to be effective and independent regulators, so as to execute the safety and security oversight mandate optimally and efficiently. It is a model that is utilised throughout the world. The national governments must support aviation authorities by allocating sufficient budget to enable them pay competitive salaries to its personnel to retain and train personnel with technical knowledge and expertise.⁸⁴⁸ African states must commit to the regional pooling of information and technical

⁸⁴⁷ as above.

⁸⁴⁸ Gwilliam (n 581 above) 176.

resources dedicated to the oversight of aviation safety,⁸⁴⁹ to aid and bring relief to states where the aviation regulatory oversight function is weak.

2.1.3 Investment in airport infrastructure

The growth of air traffic requires that there be adequate infrastructure in place at airports and maintenance thereof. The concern raised by scholars is not in relation to airport capacity in Africa, *per se*, but rather the state of existing airport facilities.⁸⁵⁰ On the landside, terminals must be upgraded and expanded according to the demands of traffic. On the airside, existing infrastructure should be repaired if needs be, and maintained. Airports are a source of revenue generation, and the private sector ought to be invited to participate in the investment of airports. The construction of new airports should only be in regions where a demand has been identified.

2.1.4 The management of flag carriers needs to be recalibrated to overcome the impact of COVID-19

State-owned airlines are more often than not, identified as a nemesis to liberalisation of air transportation services in Africa. Governments which possess national carriers are accused of adopting a protectionist attitude where the Yamoussoukro Decision is concerned, apprehensive that the national carrier might be adversely affected by a more open aviation market and protecting their routes. Traditionally, being the carriers of the national flag in the sky, national carriers are synonymous with receiving financial support from their biggest shareholder, the government, even at times when the financial performance is poor. Flag carriers are the recipients of what is often referred to as “bailouts”, sometimes to the detriment of the national fiscus and other national developmental priorities. African states are classified as ‘developing’ nations and the priorities are many, but the fiscus not entirely sufficient to meet those priorities. To ordinary citizens, applying public funds into a national airline, more so an unprofitable one, may appear to be insensible and probably insensitive; to the government,

⁸⁴⁹ as above.

⁸⁵⁰ See Bofinger & Gwilliam in general.

however, it is a matter of national pride and a revenue stream and when reflecting on the money spent to keep such flag carrier afloat, it becomes all the more ‘justifiable’ to continue supporting the flag carrier and not be seen to have incurred a colossal loss. Bofinger is one such author who cautions against spending state funds to develop unprofitable flag carriers and with unambiguous disapproval, labels them as “fiscal liabilities that often provide substandard services and present safety risk to the flying public”, with the exception of some outstanding national carriers.⁸⁵¹ Bofinger further recommends that the unprofitable flag carriers be liquidated completely.⁸⁵²

Prior to the outbreak and spread of the COVID-19 pandemic, the sentiments expressed by Bofinger would probably resonate with positivity and concurrence. However, at a time when the aviation industry has emerged from restarting and is now *en route* to recovery, complete liquidation may result in an unemployment bloodbath and labour unrest – we have witnessed the former in South Africa when the regional carrier, South African Express, was liquidated. With the exception of the historical and recurring opposition that flag carriers drain the national fiscus and yet do not bring profit, the other dimension of national carriers is that they bring socioeconomic relief and development to the citizens by providing employment. The recommendation of this paper is rather that the management style and/or approach of state-owned carriers be calibrated, where they are retained and to this end, the strategies adopted and utilised by Ethiopian Airlines are proposed as a precedent.

(i) *The ownership model*

Ethiopian Airlines is a national carrier that is wholly owned by the government but is fully autonomous. In other words, government is not involved, nor does it interfere with its governance nor operations: those aspects are the sole responsibility of management and to operate in this realm, a supportive government environment is needed.⁸⁵³ Consequently, this special condition of independence, which is admittedly very critical, enables the carrier to be run on a “strictly commercial basis”, allows the

⁸⁵¹ Bofinger (n 509 above) 54.

⁸⁵² as above.

⁸⁵³ Y Luo & R Tung ‘International expansion of emerging market enterprises’ (2007) 38 *Journal of International Business Studies* 483 <http://www.jstor.org/stable/4540438> (accessed 16 July 2023).

carrier to be more competitive and build a stronger management structure,⁸⁵⁴ all of which are important elements to run successful commercial air service operations. The relationship between the government and Ethiopian Airlines is one that bears the appreciation of market requirements in that the government allows the airline to use its profits for reinvestment and improvements,⁸⁵⁵ so much so that Ethiopian Airlines built a dedicated maintenance and training facility at its headquarters in Addis Ababa. Therefore, training of its workforce and aircraft maintenance is done by the enterprise itself and is not outsourced.

(ii) The management structure

The autonomy accorded to Ethiopian Airlines has enabled it to attract and build a dedicated management structure of highly qualified personnel. The involvement or interference of government in a state-owned airline at times has a bearing on the management recruited, and thereby compromising the performance of the airline as political interests would have to be looked after by such appointees. It is a material deficiency identified by Al-Kwafi *et al*/that due to the political and institutional influences prevalent at African firms, the management is not proficient, and same is a hindrance to their ability to compete in global markets.⁸⁵⁶

The top management structure of Ethiopian Airlines built a strategic vision for each period and fixed the strategies required to attain the vision and it also continually analyses and evaluates the airline industry at regional and international levels.⁸⁵⁷ The airline is currently working towards its 2025 vision, which is orientated on accelerating the global presence of the airline, safety, market-driven and customer-orientated service. In other words, Ethiopian Airlines is driven by a clear vision underpinned by strategies to achieve that vision. The combination of a customer-orientated service coupled with safety is definitely a pleasing vision for the travelling customer.

⁸⁵⁴ OS Al-Kwafi, GL Franwick & ZU Ahmed, 'Achieving rapid internationalization of sub-Saharan African firms: Ethiopian Airlines' operations under challenging conditions' (2020) 119 *Journal of Business Research* 666, <https://doi.org/10.1016/j.busres.2019.02.027> (accessed 31 January 2023).

⁸⁵⁵ as above.

⁸⁵⁶ as above, 671.

⁸⁵⁷ as above, 668.

The airline further employs a multi-divisional organisation system to support its top management to enhance effectiveness and efficacy of its operations. The rationale for structuring the organisation into subgroups is “...to decentralize decision making and give divisions more ability to define the appropriate procedures to run their operations”⁸⁵⁸ which is a sensible and effective business approach: allow the business-unit to own their operating procedures, and by implication, accountability thereof. These business sub-units are not fixed and evolve according to the needs to the business environment. One of the managers of the airline provides a perspective on the importance of the multidivisional organisational structure:

Our company uses a multidivisional organizational structure with the intention to decentralize decisions and empower employees. This specialized structure makes the airline more efficient, as each division makes decisions that fit business activities and market conditions; also, it helps to improve decision-making ability through taking advantage of the long-time area-specific experience. We control the accountability of each division by enabling other divisions to assess its activities.⁸⁵⁹

(iii) The utilisation of new fleet

The type of aircraft that is still utilised in some parts of Africa has been identified another encumbrance to the implementation of the Yamoussoukro Decision. Aging aircraft have financial implications for the maintenance and continued airworthiness requirements and may become a safety concern. The noise emitted by old aircraft is also offensive to the environment, as international aviation is working towards running an industry that is sustainable and not harmful to the environment, guided by the United Nations Development Programme Sustainable Development Goals of sustainable energy (SDG 7) and climate action (SDG 13).⁸⁶⁰

Ethiopian Airlines utilises a modern fleet of aircraft to make the onboard experience of the passenger a comfortable and pleasant one. It operates a number of wide-bodied aircraft which provide optimum comfort for those long-haul flights. These modern aircraft boast onboard entertainment facilities. Ethiopian Airlines is currently operating

⁸⁵⁸ as above, 669.

⁸⁵⁹ as above.

⁸⁶⁰ K Dube *et al* (n 785 above) 11.

one the youngest and most modern fleets in the world, with the average aircraft age of five years, which is among the lowest age in the industry.⁸⁶¹ This is indeed an impressive accolade on the part of the airline.

2.1.5 Government support should be conditional

Owing to the dire effects of the COVID-19 pandemic on the global aviation industry, which Yu and Chen opine will last for at least 2 to 4 years,⁸⁶² this study has argued that the intervention of government through financial support might become necessary. This support, to both state- and privately-owned airline enterprises should however be attached to conditions that will support the sustainability of the industry and operations. Conditions such as, the use of modern technology aircraft is one that will ensure that efficient aircraft is utilised. It is recommended that airlines should also satisfy the designation criteria prescribed in Article 6.9 of the Yamoussoukro Decision to be eligible for government funding, so as to develop more Decision-compliant airlines in Africa.

2.1.6 Let the liberalisation under the Yamoussoukro Decision continue on a bilateral basis

With the uptake of the Yamoussoukro Decision and SAATM by African states gradually appreciating, State Parties are not barred from concluding bilateral air service agreements aligned to the prescripts of the Yamoussoukro Decision, pending implementation throughout the continent. Like-minded states are encouraged to do so in terms of Article 10.5 of the Yamoussoukro Decision which provides that State Parties may maintain or develop arrangements on a bilateral basis. BASAs are still the main form of agreements in Africa, and they should be leveraged upon to reform its air transportation market as they are principled on reciprocity.

⁸⁶¹ as above, 670.

⁸⁶² M Yu & Z Chen, 'The effect of aviation responses to the control of imported COVID-19 cases' (2021) 97 *Journal of Air Transport Management* 13 https://www.frmprc.gov.cn/mfa_eng/topics_665678/kjgzbdffyq/t1786310.shtml (accessed 5 June 2023).

3 Perspectives

The Yamoussoukro Decision has travelled a long journey of implementation and carries the aspirations of the Africa to form a liberalised and common air transportation market and an open environment of air travel which will foster competition, better services and hopefully, a better air route network. The implementation programme of the Yamoussoukro Decision in the form of the SAATM provides a clear path to achieve the objectives of the Yamoussoukro Decision and create a single African sky. The policy instruments are therefore in place and are reflected in the regional air transportation policies of the continent. It is incontestable that the implementation is delayed. In the recovery of the African civil aviation market from the COVID-19 pandemic, it only makes sense to intensify efforts to implement the Yamoussoukro Decision so that more people move around and within the continent easily, with the support to flagship projects of the AU Agenda 2063 of the free movement of people. It only makes sense to implement the Yamoussoukro Decision to accomplish the goals of the AfCFTA Agreement and stimulate trade in Africa. The Yamoussoukro Decision is not only about the recovery of the African civil aviation market from the COVID-19 pandemic, but it has been demonstrated that it has broader economic benefits and will bring the African citizenry together which will breed social cohesion. In conclusion, reflection is made on an excerpt of lyrics of a song by two great African artists, Ladysmith Black Mambazo and Salif Keita, which speaks to the ultimate aims of the Abuja Treaty, an African Economic community –

United we stand, divided we fall. Asihlanganeni bo, sonke ma’Africa.
Africa is our home, make it a better place. Asihlanganeni bo, sonke
ma’ Africa [*United we stand, divided we fall. Let us come together, all
Africans. Africa is our home, make it a better place. Let us unite, all
Africans*].

Cases Cited

Commission of the European Communities v French Republic Case 16/73, 1974
E.C.R [1974]

Ministère Public v Lucas Asjes and Others (Nouvelles Frontières), European Court
Report [1968], 1425 - 1473

Agreements, Policies and Statutes Considered

- Agreement Establishing the African Continental Free Trade Area and Protocol on Trade in Services
- Arab League Multilateral Air Transport Liberalisation Agreement
- Banjul Accord Group Multilateral Air Services Agreement, 2004
- Charter of Arab League, 1945
- Convention on International Convention on Civil Aviation, Chicago, 1944
- EU Single European Act, 1987
- International Air Services Transit Agreement, Chicago, 1944
- International Air Transport Agreement, Chicago, 1944
- Mbabane Conference on Freedoms of the Air, 1984
- Memorandum of Understanding between South Africa and Mozambique re: air services
- Memorandum of Understanding between South Africa and Namibia re: air services
- Memorandum of Understanding between South African and Botswana re: air services
- Memorandum of Understanding between South Africa and Tanzania re: air services
- OAU Charter, 1963
- Preferential Trade Area for the Eastern and Southern African States, 1982
- The Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport in Africa, 2000
- The Declaration of Yamoussoukro on A New African Air Transport Policy, 1988

- The ECOWAS Revised Treaty, 1993
- The OAU Lagos Plan of Action for the Economic Development of Africa, 1980 – 2000
- The Treaty Establishing the African Economic Community, 1991
- The Single African Air Transport Market, 2015
- The Treaty for the Establishing the Common Market for Eastern and Southern Africa, 1994
- The Treaty for the Establishment of the East African Community, 1999
- The Treaty Establishing the West African Economic and Monetary Union, 1994
- The Revised Treaty of the Economic and Monetary Community of Central Africa, 2008
- The Southern African Development Community Declaration and Treaty, 1992
- Treaty on European Union, 2012
- US Airline Deregulation Act, 1978
- WTO General Agreement on Trade in Services and Annex on Air Transport Services, 1995

Bibliography

Books

Brenner, MA, Leet, JO and Schott, E *Airline Deregulation* (MIT Press: 1985)

Doganis, R *Airline Business in the 21st Century* (Routledge: 2000)

Goetz, AR & Budd, L *The Geographies of Air Transport* (Ashgate, Farnham: 2014)

Gwilliam, K *Africa's Transport Infrastructure: Mainstreaming Maintenance and Management* (The World Bank: 2011)

Schlumberger, CE *Open Skies for Africa: Implementing the Yamoussoukro Decision* (The World Bank: 2010)

Vasigh, B, Fleming K & Tacker, T *Introduction to Air Transport Economics*, 2nd Ed (Routledge: 2013)

Working Papers

- Abate, M (2014) 'Economic Effects of Air Transport Liberalization in Africa' 23 Swedish National Road and Transport Research Institute, CTS Working Paper 10 www.cts.kth.se.
- Abrego L, Alejandra, M, Gurosoy, T, Nicholls, GP & Perez-Saiz, H 'The African Continental Free Trade Agreement: Welfare Gains Estimates from a General Equilibrium Model' IMF Working Paper WP/19/124, May 2019 <https://www.imf.org-media/Files/Publications/WP/2019/WPIEA2019124.ashtx>

Internet Sources

- 'Multi-Sectoral Task Force on Trusted Travel and Safe Reopening of Borders to foster Saving Lives, Economies & Livelihoods on the African continent' African Union Press Release, 24 May 2021 https://www.africacdc.org/wp_content/uploads/2021/05/Africa_CDC_Saving_Lives_Multisectoral_Taskforce_Thematic_Press_Release_May_2021-edited-final-pdf.
- Chaytor, B & Ogo, I 'Recovery from the Economic Impacts of the COVID-19 Pandemic in Africa: What Role for Trade?' 7 April 2020 <https://www.tralac.org/blog/article/1449-recovery-from-economic-impacts-of-the-covid-19-pandemic-in-africa-what-role-for-trade.html>.
- Intervistas Consulting 'Transforming Intra African Air Connectivity: The Economic Benefits of Implementing the Yamoussoukro Decision' Prepared for IATA in partnership with AFCAC and AFRAA, 2014 https://www.iata.org/contentassets/44c1166a6e10411a982b2624047e118c/intervistas_africaliberalisation_finalreport_july2014.pdf.
- Constantinos, CB 'The Single African Air Transport Market: The Covid-19 Economic Onslaught on African Airlines and Strategic Lessons for an Emergent African Airline – Case – Study – Ethiopian Airlines', Respublica Literia, Public Lecture, RL Vol XIII No. 652 MMXX <https://addisababa.academia.edu/CostyConstantinos>.
- Kawagoe, K 'Air Transport Deregulation in the EU: Study from the Europeanization Perspective', paper for Presentation at the IPSA RC-3 Symposium on "European Integration between the Past and the Present", Hokkaido University, Sapporo,

Japan, 6 September 2008, 167

lex.juris.hokodai.ac.jp/gcoe/journal/LPG_vol2/2_8.pdf.

- Burghwout, G, Mendes De Leon, P & De Wit, J 'EU Air Transport Liberalisation Process, Impacts and Future Considerations' OECD International Transport Forum, Discussion Paper No. 2015-04, January 2015 www.internationaltransportforum.org/jtrc/DiscussionPapers/jtrc.papers.html.
- Presentation by PAM Ganetmore, ECOWAS Commission 'Improving Flight Connections in the ECOWAS Region' Special Air Transport Meeting of ECOWAS Member States, Accra, Ghana https://www.icao.int/Meetings/SUSDEV-AT/Documents/Presentation_Ganetmore%20ECOWAS.pdf
- Bofinger, HC 'An Unsteady Course: Growth and Challenges in Africa's Air Transport Industry' Background Paper 16 for Africa Infrastructure Diagnostic, July 2009 <https://www.infrastructureafrica.org>
- Ibeanu, O 'Political Instability & The Challenge of Democratization in Africa: A Conceptual Analysis' Centre for Democracy & Development <https://www.africapolitical.org>
- Paper by the Programme for Infrastructure Development 'The Single African Air Transport Market – An Agenda 2063 Flagship Project' <https://www.au-pida.org>
- 'The Single African Air Transport Market: Towards a Virtuous Cycle of Air Transport Development in Africa' Paper by AFRAA and AFCAC, 2019 <https://afraa.org/wp-content/uploads/2019/11/%E2%80%A2Single-African-Air-Transport-2019.pdf>
- World Bank 'African Continental Free Trade Area: Economic and Distributional Effects' 2020 <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area.pdf>
- Media Briefing by the Director-General of the World Health Organization on COVID-19 on 11 March 2020, <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>
- Report on the Strategic Response to COVID-19 in the WHO African Region, February – December 2020, World Health Organization <https://www.afro.int>
- Africa's Governance Response to COVID-19, African Union Preliminary Report, 2020 https://www.au.int/sites/default/files/documents/38893-doc--covid_19_final_english.pdf

- Caswell, M *Business Traveller*, 2020 <https://www.businesstraveller.com/business-travel/2020/04/07/Lufthansa-to-permanently-retire-selected-a380-a340-and-b747-aircraft/>

Journal Articles

Abate, M, Christidis, & Purwanto AJ 'Government support to airlines in the aftermath of the COVID-19 pandemic' (2020) 89 *Journal of Air Transport Management* 1-10.

Al-Kwifi, OS, Franwick, GL & Ahmed, ZU 'Achieving rapid internationalization of Sub-Saharan African firms: Ethiopian Airlines' operations under challenging conditions' (2020) 119 *Journal of Business Research* 663-673.

Ataguba, JE 'COVID-19 Pandemic, a War to be Won: Understanding its Economic Implications for Africa' (2020) 18 *Applied Health Economics & Health Policy* 325-328.

Ayiine-Etigo, DA & Amankwah-Amoah J 'COVID-19 and Africa's aviation and tourism sectors: A new agenda for the future?' (2021) 39(3) *Tourism Management Perspectives* 1-13.

Brown, AE 'The Politics of Airline Deregulation' (1998) 103 *Political Science Quarterly* 746.

Button K, Martini, G & Scotti D 'African Decolonisation & Air Transportation' (2015) 49 (4) *Journal of Transport Economics and Policy* 626-639.

Button, KJ & Swann, D 'Transatlantic lessons in aviation deregulation: EEC and US experiences' (1992) 37(1) *Antitrust Bull* 207-255.

Diop, B, Ngom, M, Biyong C & Biyong J 'The relatively young & rural population may limit the spread and severity of COVID-19 in Africa: A modelling study' (2020) *BMJ Global Health*.

Dube, K, Nhamo G & Chikodzi D 'COVID-19 pandemic and prospects of recovery of the global aviation industry' (2021) 92 *Journal of Air Transport Management* 1-12.

Freeman, JW 'State Regulation of Airlines and the Airline Deregulation Act of 1978' (1979) 44 (4) *Journal of Air Law and Commerce* 747-770.

Goetz, AR & Dempsey, PS 'Airline Deregulation Ten Years After: Something Foul in the Air' (1989) 54 (4) *Journal of Air Law and Commerce* 927-929.

Katz, MA 'The American Experience Under the Airline Deregulation Act of 1978 – An Airline Perspective' (1988) 6 (1) *Hofstra labour and Employment Journal* 87-100.

- Khan, AE 'Deregulatory Schizophrenia' *California Law Review* (1988) 72 (22) 1059-1068.
- Khan, AE 'Surprises of Airline Deregulation' (1988) 78 (2) *The American Economic Review* 316-322.
- Lone, SA & Ahmad, A 'COVID-19 pandemic – an African perspective' (2020) 9 (1) *Emerging Microbes & Infections* 1300-1308.
- Luo, Y & Tung, R 'International expansion of emerging markets enterprises' (2007) 28 *Journal of International Business Studies* 481-498.
- Mhlanga, O & Steyn, JN 'Liberalisation Initiatives of the Airline Industry in Southern Africa: Progress Achieved and Hindrances to Implementation' 7(1) *African Journal of Hospitality, Tourism and Leisure* 1-17.
- Mhlanga, O & Steyn, JN 'The Impact of International Air Transport Agreements on Airline Operations in southern Africa' (2016) 5(2) *African Journal of Hospitality, Tourism and Leisure* 1-16.
- Njoya, TE 'Africa's Single Aviation Market: The progress so far' (2016) 50(5) *Journal of Transport Geography* 4-11.
- Ozili, PK 'COVID-19 in Africa: socioeconomic impact, policy response and opportunities' (2020) *International Journal of Sociology & Social Policy* 1-33.
- Ozili, P & Arun, T 'Spillover of COVID-19: impact on the Global Economy' (2020) *SSRN Electronic Journal* 1-29.
- Rhoades, DL 'Sustainable Development in African Civil Aviation: Problems and Policies' (2004) 3 *International Journal of Technology Policy and Management*.
- Rose, NL 'After Airline Deregulation and Alfred E Khan' (2012) 102 (3) *American Economic Review* 376-380.
- Scharpenseel, MF 'Consequences of EU Airline Deregulation in the Context of Global Aviation Market' (2001) 22 *Northwestern Journal of International Law and Business* 91-116.
- Simo, YR 'Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility' (2020) 23 *Journal of International Economic Law* 65-95.
- Smithies, R 'Air Transport and the General Agreement on Trade in Services (GATS)' (1995) 2 (2) *Journal of Air Transport Management* 123-126.

Songwe V, Macleod, J, Karingi, SN 'The African Continental Free Trade Area: A historical moment for development in Africa' (2021) 8 (2) *Journal of African Trade* 12-23.

Sun, X, Wandelt, S & Zhang, A 'Air Transportation as a puzzle piece of COVID-19 in Africa' (2022) 43 *Research in Transportation Business & Management* 1-14.

Surovitskikh, S & Lubbe, B 'Measuring Progress in Air Services Liberalisation in South Africa's Aviation Policy in Africa' (2014) *International Conference: Tourism and the New Global Economy* 294-305.

Yu, M & Chen, Z 'The effect of aviation responses to the control of imported COVID-19 cases' (2021) 97 *Journal of Air Transport Management* 1-15.

Dissertations

Bwire SN 'Assessing the Yamoussoukro Decision: Accounting for Determinants of Air Transport Liberalization in Africa' LLM thesis, United States International University, 2018

Ssamula B (2008) 'Strategies to design a cost-effective hub network for sparse air travel demand in Africa' PhD thesis, University of Pretoria.

Documents

African Union

- (OAU) CM/Res.852 – 905 (XXXVII)
- AU Report of the Ministerial Meeting: Second Meeting of the Ministerial Working Group on Establishment of a Single African Air Transport Market
- Doc. Assembly/AU/Decl. 1-7 (XXIV)
- Doc. EX.CL/871 Assembly/AU/Decl.1 (XXIV)
- AU Agenda 2063
- Agenda 2063 Background Note 01
- The SAATM Handbook, 2019
- EX.CL/699(XX), Annex VI
- Assembly/AU/Dec 676 (XXX)
- EX.CL/700 (XX), Assembly/AU/Dec.394 (XVII)

Central Economic and Monetary Community

- CEMAC Civil Aviation Code

Civil Aeronautics Board

- Civil Aeronautics Board to Congress: 'Implementation of the Provisions of the Airline Deregulation Act of 1978, As Required by Sections 1601(c), d and (e) of the Airline Deregulation Act of 1978' 31 January 1984

COMESA

- Legal Notice No. 2 of 1999

Economic Commission for Africa

- ECA Compendium of Air Transport Integration and Cooperation Initiatives, 2010
- ECA Doc. DEC/TRANSCOM/CM/VIII/4

Economic Community of West African States

- Decision A/DEC.7/7/96
- Decision A/DEC/.6/12/03
- Supplementary Act A/SA.1/12/08
- Supplementary Act A/SP.9/02/12
- Supplementary Act A/SP.3/02/12
- Supplementary Act A/SP.4/02/12
- Supplementary Act A/SP.6/02/12
- Supplementary Act A/SP.8/02/12
- Supplementary Act A/SP.10/02/12

European Union

- EU Council Regulation 2407/92
- EU Council Regulation 2408/92
- EU Council Regulation 2409/92
- EU Council Regulation 2342/90
- EU Council Decision 87/602, 1987 O.J (L 374)
- EU Council Directive 87/601, 1987 O.J (L 374)
- EU Council Regulation 3976/87, 1987 O.J (L 374)

International Civil Aviation Organization

- Report of the ICAO Seventh Meeting of Directors General of Civil Aviation of Africa-Indian Ocean Region (AFI-DGCA/7)
- ICAO Presentation 'Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis' Montreal, Canada, 3 December 2020
- Statement by African Ministers 'African Civil Aviation Industry Resilience' ICAO High Level Conference on COVID-19
- CART Report
- Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis

West African Monetary Union

- Regulation No. 24/2002/CM/UEMOA
- Regulation No. 07/2002/CM
- Regulation No. 08/2002/CM/UEMOA
- Regulation No. 02/2002/CM/UEMOA

World Trade Organization

- WTO Council for Trade in Services, Background Note by the Secretariat, C/W/59

Others

- Ssamula, B & Venter, C 'The Way Forward in Liberalising the African Skies' Proceedings of the 24th Southern African Transport Conference, 11-13 July 2005
- Report of the Worldwide Air Transport Conference: 'Challenges and Opportunities of Liberalization' Montreal, 24-28 March 2003, ICAO Doc 9819, ATConf/5
- 'Towards the Recovery of the African Civil Aviation' *AFCAC Newsletter*, Issue April-May 2020