COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 43/CR/May06

In the matter between:

Competition Commission	Applicant
And	
South African Airways	Respondent

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents.

D Lewis

12 July 2006
Date

Concurring: N Manoim, U Bhoola

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA

CT Case No:
CC Case No: 2002Jul145

In the matter between:

The Competition *Commission* **Applicant**

and

South African Airways (Pty) Limited **Respondent**

AGREEMENT ON THE TERMS OF AN APPROPRIATE ORDER IN TERMS OF SECTION 49D OF THE COMPETITION ACT, ACT NO. 89 OF 1998, AS AMENDED.

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1. DEFINITIONS

For the purposes of this agreement the following definitions shall apply:

1.1 *"Act"* means the Competition Act, Act No. 89 of 1998, as amended.

1.2 *"this Agreement"* means the agreement set out herein, duly signed by the *Commissioner* and the *Respondent*.

1.3 *"Commission"* and *"Applicant"* means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the *Act* with principal place of business at the DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

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1.4 *"Commissioner"* means the Competition Commissioner of South Africa, the Chief Executive Officer of the *Commission* appointed by the Minister of Trade and Industry in terms of section 22 of the *Act*.

1.5 *"Competition Tribunal"* means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the *Act* with principal place of business at the DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng

1.6 *"Complaint"* means the complaint initiated by the *Commissioner* on 18 July 2002 in terms of section 49B(1) of the *Act* and filed with the *Commission* under case number 2002Jul145.

1.7 *"Respondent"* and *"SAA"* means South African Airways (Pty) Ltd, a private company duly incorporated and registered in accordance with the company laws of the Republic of South Africa with principal place of business at Airways Park, Jones Road, Kempton Park.

2. APPLICATION TO THE COMPETITION TRIBUNAL

The *Applicant* and the *Respondent* in the above matter hereby agree that application be made by the *Applicant* to the *Competition Tribunal* to have *this Agreement* confirmed as a consent order as provided for in section 58(1)(b) of the *Act*.

3. BACKGROUND

3.1 SAA applied to the Commission under section 10 of the Act for an exemption of a bilateral agreement entered into between SAA and Quantas Airlines.

3.2 During 1999, and pursuant to the consideration of the aforementioned exemption application, the *Commission* discovered that *SAA* had entered into a number of other bilateral agreements with airlines competing on international routes, prior to the enactment of the Act and that *SAA* did not apply for the exemption of these agreements after the *Act* came into force on 1 September 1999.

3.3 The bilateral agreements concerned included Code Sharing Agreements, Joint Operation Agreements, Special Prorate Agreements and Sales Incentive Agreements between *SAA* and El Al, Cathay Pacific, Thai Airways, Varig Brazilian Airlines Limited, Deutsche Lufthansa AG ("**Lufthansa**") and Emirates Airlines.

3.4 As the *Commissioner* considered that the agreements and the conduct between *SAA* and six other international airlines relating to specific country-to-country routes might constitute the fixing of prices and/or trading conditions in contravention of section 4(1)(b) of the *Act*, he initiated a complaint in terms of section 49B of the *Act* on 18 July 2002.

3.5 This consent order relates to the Commission's investigation into agreements and conduct between *SAA* and Lufthansa, which regulated their relationship in respect of flights which they both operated between Cape Town/ Johannesburg and Frankfurt.

3.5 The *Commission* summonsed *SAA* and Lufthansa to provide it with relevant documentation and for certain employees to appear in person.

3.6 *SAA* subsequently provided the *Commission* with all information/documentation sought and some of its employees were interrogated under oath by the *Commission*.

3.7 The bilateral agreements concluded between SAA and El Al, Cathy Pacific, Thai Airways, Varig Brazilian Airlines Limited and Emirates Airlines were found not to have contravened the Act and notices of non-referral were issues in respect of these matters.

4 COMMISSION'S FINDINGS

After completing its investigation, the *Commission* concluded that:

4.1 The product market is defined as that of a commercial airline service between two geographic points. In this instance, *SAA* and Lufthansa were and are competitors on the route between Cape Town/Johannesburg and Frankfurt.

4.2 Documentary and other evidence pointed to an agreement or concerted practice between *SAA* and Lufthansa, to fix the selling price of air tickets on their flights between Cape Town/Johannesburg and Frankfurt.

4.3 Meetings and communications between employees of *SAA* and Lufthansa occurred, where price changes and the harmonization of

fares was discussed and agreed upon. These meetings and communications were the result of the co-operative relationship, which existed between *SAA* and Lufthansa as a consequence of the various bilateral agreements between the two airlines.

4.4 *SAA* and Lufthansa had contravened section 4(1)(b)(i) of the *Act* in that they had directly and/or indirectly fixed the selling price of air tickets on their flights between Cape Town/Johannesburg and Frankfurt.

4.5 *SAA* stopped the above conduct in 2002 shortly after the *Commission* initiated its investigations.

5. AGREEMENT CONCERNING CONDUCT OF THE *RESPONDENT*

The *Commission* and *SAA* agree (subject to the provisions of clause 8 hereunder) that *SAA* shall:

5.1 Not fix the selling price of air tickets with Lufthansa or any other firm with which it is in a horizontal relationship, either through direct agreement with or through indirect arrangements, communications or understandings in contravention of section 4(1)(b)(i) of the *Act*.

5.3 Within twelve months from the date on which *this agreement* is confirmed as a consent order, initiate a compliance programme designed to ensure that its employees and directors are informed of and comply with their obligations under competition law and the provisions of the *Act*.

5.4 Submit its compliance program to the *Commission* within twelve months from the date of confirmation of *this Agreement* as a consent order.

6. ADMINISTRATIVE PENALTY

6.1 In terms of section 58(1)(a)(iii) of the *Act* read with section 59(1)(a), 59(2) and (3) of the *Act*, the *Respondent* has agreed to pay an administrative penalty in the amount of R 20 000 000.00 (TWENTY MILLION RAND) in full and final resolution of all proceedings between the *Commission* and the *Respondent*, in relation to any alleged contraventions of the *Act* under case number 2002Jul145.

6.2 The *Respondent* acknowledges that the penalty amount does not exceed 10% of its annual turnover in and its exports from the Republic during the preceding financial year.

6.3 The penalty amount is to be paid into the bank account of the *Commission* by no later than 31 May 2007. The *Commission's* banking details are as follows:

Bank:	ABSA Bank
Name of Account:	The Competition Commission Fees
Branch Name:	Pretoria
Branch Code:	323345
Account Number:	4050778576

6.4 The *Commission* will pay over the penalty amount to the National Revenue Fund referred to in Section 59(4) of the *Act*.

7. FULL AND FINAL RESOLUTION

This agreement, upon confirmation thereof as a consent order by the *Competition Tribunal*, concludes all proceedings between the *Commission* and the *Respondent*, in relation to any alleged contraventions of the *Act* under case number 2002Jul145 *and the Commission's investigation of the Respondent under this case*.

8. EFFECT OF THIS AGREEMENT

The *Respondent* records that nothing in *this agreement* amounts to, or should be taken to imply an admission of liability or wrongdoing on its part.

9. VARIATION

Inasmuch as, prior to the confirmation of *this Agreement* as a consent order by the Competition Tribunal, it is capable of variation or cancellation by mutual consent of the parties, no such variation or cancellation shall be effective unless reduced to writing and signed by or on behalf of the parties.

FOR THE RESPONDENT:

Dated and signed at Kempton Park on this the 12th day of ~~February~~ May 2006.

Signature: _____

Name: Louisa B. Zondo

Designation: General Counsel

Duly authorized representative of South African Airways (Pty) Limited

FOR THE *COMMISSION*:

Dated and signed at Pretoria on this the 24 day of May 2006.

_____

Shan Ramburuth
Acting Commissioner
Competition Commission of South Africa