

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 47/CR/May06

In the matter between:

Competition Commission

Applicant

And

Deutsche Lufthansa AG

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

**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

Deutsche Lufthansa AG

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.**

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.

- 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 “*Lufthansa*” means Deutsche Lufthansa AG, a company duly incorporated and registered in accordance with the company laws of Germany, with its main place of business at Von-Gablenz-Strasse 2-6, D-50679 Cologne, Federal Republic of Germany.
- 1.8 “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 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 Restrictive Practices provisions contained in Part A of Chapter 2 of 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, *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 entail 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 *Agreement* 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.

3.6 The *Commission* summonsed SAA and *Lufthansa* to provide it with relevant documentation and for certain SAA employees to appear in person. The *Commission* did not request *Lufthansa* employees to appear in person before it.

3.7 SAA and *Lufthansa* subsequently provided the *Commission* with all information/documentation sought and various SAA employees were interrogated under oath by members of the *Commission's* investigation team.

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 passenger 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 indicated that meetings and communications between employees of SAA and *Lufthansa* had occurred, in regard to price changes and the harmonization of fares. Although not a direct consequence of the various bilateral agreements between SAA and *Lufthansa*, such meetings and communications evidenced co-operative conduct, amounting to an agreement or concerted practice between the two airlines.

4.3 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.

4.4 *Lufthansa* and SAA stopped the above conduct in 2002.

5. AGREEMENT CONCERNING CONDUCT OF THE *RESPONDENT*

The *Commission* and *Lufthansa* agree that *Lufthansa* shall:

- 5.1 Not engage in the fixing of any selling prices or trading conditions in contravention of section 4(1)(b)(i) of the *Act*, with *SAA* or any other firm with which it is in a horizontal relationship, either through direct agreement with or through indirect arrangements, communications or understandings.
- 5.2 It is recorded that *Lufthansa* initiated a compliance program in 2005, which, if adhered to, would ensure that its employees and directors are informed of and comply with their obligations under competition law and the provisions of the *Act*. A copy of the compliance program has been provided to the *Commission*.

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 8 500 000,00 (EIGHT MILLION FIVE HUNDRED THOUSAND 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* within thirty (30) business days after the confirmation of this agreement as a Consent Order by the Tribunal. 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.

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

In as much 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 Pretoria on this the 30 day of May 2006.

Signature: _____

Name: _____

Nicolai von Ruckteschell

Designation: _____

Senior Vice President &
General Counsel

Dr. Holger Häfky

Member of the Board
Lufthansa Passenger Airline

Duly authorized representative of Deutsche Lufthansa AG

FOR THE COMMISSION:

Dated and signed at Pretoria on this the 31 day of May 2006.

Shan Ramburuth

Shan Ramburuth

Acting Commissioner

Competition Commission of South Africa