REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO: 92/CAC/MAR10

In the matter between:-

SOUTH AFRICAN AIRWAYS (PTY) LIMITED

Appellant

and

COMAIR LIMITED First Respondent

NATIONWIDE AIRLINES (PTY) LIMITED Second

Respondent

JUDGMENT : 11 April 2011

ZONDI AJA et DAVIS JP

Introduction

[1] This is an appeal against the judgment and order of the Competition

Tribunal ("the Tribunal") of 17 February 2010 in which it found that the override incentive agreements and trust agreements/payments between the appellant ("SAA") and various travel agents from 1 June 2001 to 31 March 2005 constituted prohibited practices in contravention of s 8(d)(i)[1] of the Competition Act 89 of 1998 ("the Act"). The appeal is also against the costs order made by the Tribunal ordering SAA to pay cost of two counsel of the first respondent ("Comair") and the second respondent ("Nationwide").

[2] The bases for the appeal are two-fold. The first basis is that the Tribunal should not have entertained the complaints lodged by Comair and Nationwide as their referral was precluded by the operation of s 67(2) of the Act. Secondly the appeal is brought on the basis that the Tribunal erred in finding that SAA contravened s 8(d)(i).

[3] The latter finding is challenged on a number of bases which can be summarised as follows:

3.1 that the relevant market was the market for the purchase of travel agent services for the sale of domestic airline tickets.

3.2 that SAA had market power in the relevant markets.

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1 Section 8(d)(i) of the Act provides as follows:

8 Abuse of dominance prohibited

It is prohibited for a dominant *firm* to-

(a) …

(d) engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:

(i) requiring or inducing a supplier or customer to not deal with a competitor;

3.3 that travel agents have the ability to significantly influence customers' preferences and they could directionally sell in any significant degree and thereby move customers away from rivals and towards SAA.

3.4 that the growth of alternate marketing channels had not eroded travel agents' ability to influence customers' preferences.

3.5 that SAA's rivals could not match the incentives offered by SAA.

3.6 that it was unnecessary to find evidentially that there was harm to the consumer in determining the anti-competitive effects of the agreements in issue. In this regard the Tribunal was criticised for having adopted a form-based approach.

3.7 that the Tribunal ignored the significant increases in Comair and Nationwide's market share in the relevant period and erred in finding that Comair and Nationwide were excluded from the market and that their growth in the market was curtailed.

3.8 that the Tribunal erred very significantly when it ignored

powerful evidence in the so-called counterfactual period. The counterfactual period represents the period post 2005 when SAA abolished override agreements of the kind in issue. It is pointed out by SAA that the Tribunal's superficial basis for rejecting the evidence in relation to the counterfactual period, which is relevant in testing whether Comair and Nationwide had been foreclosed, simply does not withstand scrutiny.

3.9 and finally that the Tribunal was also incorrect in finding that SAA could shift a significant portion of the market through the incentive schemes.

Factual Background

[4] On 13 October 2000 Nationwide lodged a complaint with the Competition Commission ("the Commission") against SAA relating to the manner in which SAA was compensating travel agents for their services ("the Nationwide matter"). Nationwide alleged that SAA was a dominant firm in the market for domestic airline travel and that it used this dominance to engage in exclusionary practices in contravention of s 8 (c)[2] and 8 (d)(i) of the Act. The complaint *inter alia* alleged that SAA had concluded agreements with travel agents in terms of which they received commissions on an incremental basis that had an exclusionary effect and that SAA had a reward scheme known as the Explorer for the

2 Section 8 (c)
It is prohibited for a dominant *firm* to-
(c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain.

employees of the travel agents which it alleged had an exclusionary effect.

[5] The Commission conducted an investigation and thereafter referred the complaint to the Tribunal on 18 May 2001. In its complaint referral, the commission alleged that SAA's agreement with travel agents and the Explorer Scheme with employees of the travel agents constituted a prohibited practice in contravention of s 8(d)(i) alternatively 8(c) of the Act, with the exception of the Explorer Scheme which ended in June 2002. According to the Commission the alleged abuse commenced in about April 1999 and was believed to have continued to exist beyond the date of complaint referral to the Tribunal.

[6] The Tribunal, however, decided, on the basis of fairness, that it was necessary to limit the duration of the abuse to a finite period. For this reason it assumed that the evidence of the existence of the abuse commenced in October 1999 and ended in May 2001 which is the date on which the Commission concluded its investigation.

[7] The Tribunal duly heard the complaint and delivered its judgment on 28 July 2005, which is reported in **The Competition Commission v South African Airways (Pty) Ltd** [2005] 2 CPLR 303 (CT). After analysing the material that was before it, the Tribunal concluded *inter alia* that:

7.1 The first relevant market was the market for the purchase of domestic airline ticket sales services from travel agents in

South Africa.

7.2 The second relevant market was the market for domestic scheduled airline travel.

7.3 SAA was a dominant firm in both markets in terms of section 7(a) as it had a market share in excess of 45% threshold.

7.4 There is respectable authority for the notion that exclusionary practices should not require evidence of actual competitive harm for a finding of abuse. The Tribunal noted that a finding is still possible if there is evidence that the exclusionary practice is substantial or significant, or has the potential to foreclose the market to competition. If it is substantial or significant it may be inferred that it creates, enhances or preserves the market power of the dominant firm.

7.5 The practical effect of the Explorer Scheme and the overrides incentive scheme is that they induced suppliers not to deal with competitors of SAA and hence constituted an exclusionary act in terms of section 8(d).

7.6 The override incentive scheme provided a compelling commercial inducement to agents to prefer selling SAA tickets to those of its

domestic rivals and secondly, that to a significant extent, agents were able to influence customer preferences so as to give effect to those incentives and the Explorer Scheme served to enhance the exclusionary effect.

7.7 Travel agents accounted for approximately 75% of sales of domestic airline tickets during April 2000 till March 2001. SAA had 19 override agreements by the end of March 2001. A significant portion of the travel agents market, itself a significant channel for ticket sales, was subject to override agreements.

7.8 The override agreements provided three forms of compensation by way of commission: the basic, the override and the increment. Prior to 1999 the basic commission was set at 9%. In October 1999 SAA dropped the basic commission from 9% to 7% but increased the commission payable in terms of the override and the increment, but only if the agent reached a more demanding target.

7.9 The effect of the anti-competitive conduct, given the structure of the market, was to inhibit rivals such as Comair and Nationwide from expanding in the market whilst at the same time reinforcing the dominant position of SAA. The exclusionary act was substantial or significant in terms of its effect in foreclosing the

market to rivals and the consumers were likely to have made wrong choices of airlines, and hence paid higher prices than would have been the case, absent SAA's schemes with agents .

7.10 SAA failed to prove that the override scheme or the Explorer Scheme, provided any technological efficiency or other pro-competitive gains that outweigh their anti-competitive effect.

[8] On 9 January 2006, the Tribunal issued a certificate in terms of section 65(6)(b)[3] of the Act, confirming that the conduct of SAA had been found to be a prohibited practice in terms of s 8 (d)(i) of the Act.

[9] Nationwide proceeded with a civil claim for damages in the High Court and issued summons on 4 July 2006. Nationwide's claim was subsequently settled.

[10] On 13 October 2003 Comair lodged a complaint with the Commission against SAA. The complaint related to the manner in which SAA was compensating travel agents for their services. Comair alleged that SAA, being a

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3 Section 65(6)(b) provides:

(6) A person who has suffered loss or damage as a result of a *prohibited practice*-

(a) …

(b) if entitled to commence an action referred to in paragraph *(a)*, when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the *prescribed* form-

(i) certifying that the conduct constituting the basis for the action has been found to be a *prohibited practice* in terms of *this Act*;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of *this Act* in terms of which the Tribunal or the Competition Appeal Court made its finding.

dominant firm in the market for domestic airline travel, uses its dominance to engage in exclusionary practices in contravention of section 8(c) and 8(d)(i) of the Act. In this case, the exclusionary practices relate to the remuneration of travel agents – the allegation being that travel agents are rewarded in a manner that kept them loyal to SAA to the exclusion of its rivals. Two remuneration practices were in issue in the complaint. The first related to the provision of override commissions to travel agents in addition to normal flat rate commission. The second related to what are termed 'trust payments'. These are lump sum payments made to travel agents at the end of a financial year if they attain certain prescribed targets in selling SAA tickets.

[11] The Commission investigated the complaint and thereafter referred it to the Tribunal on 12 October 2004. The Commission sought the following remedies in its referral:

> *"A. It is declared that SAA's contracts with travel agents whereby it paid (or pays) to travel agents amounts over and above the normal 7% commission payments, are prohibited for the purposes of section 65 of the Act.*
>
> *B. SAA is to pay an administrative penalty to the National Revenue Fund contemplated in section 213 of the Constitution of the Republic of South Africa, Act 108 of 1996, in the amount up to 10% of SAA's annual turnover in South Africa."*

[12] Comair later applied for leave to intervene in the proceedings and was granted this relief on 6 April 2005. Comair filed its own complaint referral in which it sought the following relief:

> *"1. The override commissions and trust payments made by respondent [SAA] to travel agents, and any other agreements in terms of which payments are made by the respondent to travel agents based in considerations of loyalty rather than efficiency benefits, constitute prohibited practices in breach of section 8(c) and/or 8 (d)(i) of the Act;*
>
> *2. All existing agreements between respondent and travel agents of the sort referred to in paragraph 1 above are hereby declared to be void.*
>
> *3. The respondent shall be and hereby is interdicted and restrained from engaging in any and all of the conduct, or from entering any agreements of the sort, referred to in paragraph 1 above."*

[13] On 15 February 2006 Nationwide applied to intervene in the Comair complaint referral case. The Tribunal granted intervenor status to Nationwide on 25 May 2006 and it too, filed a complaint referral. Previously, in October 2000, Nationwide had filed a complaint with the Tribunal in respect of SAA's remuneration scheme for travel agents. This culminated in a finding against SAA

which was fined R45 million for contravening section 8(d)(i) of the Act.

[14] Late in 2005 the Commission and SAA commenced negotiations to settle various complaints that were pending against SAA. In the course of this process, the consent agreement was entered into. On 24 May 2006, the Commission brought the present application to have the agreement confirmed as a consent order in terms of section 49 (D)(1)[4] of the Act, read with section 58(1)(b)[5]. The Tribunal granted the application.

[15] Nationwide filed a second complaint in terms of section 49(2)(b)[6] with the Commission on 22 May 2006. In that complaint, Nationwide made it clear that it was pursuing a declaration that SAA's override incentive scheme after May 2001 was a prohibited practice in contravention of s 8(d)(i) of the Act.

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4 Section 49D(1) and (4) provides:

49D Consent orders-

(1) If, during, on or after the completion of the investigation of a complaint, the Competition Commission and the *respondent* agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that *agreement* as a consent order in terms of section 58 (1) *(b)*.

(4) A consent order does not preclude a *complainant* from applying for-

(a) a declaration in terms of section 58 (1) *(a)* (v) or (vi); or

(b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the *complainant*.

5 Section 58 (1)(a) and (b) provides:

58 Orders of Competition Tribunal–

(1) In addition to its other powers in terms of *this Act*, the Competition Tribunal may-

(a) make an appropriate order in relation to a *prohibited practice*, including-

(i) interdicting any *prohibited practice*;

(ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a *prohibited practice*;

(iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;

(iv) ordering divestiture, subject to section 60;

(v) declaring conduct of a *firm* to be a *prohibited practice* in terms of *this Act*, for purposes of section 65;

(vi) declaring the whole or any part of an *agreement* to be void;

(vii) ordering access to an *essential facility* on terms reasonably required;

(b) confirm a consent *agreemen*t in terms of section 49D as an order of the Tribunal;

6 Section 49(2)(b) provides:

49 Conduct of entry and search-

(1) …

(2) During any search under section 48 (1) *(c)* , only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.

[16] On 20 September 2006 the Commission issued a Notice of Non-Referral of Nationwide's second complaint and Nationwide duly referred its complaint directly to the Tribunal in terms of s 51(1) of the Act.

[17] In March 2007, Comair launched an application for declaratory relief in terms of s 49D (4) asking the Tribunal to declare that the override commissions and trust payments made by SAA to travel agents, from September 1999 to the date of Comair's section 49D(4) application, constituted prohibited practices in contravention of s 8(c) and/or 8(d)(i) of the Act and in terms of s 58(1)(a)(v) or (iv) of the Act.

[18] On 12 September 2007, SAA filed an application to consolidate Comair's s 49D(4) application with Nationwide's complaint referral. The application was granted by the Tribunal, with the consent of the Nationwide and Comair, on 7 November 2007.

Issues

[19] The present proceedings flow from that consolidation of Nationwide's complaint referral and Comair's s 49D(4) application.

[20] The Tribunal's order against which SAA appeals reads as follows:

> *"254.1 We declare the following conduct of SAA to be prohibited practices in contravention of section 8(d)(i) of the Act –*

i. The override incentive agreements between SAA and various travel agents from 1 June 2001 to 31 March 2005; and

ii. The trust agreements/ payments between SAA and various travel agents from 1 June 2001 to 31 March 2005.

254.2 An order of costs, including the costs of two counsel, in favour of Nationwide and Comair."

[21] Having sketched this factual background, we turn now to consider the main issues raised in this appeal:

1. whether the Tribunal was correct in rejecting SAA's objection to the complaint referrals on the ground that they were precluded by the operation of the provision of section 67(2) of the Act;

2. whether the Tribunal erred in finding that SAA had contravened section 8(d)(i) of the Act.

SAA's section 67(2) argument

[22] One of SAA's grounds of appeal related to the point *in limine* it took against Comair's complaint referral to the effect that the conduct forming the subject

matter of the complaint was substantially, if not completely, the same conduct as in the first Nationwide matter and that the referral was precluded by section 67(2) of the Act. That section provides as follows:

> "A complaint may not be referred to the Competition Tribunal against any *firm* that has been a *respondent* in completed proceedings before the Tribunal under the same or another section of *the Act* relating substantially to the same conduct*".*

[23] The Tribunal considered and rejected SAA's objection, holding that SAA could not invoke the protection of section 67(2) for its conduct after 31 May 2001.

[24] It is instructive to cite the Tribunal's reasons for dismissing SAA's point *in limine:* (Reported as **Nationwide Airlines (Pty) Ltd and another v South African Airways (Pty) Ltd** [2009] 2 CPLR 509 (CT))

> *"[45] While the Tribunal and the CAC have both interpreted the section to include the notion of "substantially the same conduct" or "similar conduct" both have indicated that where the particulars of complaint deal with the same or similar conduct in a different time period, this would not make such a complaint vulnerable to an attack under section 67(2).*
>
> *…*

[47] In other words section 67(2) seeks to protect a respondent from double jeopardy related to the same or similar conduct in a specified time period. For example, a respondent may have been prosecuted for abuse of dominance under section 8(c) for conduct in a specified time period. Once the proceedings have been completed, a complaint of the same conduct, occurring in the same time periods, could not be referred to the Tribunal under another section of the Act, example section 8(d)(i) or section 5. Similarly by way of example, if in those completed proceedings the issue of dominance was determined on the basis of the respondent's market share, a subsequent complaint, for the same conduct occurring in the same time period based on a notion of collective dominance could not be referred to the Tribunal once proceedings in the former complaint are completed.

[48] Substantiality would thus relate to materiality and would include <u>both</u> manner and time. Both the CAC and this Tribunal have held that conduct occurring in different relevant time periods constitutes a <u>material</u> difference between two complaints.

[49] SAA's a-temporal approach to section 67(2), if adopted by this Tribunal, would lead to an absurdity as demonstrated the following example. Consider the matter of a cartel member who was prosecuted for a cartel which had lasted for two months. Cartels are

considered to be the most egregious offences under the Act. On SAA's interpretation, this person could now with impunity engage in any number of cartel activities after being prosecuted and found guilty for the first two month long cartel. If the Tribunal were to adopt such an approach, it would never be able to prosecute a respondent for repeated offences. Thus when a party seeks the protection of section 67(2), such protection can only be competent where it relates to substantially the same conduct taking place in a specified or defined period. Substantially the same conduct taking place in a specified or defined period. Substantially the same conduct or even identical conduct occurring in a different time period would constitute new conduct and would not be protected by s67(2).

[50] Furthermore, SAA's suggestion that the time period of the Nationwide decision extended into 2005 is completely baseless. The Tribunal in that case expressly stated as follows –

> *"We declare the following conduct of SAA to be prohibited practices in contravention of section 8(d)(i) of the Act:*
>
> - *the scheme known as the override incentive scheme, being a contract between itself and various travel agents between October 1999 and May 31, 2001; and*

- *the scheme of travel agents' compensation known as Explorer, from a date unknown until 31 May 2001."*

[51] SAA's conduct from 1999 to 31 May 2001 has already been evaluated by the Tribunal in the Nationwide case. This complaint is therefore concerned with SAA's conduct after 31 May 2001, namely the period from 1 June 2001 to 31 March 2005. Even if SAA, for argument's sake, had not introduced a new incentive scheme in 2001 but had continued with the same scheme evaluated in Nationwide, its conduct in the subsequent period of 1 June 2001 to 31 March 2005 would constitute conduct that would not be protected under section 67(2) precisely because it was occurring in a different time period.

[52] The relevant period of the Nationwide decision was October 1999 to 31 March 2005. On this basis alone, we find that SAA's approach to section 67(2) is without any merit and the point in limine is accordingly dismissed. To the extent that the Comair complaint concerns the second generation override incentive agreements and the Explorer scheme in place until 31 May 2001, SAA is protected from further prosecution by the provisions of section 67(2). However SAA cannot seek the protection of section 67(2) for its conduct occurring after 31 May 2001, even if that conduct was substantially similar in nature to conduct in the previous period.

[53] Moreover, and contrary to SAA's assertions, the nature of the incentive scheme under consideration in this matter, consisting of the third generation and trust agreements was never considered by the Tribunal in the Nationwide case. In that decision the Tribunal was only concerned with the override incentive agreements (second generation agreements) and the Explorer scheme for the period October 1999 to 31 May 2001. The Tribunal took heed of the fact that the incentive scheme was possibly still in operation but pointed out that:

'…although the evidence is that the scheme was still in effect at the time of the hearing, the only evidence we have of its effect is for the investigation period, which ends in mid-2001. We do not know for instance if the nature of the contracts (our emphasis) changed in any respect after the investigation period ended. Recall that this has been an important part of our finding on the contravention that it is the nature of the override, not the fact of an override being in existence that is of central concern…'

[25] We agree with the Tribunal that the effect of section 67(2) is to preclude the Commission and any complainant from bringing a complaint against a respondent whose conduct had previously been the subject of any final or definitive determination by the Tribunal .Thus , if a respondent has already been prosecuted for certain conduct, it ought not to be prosecuted again for the same conduct,

whether or not the earlier prosecution resulted in an adverse finding. We also agree with the Tribunal that a respondent who wishes to rely on the protection of section 67(2) bears the *onus* of proving that it is indeed entitled to protection.

[26] In ***SAPPI Fine Paper (Pty) Ltd v Competition Commission of South Africa and another*** [2003] 2 CPLR 272 (CAC) at paragraph 52 this Court held that section 67(2) was enacted to avoid a firm from being "*tried*" twice for the same or substantially the same conduct.

[27] In other words, to trigger the operation of section 67(2) it must be shown that the complaint relates to substantially the same conduct and in respect of which a firm was a respondent in the completed proceedings (**SAPPI** supra at paragraph 42). If new facts are placed before the Commission or if new facts come to light which were not previously known to the Commission, it is enjoined to investigate the complaint in order to properly fulfil its statutory function as the primary body responsible for prosecuting any conduct which is alleged to be prohibited by the Act. (**Omnia Fertilizer Ltd v Competition Commission and others; Sasol Chemical Industries v Competition Commission and others** [2006] 1 CPLR 27 (CAC) at paragraph 25).

[28] As this court said in **Omnia Fertilizer Limited v Competition Commission and others** *supra* at paragraph 28:

> "*It is common cause the complainants are the same in both the referrals. Further, the third respondent has embodied allegations of fact that are in*

some measure repeated in the second complaint but, as the papers reveal, the similarity ends there. Not only new facts are relied on in making the second referral but these facts are more extensive and deal in part with events that occurred after the filing of the first complaint. Moreover, the second complaint implicates two new parties, Omnia and Kynoch. In addition, new contraventions are identified which are fully ventilated in the answering affidavits of the third and fourth respondents. It will be jejune to repeat. We are therefore satisfied that the complaints were and are temporally and qualitatively different."

[29] *Mr Subel*, who appeared with *Mr Bhana* for SAA, submitted that the conduct in issue in this matter (save for the minor additions of the trust agreements) was substantially, if not completely, the same conduct as that which formed the subject matter of the dispute in the first Nationwide matter. He correctly pointed out that, for section 67(2) to apply, it is necessary for SAA to demonstrate, firstly, that it is was a respondent in completed proceedings before the Tribunal and secondly, that those proceedings related substantially to the same conduct under the same or another section of the Act.

[30] *Mr Subel* emphasised that section 67(2) focuses on the underlying conduct and does not require the conduct to relate to the same period. He argued that the date "*May 2001*" was simply an assumed date for practical purposes only and did not signify a date upon which conduct on the part of SAA was found to have

changed.

[31] He pointed out that the referral in issue in the present matter simply introduced multiple hearings in respect of substantially the same conduct with the result that SAA faced the classic double jeopardy in respect of overlapping issues and which resulted in SAA being found, on two occasions, guilty of a contravention of the identical section of the Act for substantially the same conduct.

[32] In our view, there are fundamental differences between the two complaint referrals, both in terms of the nature of the conduct upon which the complaint was based and the time periods during which the conduct occurred.

[33] In this regard, it is necessary to refer to the Tribunal's order in the first Nationwide matter to see how it characterised the nature of the conduct that was before it for determination as well as the time period over which it occurred. It gave the following order:

> *"(b) We declare the following conduct of SAA to be prohibited practices in contravention of section 8(d)(i) of the Act:*
>
> - *the scheme known as the override incentive scheme, being a contract between itself and various travel agents between October 1999 and May 31, 2001; and*
>
> - *the scheme of travel agents' compensation known as*

Explorer, from a date unknown until May 31 2001."

[34] It is clear from the terms of the order that the conduct of SAA which the Tribunal declared to be prohibited practices in contravention of section 8(d)(i) of the Act is first, the scheme known as the override incentive scheme in the form of a contract between SAA and various travel agents which took place between October 1999 and May 31, 2001 and secondly, the scheme of travel agents' compensation known as Explorer, from a date unknown until May 31, 2001.

[35] As regards the nature of the agreements which were the subject of the investigation in the Comair complaint referral it is important to point out the following:

35.1 the override incentive agreements ("2nd Generation" contracts) that were in place as at the date of the Nationwide referral in May 2001 were replaced by another set of agreements (the "3rd Generation" contracts) and also the trust payments that SAA began making to travel agents.

35.2 According to Mr Viljoen, it became necessary for SAA to replace the 2nd Generation contracts with 3rd Generation contracts and trust payments in April 2001 as a result of the initiation of the Nationwide complaint and after receiving competition law advice. Mr Viljoen explained that the trust payments, were introduced by SAA in order

to provide agents with incentives for incremental growth, and to compensate them for the introduction of flat rate overrides following the change from 2nd to 3rd Generation contracts. They were made to travel agents on the basis of their international and domestic support for SAA in terms of SAA flown revenues and SAA market share.

35.3 SAA restructured its travel agent contracts again when the Tribunal handed down its decision in the Nationwide case in July 2005. It thereafter introduced the 4th Generation contracts.

35.4 It is the 3rd and 4th Generation contracts and trust payments that form the subject matter of these proceedings and upon which Comair and Nationwide base their case for the declaratory relief that they seek.

35.5 In summary, while 2nd and 3rd generation contracts shared certain characteristics in common, there were key features which distinguished these contracts including the following:

35.5.1 Whereas 2nd generation contracts contained incremental overrides to incentivise agents incremental performance, the 3rd generation contracts contained flat override payments for the achievement of base revenues.

35.5.2 Differentiated override payments depending on the class of tickets sold by the travel agent, which did not feature in the 2nd generation contract, were introduced in the 3rd generation contracts during the period 2002/2003.

[36] There are differences in terms of the structure and specific provisions between the incentive agreements considered by the Tribunal in the Nationwide case and those considered in the Comair referral. It is these features which are relevant in determining whether or nor the agreements were anti-competitive. These agreements took place at different time periods.

[37] In argument, *Mr Subel* submitted that the attempt by the Tribunal to simply dilute SAA's objection on the basis that the conduct occurred at a different time period ignores the fact that the so called "relevant period" was relevant only in that it was considered to be sufficiently reliable to arrive at a finding in relation to the conduct.

[38] He submitted that the approach adopted by the Tribunal was fallacious in that on the basis of its reasoning, SAA's conduct in each of the years from 1999 to 2001 could justify the referral of three separate contraventions by the Commission and result in three findings against SAA. He argued that on the Tribunal's reasoning the same agreement would lead to a finding that because the conduct occurred both pre 31 May 2001 and post 31 May 2001 that the conduct was not substantially similar in nature because it occurred in a different time period.

[39] In essence, this dispute turns on the interpretation of the provisions of section 67(2). The legislature's intention must be sought in the first place by interpreting the words used in section 67(2) according to their ordinary meaning and in the light of their context. (**Protective Mining & Industrial Equipment Systems (Pty) Ltd (formerly Hampo (Pty) Ltd v Audiolens (Cape) (Pty) Ltd** 1987 (2) SA 961 (A) at 991 G-H; **Jaga v Dönges, NO and another; Bhana v Dönges, NO and another** 1950 (4) SA 653 (A) at 662 G – 664 H).

[40] In our view, the construction of section 67(2) contended for by *Mr Subel* must be rejected as it would lead to a result contrary to the clear intention of the legislature. We agree with *Mr Unterhalter*, who appeared with *Mr Wilson* for Comair, that in order for conduct to fall within the immunity protection of section 67(2) it must be conduct that takes place at the same time as the conduct that forms the subject matter of the "completed proceedings" and cannot be a repeat or continuation thereof at a different time period. It could never have been an intention of the legislature to grant permanent immunity for the conduct occurring at different time periods on the basis that conduct had previously been the subject of "completed proceedings" before the Tribunal." (**Barnes Fencing Industries (Pty) Ltd and another v Iscor Ltd (Mittal SA) and others;** [2008] 1 CPLR 17 (CT) at paragraph 39).

[41] Of some significance was an argument put up by SAA in support of its contention that section 67(2) was applicable. *Mr Subel* noted that both Comair and Nationwide interests in prosecuting the present case were solely for the

purposes of obtaining a declaration as a pre-requisite, in terms of section 65(6)(b) of the Act, for the institution of an action in the High Court for alleged damages flowing from the conduct of SAA. *Mr Subel* was invited by this court to concede that, if his argument was correct, there would be no reason why the appellant (or SAA) would resist such a declaration in that the initial decision of the Tribunal would cover all such alleged conduct. Understandably, it was an invitation which *Mr Subel* declined which, in itself, illustrates the fundamental point that even SAA considered that these disputes constituted different cases. Indeed, SAA sought to defend itself on the merits, based on the very nature of the 3rd and 4th generation contracts as well as the changed dynamic of the market in order to justify a different decision from that adopted by the Tribunal in the first case.

[42] In the circumstances SAA's point *in limine* stands to be dismissed.

[43] We now turn to consider the merits.

The Relevant Period

[44] The "relevant period" for the purposes of the complaint referral in the instant matter is the period between 1 June 2001 to 31 March 2005. The Tribunal determined 31 March 2005 as marking the end of the relevant period because the 3rd generation agreements and trust payments, which were subject to the

investigation by the Commission in the Comair referral, were in force until 31 March 2005. The Tribunal was, however, mindful of the fact that there might be some degree of overlap in the Nationwide and Comair complaint referrals as some of the 3rd generation agreements might have been concluded with travel agents before 31 May 2001.

[45] It also recognised the probability that one or two 3rd generation agreements remained in force for a brief period of time after 31 March 2005 and that some of the 2nd generation agreements might have persisted after the 31 May 2001 date. It, however, reasoned that these overlaps were of a very limited duration and would not have a material impact on its competition analysis for the period 1 June 2001 to 31 March 2005.

The Relevant Conduct

[46] The 3rd generation agreements and trust payments constituted conduct which fell under scrutiny in this appeal. Their description and how they operated was summarised carefully by the Tribunal in its decision as follows:

"*[55] In order to understand the third generation (3G) agreements it is necessary to revisit the essential elements of the second generation (2G) agreements. In the second generation agreements, the incentives to travel agents were structured as follows. Travel agents were paid a flat basic commission for all sales up to a target that was set for them. The target figure was expressed in rands. If they reached and exceeded the set target they become eligible for two additional types of commission, payable over and above the flat basic commission. The first of these was a commission calculated not only over the amount by which the travel agent exceeded the target but over the total sales achieved above and below the target.*

[56] By way of example, let us assume that a particular travel agent had a sales target of R50 million to achieve. The travel agent would earn a flat commission of 7% on this volume, expressed in rand value. However if the travel agent exceeded the target by R5m it would earn an override commission, set at typically 0,5%, calculated on all sales earned namely R55m. Hence the agent at that stage would earn an additional commission of R275 000, over and above its 7% flat commission of R3 850 000 In total the agent would earn an average commission of R4 125 000 translating into an average rate of 7.5%. This is called the override incentive and because it is calculated over the total sales achieved it is referred to as the "back to rand one" principle.

…

[58] The actual percentage of the override incentive may have differed from agent to agent but the basis of its computation was common across all. In addition to the override commission travel agents also became eligible for a third category of commission, referred to as the incremental commission. If the travel agent exceeded the first target for the override commission, also referred to as base, by a certain target it became eligible for the incremental commission. This commission was not calculated back to rand one but was calculated in relation to the first target ("back to rand base" or "back to base" principle) and was typically much higher in percentage terms than the override commission.

…

[60] In the course of 2001, SAA changed its override agreements. The changes were announced around the time when the Commission had almost finalised its investigation into the Nationwide complaint and just before it had referred it to the Tribunal.

[61] The general features of the 3G agreements were as follows. Override payments were introduced for the achievement of base revenues. Base (target) revenues were usually set on the previous

year's sales of the particular travel agent and were individually negotiated with each travel agent. Payments to travel agents for achieving base were calculated on a back to rand one basis. In other words, both the basic flat commission of 7% and the override incentive commission that had been offered by SAA in the second generation agreements remained in place.

[62] An important change introduced by SAA in the second generation agreements was that targets and computation of achievement of targets would be done on the basis of flown revenue rather than BSP figures. Flown revenue is a measurement applied across all couriers in the determinant of rebate deals. BSP refers to Billing and Settlement Plan sales which is the gross bookings by IATA-accredited travel agents. The significance of this is that while travel agents could always calculate their BSP figures through reconciliations with other relevant components of gross sales, only airlines would be in possession of the flown revenue figures. Third generation agreements in place for the first two contract years (2001/2002 and 2002/2003) were based on flown revenues and those for subsequent years on number of flown passengers. Flown revenues sold on SAX and SAL were also included in the override agreements for major travel agents for the purposes of computing performance and payments to travel agents.

[63] The basis of computation of flown revenues however was also adjusted from year to year or agreement to agreement during this period by the introduction of a number of exclusions. The agreements for example excluded the acquisition of travel agents in the form of new outlets or new corporate accounts with in-house travel agents from the computation of growth for the purposes of meeting the set targets. Hence if a particular travel agent acquired another travel agent, opened a new outlet or acquired new corporate in-house account, revenue of SAA sales from these sources were not computed as incremental growth but were instead included in the base revenue target and the actual revenues for that agent.

[64] Differentiated override payments depending on the class of tickets sold by the travel agent were introduced during contract year 2002/2003. The classes of tickets were differentiated between premium, sub-premium and discounted. Notwithstanding all of these changes, the basis of rewarding travel agents to achieve the set targets was still calculated on an override basis in that agents were paid commissions over and above the standard commission on a back to rand one principle for achieving targets set by SAA.

…

[67] Over this period there was a constant revision of the computation of base revenues in order to exclude from a particular agent's base, those SAA sales that would in any event have been made by any other player in the market including SAA itself. The agreements also became more specific over time, rewarding agents only for specified classes of tickets.

[68] Trust agreement were introduced in contract year 2001/2002 and remained in place until the first quarter of contract year 2004/5. TRUST was an acronym adopted by SAA for "True partnership, Respect, Undivided support, Sharing of information and Training of SAA product and knowledge". Trust payments consisted of lump sum payments made by SAA to travel agents for achieving specific revenue and market share targets and in exchange for the agent's support of SAA. The payments were additional to the domestic overrides discussed above..

[69] The precise formula for trust payments differed across agents and through time. The formula for the larger agents such as Renfin and Sure Travel initially provided for positive revenue growth during 2001 to 2003 and thereafter for maintenance of the flown revenue levels achieved in previous years. Trust payments for smaller agents seem to contain positive revenue targets until 2003/4. What was common to all of them was the payments were made upon

the above terms achievement of a particular target. In addition to such and payments, trust agreements also included allocations of tickets to agents' promotional tickets and marketing incentives.

SAA's contracts after mid 2005

[47] The structure of SAA's travel agent agreements changed in 2005/06, around the time of the Tribunal's decision in the Nationwide case (in July 2005). Documents discovered from SAA and from travel agents show that this change was implemented by SAA around the beginning of FY 2005/06 to mitigate the risk of further actions from the competition authorities, following the outcome of the Nationwide case.

[48] In May 2006, SAA entered into a consent agreement with the Commission in terms of which it *inter alia* agreed to change the structure of its incentive schemes with travel agents according to a number of criteria. This consent order was approved by the Competition Tribunal in December 2006.

[49] Under the consent agreement, SAA was required to refrain from entering into agreements containing the following key features:

- Individual growth targets for each agent (where the commission is

paid on the basis of performance relative to a previous period);

- Market share targets (where incentives are paid conditional on the agent conducting a given share of its business with SAA);

- Differentiated sales targets across agents where differences do not reflect cost savings;

- Retrospective (i.e. “back to rand one”) commission rates, and

- Commission rates increasing “other than incrementally on a straight line basis above any base line”.

[50] According to Dr Federico, the SAA’s agreements which he analysed for the period 2005/06, appeared to comply with the features of the consent agreement with the Commission. In particular, the agreements in 2005/06 did not contain “back to rand one” retroactive overrides and did not appear to have included trust payments. Instead, the agreements relied on incremental overrides (i.e. override commissions only on sales in excess of a target level) and set the target level as only a very small fraction of prior-year revenue. For example, the target level in the Renfin agreement for 2005/06 was only R1 million, approximately 1% of their total SAA sales over the previous year. Using a low target in the calculation of incremental overrides compensates travel agents for the elimination of “back to rand one” overrides. In Dr Federico’s opinion, the new structure was effectively

the same as paying a flat commission rate which did not depend on revenues.

[51] He observed that by lowering the targets to levels that were easily achieved, the change in the structure of the 2005/06 agreements reduced the incentive of travel agents to push additional traffic onto SAA flights. The revised structure did not have a big jump in the marginal commission rate at a growth rate that the travel agent would have to work to achieve within a given year. Moreover, absolute sales targets were not differentiated across agents, which constrained SAA's ability to tailor agreements to the characteristics of each agent in order to induce more directional selling effort from such agent. Significantly, Dr Federico continues:

> "*However, one notable difference between the European Commission's principles on travel agent commissions on the one hand, and the consent agreement on the other is that under the latter SAA is still allowed to, and does, discriminate in its commission rate across agents and across years. Therefore, even if the average rate paid to agents is simply a flat rate and it does not depend on the achievement of a particular sales target within a given year, SAA is still able to lower such rate during the following year for a specific agent if performance by that agent is not seen as satisfactory. This may discourage agents from moving too much traffic away from SAA for fear of losing part of SAA's base override during later years. This effect can be expected to blunt the pro-competitive impact of the change in SAA's conduct."*

The Relevant Market

[52] In the Nationwide decision the Tribunal found that there were two relevant markets. First, the market for the purchase of domestic airline ticket sales services from travel agents in South Africa and secondly, the market for scheduled domestic airline travel. The Tribunal found that SAA was dominant in both markets and that it had abused its dominance in the first market in order to exclude its rivals in the second market.

[53] It further found that travel agents were an important channel of marketing and distribution of tickets for airlines and that direct sales by airlines over the internet or the counter were not substitute channels of distribution for consumers who wished to examine their choices. The Tribunal also found that a significant portion of each of the three airlines tickets (SAA, Comair and Nationwide) were sold through travel agents during the relevant period and which was clear evidence of the centrality of travel agents to consumers.

[54] In its decision in these proceedings, the Tribunal confirmed its definition of the market for the purchase of travel agents services for the sale of domestic airline tickets as the travel agents still remained the most important avenue through which domestic airlines could distribute their tickets despite the growth of the internet and sales through other channels.

[55] With regard to the definition of the relevant market for the airline travel, the

Tribunal continued to define it as the market for domestic scheduled airline transportation in South Africa. It, however, accepted that in the relevant period, various offerings were differentiated and that SAA's conduct, if exclusionary, would predominantly have an effect on its rivals on that part of the domestic air travel market which was distributed by travel agents.

[56] SAA objected to the description of the relevant market by the Tribunal and contended that the relevant market is the market for the provision of domestic air travel services in the conveyance of passengers on particular domestic airline routes on particular flights at particular times on particular days.

[57] In support of its contention SAA relied on a report compiled by Dr Affuso of RBB Economics in which she rejected the proposition that the relevant market could be defined by reference solely to the extent of the alleged abuse simply because the subject matter of the allegedly abusive agreements is the relationship between SAA and travel agents. According to Dr Affuso, the market should be defined by reference to the competitive constraints faced by the various parties in accordance with standard market definition procedure.

[58] She pointed out that in most abuse of dominance settings the allegedly dominant firm is dominant in the supply of set of goods or services. Dominance in supply would then open up the possibility that dominance may be abused through exploitation or exclusion. She noted that in the instant case, according to the complainants, SAA is a dominant purchaser of travel agency services. She

argued that the logical consequence of such position is not that SAA would necessary have market power, but rather that it would have buyer power.

[59] In her view there was nothing in the present case to justify deviation from the standard practice of defining the market by reference to the services supplied. She reasoned that if travel agents are regarded as distributors of airline tickets to customers, as opposed to an input for the provision of air transport services, then one is immediately directed to consider the relevant issue of whether customers consider other forms of ticket distribution, such as buying tickets direct from the airlines over the internet or telephone, as demand-side substitute for the services of travel agents.

[60] The Tribunal rejected Dr Affuso's theory stating that it was fundamentally flawed and was not supported by the evidence. One of the reasons for its rejection of Dr Affuso's theory was based on the fact that airlines do not on-sell tickets to travel agents as one would expect in a wholesale-retail relationship and they do not have any discretion with regard to the pricing of the product offered by the airline, the quantity of supply, the terms and conditions on which such product is offered and do not acquire ownership and risk in the product. Finally it also found that all the witnesses testified that, during the relevant period, the alternative channels suggested by Dr Affuso were not suitable substitutes for travel agents services for airlines because the uptake of these channels by consumers was slow for a variety of reasons.

[61] There is merit in the Tribunal's criticism of Dr Affuso's theory. It fails to appreciate that travel agents do not purchase and then on-sell airline tickets. The analysis fails to give a proper recognition of the role played by the travel agents in the distribution of the airline tickets process. They act as intermediaries in facilitation of the transaction for the sale of tickets between the airlines and the consumers.

[62] Furthermore the suggestion that the Tribunal's definition of the first relevant market failed to consider possible demand-side substitutes, is rejected. It was Dr Niels' evidence that during the relevant period travel agents continued to be main distribution channels representing more than 80% of sales of SAA and more than 60% of sales of Nationwide. The direct sales mechanisms were not satisfactory substitutes for consumers. The internet did not account for a significant proportion of sales at the time growing from zero in 2001-2002 to 5% in 2004-2005 for SAA and from 0.1% to 2% for Nationwide.

[63] SAA also contended that ,although travel agents are the most prominent and important booking channels, (particularly for business travellers), the internet is a viable alternate route to market .Hence ,bookings through the internet constitute a competitive restraint on the travel agents behaviour and travel agents are thus not insulated from competition from the internet and direct sales.

[64] SAA relied on the evidence of Dr Affuso and Viljoen. The essence of their evidence was that even though the internet might have had a small share of the

market, it was certainly quite powerful in exerting a competitive constraint on travel agents.

[65] The Tribunal considered and rejected this argument. Although it found that there was a single market for scheduled domestic airline travel it, nevertheless, accepted that during the relevant period under consideration various offerings were differentiated and that SAA's conduct, if exclusionary, would predominantly have an effect on its rivals on that part of the market which was serviced by travel agents. That segment of the market consisted of the less price sensitive and more time and comfort sensitive passengers and excluded Kulula and 1Time and all Nationwide and SAA fares which were exclusively distributed through the internet or other direct channels.

[66] The Tribunal's finding cannot be faulted. There is no doubt that during the relevant period the internet, call centres and over-the counter sales could be and were used as an alternative means of distributing tickets for the airlines. But the evidence showed that they were not suitable substitutes for travel agents services. This is because of the specialised nature of services rendered by the travel agents to the airline and travellers and which the internet was unable to provide. In any event the overwhelming number of tickets were purchased through travel agents.

[67] According to Mr Venter of Comair, the service provided by the travel agents included managing the total travel budget and consolidating all the different

elements of travel into reports to the corporate clients which is the role which the internet cannot perform.

Dominance of SAA

[68] The next question is whether SAA is dominant in the relevant market. In terms of section 7[7] of the Act, a firm with a 45% share of the market is irrebuttably presumed to be dominant for the purpose of the Act, and hence subject to the abuse of dominance provisions contained in section 8. Section 7(b) creates a presumption of dominance if a firm has less than 35% but enjoys market power. An enquiry into the market power is only necessary when a firm's market shares are less than 45%.

[69] In calculating SAA's market share the Tribunal included South African Express (SAX) and South African Airlink (SAL) for the relevant period, which was over 45%, and concluded that SAA was presumably dominant, as provided in section 7, by virtue of its market shares not only in the wider market but also in the market for travel agents services. There is no attack by SAA on this finding.

[70] For instance the SAA, SAX and SAL's market shares in the market for domestic airline travel during the period April 2001 to March 2002 was 71% and 58% during the period April 2004 to March 2005. Their combined market share in

7 Section 7 of the Act provides:
7 Dominant firms-
A firm is dominant in a market if-
(a) it has at least 45% of that market;
(b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have *market power* ; or
(c) it has less than 35% of that market, but has *market power* .

the market for travel agent services calculated in terms of BSP was 76% during the period April 2001 to March 2002, 77% during the period April 2002 to March 2003, 79% in April 2004 to March 2004, 77% during the period April 2004 to March 2005 and 74% during the period April 2005 to March 2006.

Market Power

[71] "Market Power" is defined in section 1(1)(xiv) of the Act as "the power of a *firm* to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

[72] SAA submitted that during the relevant period it did not have the power to control prices, or to exclude competition or to behave to any appreciable extent independently of its competitors. It argued that it had to react by lowering its prices to match that of its competitors. It further argued that it did not have market power in relation to passengers and travel agents.

[73] However, once SAA's share of the defined market had been established, section 7(a) of the Act became applicable, namely the provision that a firm is dominant when it has a market share of 45% or more. Accordingly, the Tribunal correctly found that there was no necessity to engage in an enquiry into SAA's market power as this would only be necessary if SAA's market share had been less than 45%. This finding follows the provision of the Act and obviates the need to canvass the detailed evidence of Dr Affuso regarding SAA's lack of

market power.

Abuse of Dominance

[74] In the Nationwide case, the Tribunal considered the anti-competitive effect of a strategy devised by SAA through its incentive schemes contained in its override agreements and Explorer Scheme. The incentive scheme involved incentive contracts between SAA and travel agents. The Explorer Scheme was aimed at rewarding individual travel agency staff with free travel on SAA flights in return for reaching targets for sale of SAA tickets.

[75] The override incentive contracts concluded pursuant to the incentive scheme were designed such that the agents received a flat basic commission of 7% for all of SAA's sales up to a target specified in the contract. When the target was reached, the travel agents were eligible for two further types of commission in addition to the basic commission. An "override commission" was paid if a travel agent exceeded the base target. This commission was paid not only on the amount in excess of the target but on the figure of total sales; hence the practice was referred to as the "back to rand one" principle. A second commission payment was made only on the amount of growth in excess of the target (the incremental sales), determined with reference to certain thresholds. This was known as the "back to rand base" principle.

[76] In the Nationwide case, the Tribunal held that SAA through its incentive

schemes in its override agreements and Explorer Scheme induced travel agents not to deal with SAA's rivals in the domestic scheduled air transportation market and hence constituted an exclusionary act under section 8(d)(i). It held further that the exclusionary act had a significant anti-competitive effect on SAA's rivals in that it foreclosed the market to rivals. It found that while it was highly likely that this foreclosure had had an adverse effect on consumers quantifying this harm was difficult.

[77] As already noted, the agreements in issue in this appeal are contracts which SAA concluded with travel agents during the period June 2001 to March 2005. To recapitulate , those agreements comprised the "3rd generation" override contracts and trust payments (an SAA acronym for "True partnership, Respect, Undivided support, sharing of information, and Training of SAA product and knowledge). Trust payments were introduced by SAA during 2001/02 partially to offset the effect of the reduction in the override payments in order that travel agency business could remain viable.

[78] Viljoen pointed out that the change was made on the basis of legal advice taken by SAA and in recognition of the fact that the override agreement was being criticised by competition authorities and an alternative structure needed to be put in place to incentivise travel agencies to focus on the building of SAA, and its market perception. The measurement of the payment was not related purely to growth of sales. Various other more subjective and qualitative elements were introduced to determine whether a travel agency qualified for the trust payment.

[79] In considering the anti-competitive effects of the override agreements and trust payments the Tribunal enquired whether travel agents were financially incentivised by SAA to move customers away from rivals and towards SAA, and whether the travel agents had the ability to do so. The key findings of the Tribunal, in upholding the complaint, were firstly that, on the evidence during the relevant period, travel agents had the ability to influence customers' preferences away from other airlines and in favour of SAA. A second question arose as to whether the financial incentives offered by SAA during the period had, in fact, induced travel agents not to deal with rivals of SAA. The Tribunal concluded that, on the evidence, the various agreements had provided financial incentives to travel agents to direct customers' preferences in favour of SAA and away from its rivals. Accordingly, the Tribunal found that the override agreements and the trust payments, both separately and collectively, contravened section 8(d)(i) of the Act.

Ability to Divert

[80] We turn first to consider whether the Tribunal was correct in finding that during the relevant period travel agents did have the ability to influence customer's preferences to a large extent and whether, on the basis of SAA's argument, the growth of the internet and other direct sales channels had not eroded this ability to any significant extent.

[81] SAA submitted that travel agents do not have any significant ability to embark upon directional selling. It argued that Comair did not experience significant growth despite retaining base commission after SAA reduced base commission in 2005 and changed the override agreements in 2006. It pointed out that Venter of Comair conceded that the agent's ability did not allow the agents to unilaterally decide whether or not to sell an airline or to switch the tap on or off.

[82] SAA criticised the evidence upon which Dr Federico relied to conclude that travel agents have the power to divert passengers to another airline. In SAA's view, the evidence upon which Dr Federico relied to support the assertion of directional selling ability, and which indicated that, during the period between 2001/2002 and 2002/2003, Comair experienced a 30% reduction, ignored the reason why Comair's market share had reduced, that is that Comair had cannibalised its business in favour of Kulula.

[83] SAA further argued that it was significant that, even Bricknell of Nationwide, suggested that the ability of travel agents to divert traffic is relatively small which he estimated to be approximately 10% of the market. Bricknell accepted that there were a number of constraints on the agents' ability to divert traffic such as loyalty programmes, corporate agreements, frequency of flights and scheduling. Viljoen testified that there is a strong competition between travel agents and a failure by a travel agent to fully inform passengers of all alternatives available to them would lead to a serious loss of business because airline travellers are educated and sensitive to both price and fare restrictions.

[84] Harris also gave evidence regarding the ability of travel agents to influence the choice of carriers. She stated that the ability of travel agents to engage in directional selling was limited. She was aware that other agents were doing it although her company did not. Harris pointed out the leisure/personal travel market was dictated by the needs of the consumer , based on time or price. With regard to the corporate market ,those who were responsible for procurement were well informed .Hence it was not likely that they could be influenced to choose a particular carrier which was not in the interest of their companies.

[85] The Tribunal found that, while market conditions may have changed to some extent, the ability of travel agents to influence customers' preferences to a significant degree had not been affected by the changes. The changes to which it referred were the slow growth of internet sales and introduction of Low Costs Carriers (LCC's).

[86] The LCCs, which relied mostly on the internet as a distribution channel, were suited to and targeted primarily at non-time sensitive (NTS) passengers, whilst time sensitive (TS) passengers continued to rely heavily on travel agents as their sales channel. Customers and especially TS passengers continue to rely on travel agents to compare the different offerings available from the rival airlines. In this regard Dr Federico testified that during the relevant period travel agents remained the route to market for traditional carriers. Online sales for full service carriers were very low. They were between 2% and 7%.

[87] Venter testified that, even if passengers attempt to conduct an exercise in comparison, it is simply not possible to see whether in relation to a particular booking request, a travel agent could have booked a passenger a cheaper seat on the same or different airline than the one that was booked. This is because the information available to travel agents on the GDS reflects constantly changing prices available to passengers on different airlines as a result of the ongoing "yield management" practised by airlines during the period before a flight. Earlier prices and seat availability are not recorded anywhere to make such a comparison possible. This then makes it impossible for passengers to determine whether or not a particular sale by a travel agent is or was the cheapest that could be obtained for the passenger. It is this information asymmetry between travel agents and passengers which encourages travel agents to engage in directional selling.

[88] Travel agents also play an important role in advising large clients with which airline to conclude corporate agreements. This is another dimension in which travel agents are able to direct traffic towards a particular airline. Indeed in his witness statement Viljoen acknowledged the important role played by travel agents:

> "*27.1 travel agents offer a professional service to travellers;*
>
> *27.2 travel agents ensure ongoing intense inter and intra brand competition;*
>
> *27.3 intra brand competition translates itself into innovation in product offering (including package tours and promotions);*

...

27.7 travel agents and their consultants offer specialised services ancillary to the distribution of air travel services. These specialised niche services require skills and expertise not currently held by SAA. The costs required to develop same would be large and again, could only be recouped by increased fares."

[89] To show evidence of travel agents' ability and incentive to influence airline choices Dr Federico presented data on Comair's share of total BSP for the five largest travel agent groups in South Africa, namely Tourvest, Renfin (Bidvest), Sure Travel, SAA City Centre and Excel for the financial year 2001 – 2007. The data presented showed Comair's share was highest at Tourvest, which was the group that was the biggest supporter of Comair. The group of agents that supported SAA during the period FY 2002 to FY 2005 appears to have reacted most strongly to SAA's incentive contracts and reduced its support for Comair up to mid 2005 (from 18 % in FY 2001 to 13% during the FY 2003 to FY 2005 period, and back up to above 14% after June 2005).

[90] An email addressed by Mr William Puk of Sure Travel to his managers after SAA had announced its intention to move to a zero commission structure, provides evidence of travel agents ability to engage in directional selling.

[91] The email states:

"*…It has become very clear that we cannot rely on Saa for a decent override agreement in future and our basic commission is about to disappear altogether. Furthermore I see no signs that their utter contempt and disregard for travel agents is being reconsidered. Therefore, I am formerly advising you that our group strategy is to move our discretionary business away from Saa onto more agent friendly carriers, hence the new deals with Virgin & Nationwide. Our international priorities must now lie firmly with British Airways, Virgin, Lufthansa, Nationwide, Cathay Pacific etc and domestically with BA/Comair & Nationwide as a first priority. An effort and directive to this effect must therefore be communicated by you to all your staff. It makes sense from a business point of view, 0% commission from Saa and generally expensive GDS fares to sell to consumers, versus standard guaranteed commission from other airlines (provided we move the business to them) and generally better value fares for the consumer. We need to show Saa in the months of Feb/Mar & April that travel agents are still vital to their business and that we can and will, direct the business away from them.*'"

Influence of Overrides on Travel Agents

[92] The Tribunal found that the override agreements and the trust payments, separately and collectively were in breach of section 8(d)(i) as travel agents were, in fact, induced to direct customers' preferences towards SAA and away from its

rivals because the incentive agreements rewarded the agents for maintaining and achieving the sales of the previous year (base) over the total sales from rand one and trust payments rewarded agents for increasing market share in both the domestic and international markets and for supporting SAA.

[93] SAA submitted that the Tribunal erred in finding that the incentive agreements and trust payments induced the travel agents to direct customers' preferences towards SAA and away from its competitors. It argued that there was no correlation between the overrides and the volume of business received from travel agents. Viljoen testified that the overrides were paid because SAA did not want to take the chance of losing business by not paying overrides. In providing for overrides it merely followed the market and the other airlines. He denied the suggestion that overrides had an effect on travel agents' decision in selling airline tickets.

[94] Viljoen pointed out that more than 40% of SAA's agents were independent agents who did not have override agreements but yet they accounted for almost half of its business. To demonstrate that the override agreements had no influence on the volume of business received from travel agents Viljoen testified, with reference to exhibit 18 which indicated that in the period when SAA did not have override agreements with Tourvest, its business grew by about 19 to 20 %. Viljoen also gave evidence based upon on exhibit 15, comparing Amex support during 2004/2005 (when the current generation overrides were in force) with the years 2006/2007 (when the current generation overrides were removed) and

which revealed that the support received from Amex was largely unchanged.

[95] SAA also referred to the evidence of Mortimer who testified that even after SAA abolished the 7% base and had less favourable overrides compared to Comair and Nationwide, SAA continued to be Amex's preferred partner and Amex continued to focus on SAA due to SAA's natural market share.

[96] There were at least three factors which played a major role in influencing travel agents' decision to divert business from SAA's rivals to SAA.

[97] First, SAA offered very large rewards for achieving base revenues, with additional rewards for incremental revenues and market share gains. SAA spent approximately R300 million per annum on travel agents override payments and trust payments. The risk of losing the cash override incentive retroactively was, in our view, a strong incentive for a travel agent to reach target.

[98] Secondly, during the relevant period there was no significant growth in the market for the sale of tickets through travel agents. Growth took place in the market segment served by lower cost carriers and on-line sales by full service carriers to non-time sensitive passengers.

[99] Thirdly, travel agents did not know during the course of the contract year whether SAA targets had been met. This uncertainty drove travel agents to sell more SAA's tickets.

[100] The Tribunal was also correct in finding that a small rival trying to match the total commission revenue offered by SAA, would have to pay much higher average commission rates. SAA was able, because of its capacity and size, to offer alternative commission rates to the travel agents.

[101] SAA was dominant in the relevant market. It had a larger market share than its rivals. In these circumstances it would be particularly difficult for its rivals to outbid it in the face of overrides based on overall sales volume. By reason of its significantly higher market share, SAA generally constitutes an unavoidable business partner in the market. In order to attract travel agents with whom SAA had incentive agreements, SAA's rivals would have to offer them significantly higher rates of override commissions.

[102] In the present case, SAA's market share was higher than that of Comair and Nationwide in South Africa. Comair and Nationwide were not in a position to grant travel agents the same advantages as SAA, since they were not capable of attaining a level of revenue capable of constituting sufficiently broad financial base to allow them effectively to match override rates offered by SAA.

[103] It was Viljoen's evidence that in the 2001 incentive scheme agents were still paid the standard 7% commission on each ticket sold. They would still earn an override commission on a back to rand one basis when they reached a particular target calculated on the value of all tickets sold up to target (base). However, in relation to ticket sales post base, the agents were no longer paid a commission

calculated on an override basis but were paid a flat commission. This resulted in less revenue for the agents on sales made after reaching target. Trust agreements were introduced to “compensate” agents for the losses they would incur as a result of amendment effected to the commission structure payable post base.

[104] The overrides agreements and trust payments were designed to continue providing travel agents with the same level of reward received under the 2nd generation agreements which the Tribunal in the Nationwide case found violated section 8(d)(i). SAA employed the override agreements and trust payments structure as a tool to maintain its dominance in the market for the distribution of the domestic airline tickets through travel agents. The evidence justifies the time and expense incurred by SAA in implementing these arguments to maintain its dominance in the market.

Anti-Competitive effects

[105] In the Nationwide case the Tribunal set out its approach to section 8 (d)(i) and which it subsequently endorsed and followed in the present matter. It stated that the anti-competitive effects for the purposes of section 8(d)(i) can be established either by evidence of:

1. actual harm to consumer welfare; or

2. if the exclusionary act is substantial or significant in terms of its foreclosing the market to rivals.

[106] The Tribunal stressed that section 8(d)(i) did not require the showing of actual harm. It was sufficient if there was evidence that the exclusionary practice is substantial or significant or it has the potential to foreclose the market to competition. If it is substantial or significant, it may be inferred that it creates, enhances or preserves the market power of the dominant firm. If it creates, enhances or preserves the market power of the dominant firm it will be assumed to have an anti-competitive effect.

[107] In the present dispute, the Tribunal held that for purposes of its enquiry it was sufficient for it to show that SAA's incentive scheme had the potential or did in fact foreclose its rivals in the domestic airline market.

[108] Applying the effects based approach the Tribunal found that there was sufficient evidence for it to find that SAA's conduct had a significant anti-competitive effect on both Nationwide and Comair in that it impeded their growth in that segment of the domestic airline travel market distributed through travel agents.

[109] It was submitted on SAA's behalf that the Tribunal erred in applying a 'form-based approach ' in considering the anti-competitive effect of its conduct and further that even on the approach adopted by the Tribunal there was

insufficient evidence of anti-competitive effects in the present matter. SAA argued that the Tribunal significantly misdirected itself by focusing on the design of the overrides. It pointed out that the notion that the form of the agreement per se is indicative of actual harm to consumer welfare or indicative of a substantial or significant foreclosure effect to rivals, was wrong.

[110] *Mr Subel* sought to buttress this argument that, absent consumer harm in the form of an increase in price or a reduction in output, there had been no breach by SAA of section 8(d)(i). He referred in this connection to an article which had been co-authored by Nationwide's expert Dr Niels in which the following was stated:

> "*EU case law on abuse has for years been criticised as legalistic and interventionist, and the current review is seen by many as an opportunity for change. Various commentators have stressed the desirability of moving towards an approach that emphasises the actual or expected economic effects of allegedly abusive behaviour by dominant firms, rather than its form*".

In short, SAA contended that the Tribunal had found against SAA, which finding was not based on evidence of price or output effects to justify a finding of anti-competitive effects in the market. There had been no proof of economic effects and hence the degree of foreclosure as well as any evidence of foreclosure was insufficient to justify its finding.

[111] By contrast, *Mr Subel* emphasized the counterfactual period, the post 2005

when a new commission structure was introduced, that is in May 2005. As noted, this resulted in a significant reduction of the base commission from 7% to 1%, a flat commission on overrides and the abolition of the 'back to rand one' principle. From April 2006 the base was the same for all agents (R2 million) and the rates were the same for all agents (3.5% premium and 3% discount). In this connection, Viljoen examined Amex's support of SAA during the 04/05 period when the 3rd generation overrides were in operation with the 06/07 period when the overrides had been abolished and, stated that SAA's market share support from Amex remained unchanged. Dr Affuso sought to support this contention by testifying that, if Comair and Nationwide's allegations had been correct, it would have been expected that they would grow and increase their market share after the change in SAA's agreement structure in 2005 and 2006, but instead no material change was evident.

[112] These submissions need to be interrogated through the wording of the Act. Section 8 of the Act makes it clear what is necessary in order to establish an anti-competitive effect. It includes the consideration that, if the exclusionary act is substantially significant, in terms of its effect in foreclosing the market to rivals, the section applies. This approach can be established either by way of evidence of actual competitive harm or by evidence that the exclusionary practice is substantially significant; that is the practice has the potential to foreclose the market to competition, in which case an anti-competitive effect can be inferred.

[113] As *Mr Unterhalter*, observed, the overall incentive structure created by the

3rd generation contracts together with the trust payments contained certain characteristics which were manifestly designed to achieve a form of foreclosure. These included:

1. Very high marginal payments if the target was met;
2. Incentives to travel agents to concentrate their directional selling efforts in favour of a single carrier through "back to rand one" incentives, the effect of which approximated exclusivity on the part of such travel agents;
3. Incentives that were tailored to the market position of each specific travel agent and which were accordingly designed to have a maximal impact on the conduct of each agent; and
4. Targets that were constructed around measures of flown passengers and flown revenue, which information typically was not known to travel agents, with the result that travel agents were uncertain whether or not they had achieved such targets and accordingly had heightened incentives to support a single carrier.

[114] A key question therefore was whether this design had the necessary effect to justify the invocation of section 8.

[115] During the relevant period, the share of total market sales enjoyed by Comair, for example through travel agents declined by less 20%, the level of Comair's overall sales with travel agents fell by 14% during the relevant period whereas correspondently that of SAA rose by 16%.

[116] Arguably a more significant piece of evidence was Comair's share of Amex during the two year period when Amex did not have an override agreement with SAA. During this period, the sale of Comair's tickets was contrasted with those tickets sold through other agents who had override agreements with SAA. Comair's share of sales rose from 27% to 36% compared to a comparative decline from 18 to 13 % of sales through other agents who had such override agreements.

[117] This conclusion was also supported by a comparative analyses of SAA's share of flown revenue at Amex and Bidvest during the relevant period when SAA had an override agreement with Bidvest but not with Amex. During this period SAA's share of revenue through Amex declined by approximately 6 percentage points whereas its revenue through Bidvest increased by approximately 5 percentage points.

[118] This evidence, which did not appear to be contested by Dr Affuso, the chief economic witness for SAA, revealed the effects of directional selling by travel agents. A further examination of the change in flown revenue, passengers and yields between SAA and Comair during the period 1999/2000 to 2004/2005 revealed material discrepancies in the growth between the two airlines. Indeed during the relevant period the passenger numbers of Comair declined.

[119] *Mr Unterhalter* noted that SAA sought to explain the discrepancies by way

of two contradictory theories. In the first place Comair's underperformance relative to SAA came about because Comair was more adversely affected by the entry of Kulula than was SAA; in other words Comair cannibalised itself disproportionately to the successful introduction of Kulula. The second theory was that SAA's yields, relative to those of Comair during the relevant period were as a result of intense competition from low costs carriers which presumably impacted upon SAA more than was the case with Comair.

[120] The first theory is somewhat implausible for the following reason: Given the common ownership between Kulula and Comair, there was no incentive to cannibalise Comair revenues, nor would the latter have had any incentives to compete with Kulula on price to retain non time sensitive passengers (NTS passengers) on its flights; because Comair would, in any event, secure the benefit of those passengers on Kulula. By contrast, SAA would have had every incentive to lower its fares in order to prevent its NTS passengers from migrating to Kulula because the loss of those passengers would represent a net loss of revenue to it.

That is what happened when SAA introduced "X fares" which were low-priced fares intended to match Kulula on SAA's flights. The introduction of X fares would ordinarily have suppressed its yields relative to Comair given the low prices of those fares. However its yields in fact increased significantly relative to those of Comair during the period.

[121] The evidence on relative yields is not explicable in terms of SAA's first

theory, but it is explicable in terms of Comair's explanation, namely that SAA's incentive agreements caused directional selling of time sensitive passengers ("TS passengers") from Comair to SAA, thereby resulting in a net increase in the latter's yields, notwithstanding the negative effect of the X fares introduced by SAA at that time.

[122] The second theory which is inconsistent with the first theory has similar difficulties. While this theory could conceivably account for SAA's increased relative yields (in that SAA lost a greater number of NTS passengers than Comair to LCCs) it could not explain the data on revenues and passengers. SAA's revenues and passenger numbers increased more than those of Comair over the relevant period, which is inconsistent with this second theory. The relative increases in SAA revenues and passenger numbers are consistent with Comair's explanation that SAA captured greater numbers of TS passengers at its expense as a result of its incentive agreements with travel agents.

[123] Significantly, whilst Nationwide was able to grow the NTS segment of the market, similarly to Kulula, it suffered significant foreclosure in the travel agent's segment and accordingly, in the far more lucrative TS passengers segment.

[124] *Mr Gotz*, who appeared on behalf of Nationwide, referred to the following evidence in support of this conclusion. Viljoen was provided with an extract from SAA's 2006 Annual Report, which reflects the analysis of SAA concerning the cutting of the base commission (with effect from 1 May 2005), and the changes in

the override incentive scheme, and indicating that travel agents directed business to SAA's rivals Mr Viljoen was asked whether he accepted 'that SAA's clear view, as it reports the facts to the shareholders and to members of the public, is that the trade can direct business away from you towards your competitors.' He replied as follows:

'*MR VILJOEN: That's certainly the position that Khaya Ngqula has taken in his report. It's not my report.*

ADV GOTZ: It's not your report, but it's certainly SAA's clear view that that's what happened. Once commissions were cut and the overrides disappeared, the structure of the arrangement followed. Your fears were realised, weren't they?

MR VILJOEN: It could well be. I don't have the facts of the time and if one goes on what they are stating, then it must be correct.

ADV GOTZ: Every witness in these proceedings so far has testified that as far as they are concerned, travel agents do have the ability and did direct business away from Nationwide and Comair towards SAA's consequence of this structure and your view is different.

MR VILJOEN: No, I didn't say that don't. I said I'm not 100% sure that it is a powerful ability and an ability to powerfully move it. I said right from the start on the one hand I believe they can affect it, but how much…

…

ADV GOTZ: I don't think anybody is saying that it's possible to divert the entire market from one airline to another, but I think you fairly conceded that there is that ability.

MR VILJOEN: There is some ability. But again, can it be sustained?'

[125] Similarly Ms Harris accepted that travel agents had the ability to direct business away from Nationwide and Comair towards SAA, as is evident in the following passage.

'ADV SUBEL: When a client requires a ticket on one of these routes…

MS HARRIS: One ticket?

ADV SUBEL: A ticket or even a series, your ability to influence, improperly influence, in other words, other than in the client's interest, the choice.

MS HARRIS: Well, again I'm going to say that I suppose the ability could be there, because one could find or have some relationship with an airline where perhaps that airline would seek to influence you financially or otherwise, but again I don't believe that would be sustainable.'

Ms Harris confirmed that travel agents in the Rennies Group had a discretion, with which to influence customers.

'ADV UNTERHALTER: But I think you will also accept, as I think you have, but there is this ambit of discretion and within it you are exercising a judgment in formulating the recommendation?

MS HARRIS: Correct.

ADV UNTERHALTER: And I think you also would accept given all of this that it is a complex judgment, not just because of the many factors that are involved in it, but also because you are trying to make an assessment of,

as it were, an answer which is meant to summarise all kinds of different preferences that are made up within a corporate as you have described there are many interests, many specific preferences and you are trying to, as it were, summarise all of that up and say well ultimately this is the recommendation that we have is that correct?

MS HARRIS: That is correct.'

[126] Returning to the nature of the incentive agreements, viewed within the context of the dominant position of SAA in the relevant markets, the following findings in the first Oxera report are instructive.

> *4.17SAA's competitors are significantly smaller than it, thus it would be difficult for them to sustain the same marginal incentives at an affordable level of overall commissions due to having a base that is a fraction of the total of SAA. If the smaller rival adopted the same override structure (ie, the same override percentage to be applied back to Rand one), the size of the reward to the travel agent for meeting the target would be much smaller. Only by setting a significantly higher override percentage would the total reward for meeting a threshold be equivalent across airlines. However, in setting a much higher override percentage to be applied back to Rand one, the smaller rival would incur a much higher average commission applied across its total sales revenue.*
>
> *4.18or example, in 2002/03, Nationwide's total revenues were only*

16% of SAA's. If SAX and SAL revenues are considered as well, this percentage is reduced further.

4.19 Shifting significant market share away from SAA to a competitor the size of Nationwide would imply the need to set much higher overrides, and consequently much higher average commission rates. In the Sure Travel 2002/03 example above, reducing SAA's market share by 5% (ie, moving from Base to Base – 5%) would lead to reduced commissions for the agent of R57.8m. Were Nationwide to match the lost commission for Sure Travel, this would imply average commission rates of 43.5% for Nationwide on the gained customers.

4.20 Nationwide would need to pay the 43.5% average commission on a significant percentage of revenue, while paying 7% standard commission on the remaining revenue. The example leads to a 15.8% average commission on Nationwide's total revenue.

4.21 If the travel agent were to meet the SAA override target, on the other hand, it would only pay the 43.5% average commission on 5% of its revenue, and 7% standard commission on the remaining 95%. This would imply much lower average commission (8.8%) on total revenue for SAA.

4.22 This higher commission rate faced by Nationwide would represent a competitive disadvantage, undermining their

potential for growth. This was also recognised by the Tribunal, as shown in paragraph 166:

Furthermore, as the rivals are not dominant firms, their schemes whilst similar to SAA's, are always going to be ineffectual – they simply do not have the market share to change the incentives of travel agents unless they drastically increased the compensation to agents. Holt argues that this would have to be to a level that is unaffordable to them."'

Performance in terms of sales and yields

[127] These conclusions are also supported by a further examination of performance based on sales and yields. The evidence before the Tribunal showed that SAA outperformed BA/ Comair during the period 1999/00 and 2004/05 (See Tribunal decision, paragraph 195, Table 6). Table 6 indicated changes in the performance of SAA and BA/Comair over the relevant period in terms of overall flown revenue, overall flown passengers and yields. It showed that SAA's flown revenue grew by almost 40% over the relevant period representing a three-fold difference in absolute revenue growth. It further showed that SAA also outperformed BA/ Comair in terms of growth of passengers and yields.

[128] The Tribunal found that the inference to be drawn from SAA's superior revenue and yield performance over BA/Comair was that SAA was able to capture more of the high-yield passengers than BA/Comair as a result of directional selling pursuant to SAA's incentive agreements with travel agents.

[129] SAA argued that the real and probable reasons for the market share picture in the relevant period were, firstly, its product offering; secondly Comair Cannibalisation Strategy; and thirdly the Nationwide product was less attractive to the consumers.

[130] As regards its product offering, SAA argued that the market reflected its natural market share which it would have had irrespective of override agreements because it improved the quality of its product offering during the relevant period, including the introduction of an advanced yield management system which in turn optimised the average yields.

[131] In support of its contention, SAA referred to the evidence of Mortimer who testified that factors such as routing, capacity, brands, investment and loyalty programmes, sales team and market reputation gave SAA competitive edge over its rivals. Viljoen also testified that SAA had the best fleet compared to Comair, Kulula or Nationwide. He pointed out that the FAT principle (frequency availability and timing) was greater with SAA than any other airline and made it the more attractive competitor.

[132] But the factors which SAA argued contributed to its market share were however, not unique to SAA. There is evidence which indicated that throughout the relevant period the quality of BA/Comair's product offering was at least as good as that of SAA, particularly in terms of its frequent flyer programme, service levels, safety, reliability, interconnecting passengers and focus on business class

passengers. The fact that the incentive agreements scheme was conducted by a firm such as SAA which had a high degree of dominance in the relevant market made it an unavoidable trading partner for the major travel agents and most consumers would be likely to expect a travel agent to offer SAA flights.

The contravention of section 8(d)

[133] In summary, the strategy devised by SAA through override agreements and trust payments had anti-competitive effects. The evidence reveals that SAA is a dominant firm and it is trite that a strategy which had a foreclosure effect in the market will be regarded as contrary to section 8(d) if it is applied by an undertaking in a dominant position.

[134] This principle is succinctly expressed by the General Court of the European Union in (***Tomra Systems ASA and Others v European Commission***), case no T-155/06 delivered on 9 September 2010.

[135] At paragraphs 206-207 the General Court held:

> *"[206] It is appropriate to recall that, according to settled case-law, the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and*

which , through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition. It follows that Article 82 EC prohibits a dominant undertaking from eliminating a competitor and from strengthening its position by recourse to means other than those based on competition on the merits. The prohibition laid down in that provision is also justified by the concern not to cause harm to consumers (Case T-65/98 Van den Bergh Foods v Commission [2003] ECR II-4653, paragraph 157).

[207] Whilst the finding of a dominant position does not in itself imply any criticism of the undertaking concerned, that undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market (Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, paragraph 57, and Case T-201/04 Microsoft v Commission ECR II-3601, paragraph 229). Likewise, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it (Case 27/76 United Brands and United Brands

Continentaal v Commission [1978] ECR 207, paragraph 189, and Michelin II, paragraph 55)." [See also Eleanor Fox 'What is harm to competition? Exclusionary Practices and Anti Competitive Effect' (70) Anti Trust Law Journal 370].

[136] While this *dictum* reflects the approach adopted by the European Courts to the competition regime enshrined in Articles 101& 102 of the European Treaty, the Act mandates an approach which is not dissimilar. The design of the Act, particularly its objectives as set out in section 2, makes it clear, that the Act is concerned to protect a competitive process. That this enquiry entails an examination into the effects of an exclusionary act means that, if the evidence supports such a conclusion, foreclosure of rivals triggers an application of section 8(d). In this case, the design of the impugned agreements, the cost to SAA in funding the benefits which were paid to the travel agents, in themselves constitute clear indications of the purpose sought to be achieved by SAA, as a dominant firm .

The evidence showed that Comair and Nationwide's share of the total market sales through travel agents declined over the relevant period, when the agreements were operating between SAA and the travel agents. The cross sectional analysis produced by Comair and Nationwide's experts revealed that the presence or absence of override commissions had a material effect on the respective airlines share of the defined market, which was particularly marked in the directional selling by travel agents of TS passengers in favour of SAA and against its rivals.

[137] SAA sought to counter this conclusion with regard to the Comair strategy, by arguing that Comair had been less candid with the Tribunal in relation to its strategy and how it has operated the Kulula and Comair brands. It contended that it was significant that up until Kulula entered the market, the Comair brand was growing quite healthily but this changed dramatically when Kulula came onto the scene. In other words, it is suggested by SAA that BA/Comair cannibalised itself disproportionally through the successful introduction of Kulula.

[138] While this cannibalisation theory could account for the relative reduction in BA/Comair's total revenues and passengers it cannot, however, explain the data on yields. If Comair was losing more NTS passengers as a result of Kulula's entry than SAA was, Comair's yields would have risen in relation to those of SAA because its passenger base would be made up of more high-yield passengers.

[139] As regards Nationwide products, SAA submitted that Nationwide's safety record and the perception that it was unsafe, together with its financial upheavals, contributed to its being a less favourable airline to the consumers.

[140] While it may be correct that Nationwide's safety record and financial upheavals might have been to blame for the drop of its market share over the relevant period it is clear that the SAA incentive agreements were more likely to have an anti-competitive effect on Nationwide.

[141] The evidence indicated that whilst the average yield differential between SAA and Nationwide was 38% in 1999/00 it widened by almost 20% by 2004/05. Over the same period, the average yield differential between Nationwide and Kulula dropped by 50%, from 37% in 2001/02 to 18 % in 2004/05.

[142] There was accordingly a clear drop in Nationwide's average fares towards the bottom end of the market and away from SAA which suggested that Nationwide's growth was achieved only in the non-time sensitive part of the market, and that it was foreclosed from the high-yield time sensitive part of the market as a result of SAA's incentive agreements.

[143] Dr Federico testified that Comair, SAA's closest competitor in terms of its business model, under-performed SAA in terms of overall revenues and sales to travel agents. He pointed out that during the period 1999/2000, 2004/05, Comair's overall revenue actually fell slightly while SAA's revenues grew by over R600 million, equivalent to a 27% growth.

[144] In terms of the sales to travel agents during the same period, SAA revenues grew by 16% whilst Comair's revenues fell by 14 %. He further testified that the evidence across travel agents, most notably the performance of Tourvest vis-à-vis the rest of the travel agents market, also indicated that travel agents support plays an important role in explaining its under performance. For instance Amex, which is part of the Tourvest Group, did not have an agreement with SAA between 2001/2003 and Comair's share at Amex and in part Seekers increased

during this period up to 2003/04 whilst its share at most travel agents had declined during that period.

[145] Dr Federico pointed out that it was unlikely that the entry of Kulula in 2001 could be an alternative explanation for Comair's under-performance for three reasons. First, Kulula and BA/Comair are under Comair's ownership and are designed to offer complementary offerings rather than competing against each other. Secondly, SAA's average increase relative to BA/Comair during this period indicates that SAA did not compete harder than BA/Comair to fight the potential threat from Kulula in order to protect sales which in turn implies that SAA's better performance is not explained by more competitive prices and more volumes. Thirdly, there was a possibility that travel agents sheltered SAA from the impact of Kulula.

[146] In conclusion SAA's conduct substantially foreclosed the relevant market to its rivals and such conduct accordingly had the requisite anti-competitive effect for purposes of establishing a contravention of section 8(d)(i) of the Act.

Efficiency of the SAA's conduct

[147] The question is whether there was any technological, efficiency or other pro-competitive gain from SAA's anti-competitive conduct. The Tribunal found that there was no credible evidence of any efficiency achieved through the incentive scheme placed before it. This finding was not challenged by SAA and it therefore

stands.

The approach to evidence

[148] Regrettably, the repetitive nature of the voluminous record coupled with much irrelevant evidence, particularly from expert economists, who provided the Tribunal with the benefit of their views on the proper interpretation of the wording of the Act which is manifestly to be undertaken by the Tribunal and this Court compels some remarks.

[149] In a number of cases, this court has been subjected to excessively lengthy records caused by the admission of evidence that is plainly inadmissible, such as economists seeking to advise on strictly legal issues, together with lack of definition of the issues in dispute and, arguably some uncertainty about whether the procedure to be adopted is of an inquisitorial or accusatorial nature. These problems have contributed to excessively lengthy and costly proceedings and records that make it even more difficult to read than is usually the case to conduct appellate proceedings.

For these reasons, consideration needs to be given to the use of the 'hot tub' method of hearing evidence of experts. In terms of this method, the experts are afforded the opportunity of meeting with each other so as to determine what is common cause between them and what remain relevant disputes. On the strength of these conclusions, the proceedings before the Tribunal can be confined to that which is in dispute. A relaxation of the adversarial system would

allow the Tribunal to assess the merits of the differences of expert testimony which, would also add much needed coherence to the record and, arguably, significantly reduce the length of proceedings.

[150] Similarly pre-trial conferences need to be utilised more effectively to define the issues to be determined. For example, in this case, great time, energy and expertise were taken up with questions of market power of SAA, yet the finding that SAA had more than 45% of the market was hardly disputed on appeal. The point is that greater intervention is required to ensure a crisper and more nuanced definition of the issues that are required to be determined.

[151] In the result, the appeal is dismissed with costs, including the costs of two counsel.

ZONDI AJA

DAVIS JP

PATEL JA agreed