

# SAA cases and the emphasis on the economic impact of the abusive conduct



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## SAA cases 1

- What distinguishes the SAA cases on rebates from many other cases is the emphasis on the economic impact of the abusive conduct.
- These cases represent a clear example of the adoption of an **effects based approach to assess exclusionary behavior**

Case	Market	Conduct
SAA I (SA, 2005)	Airline ticket sales to travel agents	<b>Retroactive commissions</b> with individualised growth targets
SAA II (SA, 2010)		<b>Retroactive commissions</b> with individualised growth targets and lump-sum payments
<b>British Airways (EU, 1999, 2003, 2007)</b>		Retroactive commissions with individualised growth targets
<b>BA v. Virgin (US, 2000)</b>		Conduct found not to be predatory/abusive

## SAA test

- The approach taken with regard to exclusionary conduct is set out in SAA1, and repeated in SAA2.
- The approach is as follows:
  - First, examine whether the conduct in question is exclusionary in nature in terms of the definitions of the relevant section
    - In this case, section 8(d)(i) requiring or inducing a supplier or customer to not deal with a competitor
  - Second, to enquire as to whether there is an anti-competitive effect.
    - This requires either evidence of actual harm to consumer welfare or a substantial effect in terms of foreclosing the market to rivals.
    - This latter assessment is partly factual and partly based on reasonable inference drawn from proven facts.
    - Whether in terms of consumer harm or likely foreclosure, the evidence can then be weighed against any efficiency gains.

## Theory of harm: SAA cases

- SAA's conduct is non-predatory leverage
  - Because of its dominant position, SAA has an advantage relative to its smaller rivals when “bidding” for travel agent loyalty through commission contracts
    - Exclusivity over divertible customers is more valuable to SAA because SAA will be able to extract a higher price from the diverted passengers due to its denser network
  - SAA uses travel agent incentive schemes to leverage its pre-existing dominant position and reinforce its market power
    - Consumers harmed since agents do not set prices and cannot pass-through the commission payments
  - This is unlike the AEC test (EC Guidance) which can be interpreted as applying a quasi-predatory framework to loyalty rebates
    - The AEC test effectively sees loyalty discounts as ‘disguised’ predation
    - Predatory incremental prices are ‘hidden’ by non-predatory prices on non-contestable units

## SAA 1: Effects based approach

- Directional selling by travel agents
  - Detailed factual evidence on whether travel agents could actually divert traffic between competing airlines (based on testimony and discovered evidence from some of the largest agents in South Africa, and from the competing airlines).
    - ADV PRETORIUS:.. So I am asking you again, which one is really paramount to the Managing Director of a firm, the consumer or the incentive , reaching the incentive threshold? Mr Puk from your point of view, what is most important?
    - MR PUK: From my personal point of view, if you are asking for the paramount, I am employed to make sure that the group achieves its preferred agreements. (paragraph 195)
    - MR MORTIMER: [...] it certainly would be in our commercial interest to promote our preferred. It's very simple. We are not going to make any profit out of selling a non-preferred's ticket. We're going to basically break even on trading. If we're going to make profit, we're going to make profit because we sold a preferred carrier; [...] wherever we have the opportunity we promote our preferred supplier and that can and has been at times highly lucrative and it is on that basis that we are able to achieve our volume incentives and generate profitability in our business. (paragraphs 201-202)
  - On the effects on consumers
    - Consumers were harmed since they had to rely on travel agents to make their bookings

## SAA 1: Effects based approach

- The Tribunal concluded that it was:
  - “satisfied that there is sufficient evidence of travel agents’ ability to influence customer preferences” (paragraph 206); and that “the consumer’s ability to police opportunistic behaviour by agents is seriously constrained in this type of market, because of the informational asymmetries that exist” (paragraph 209).
- On consumer harm
  - the Tribunal recognised the fact that SAA’s scheme tended to be more anticompetitive than a standard price discount, since the incentive is paid to an intermediary, with limited pass-through to consumers (partially because agents cannot lower ticket prices) (paragraphs 158 and 251).
  - It also concluded that consumers would be harmed as a result of SAA’s conduct, since they are likely to make the “wrong choices of airlines” (paragraph 242).
- In sum
  - (a) the incentive schemes caused travel agents to sell SAA tickets and not to sell competitors’ tickets, and (b) competitors performed poorly during the period and pointed to the schemes as a likely cause of their performance.

## SAA 2: Effects based approach

- On the effect on competitors
  - In SAA 1, the Tribunal found that anti-competitive effect can be found if “the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals” (paragraph 132)
  - The Tribunal also found that an exclusionary practice is substantial if it “has the potential to foreclose the market to competition” (paragraph 129)
  - This test set in SAA 1 and is also met in SAA 2:
    - Limited by-pass possibilities for competitors (and consumers)
    - Contracts designed to provide incentives to directionally sell
    - SAA’s dominance and consequent inability by rivals to match
    - High coverage of the contracts
    - Ability by agents to directionally sell

## SAA 2: Effects based approach

- But evidence goes further in SAA 2, supporting a finding of actual effects on competitors
  - Cross-sectional evidence on BA/Comair market share across travel agent
  - Absolute and relative sales through travel agents for SAA and BA/Comair
  - SAA and BA/Comair relative performances in the overall airline market
- On the effects on consumers
  - According to the SAA 1 test, there is no need to show effects on consumers
    - The presence of a significant exclusionary act, and of actual/likely effects on competitors is sufficient for a finding of abuse
  - Nonetheless, some evidence provided to show that:
    - Consumers make the “wrong choice of airlines”, at “wrong prices” (Nationwide, paragraph 242)
    - This is a direct result of directional selling by travel agents (for given prices)
    - Empirically supported by cross-sectional evidence and evolution of SAA’s relative yields
    - Foreclosure of rivals leads to reduced investment in frequencies, and entrenchment of SAA’s dominance (Nationwide, paragraph 241)



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