

Competition Law in SADC- South Africa

The case of asymmetric extra-
regional interdependence



The outline of the presentation

- Overview of competition authorities in Africa
- SADC and its protocols
- South African competition law



Overview of the competition authority and African states

Pre 1990	1990-1999	2000-2009	2009-2026	No national Competition authority but part of regional competition authority	No national authority, not part of a regional competition authority
Gabon, Kenya, South Africa (3)	Algeria, Tunisia, Burkina Faso, Cameroon, Cote D'Ivoire, Malawi, Mali, Niger, Senegal, Tanzania, Togo, Zambia, Zimbabwe (13)	Botswana, Cabo Verde, Djibouti, Egypt, Eswatini (<i>former Swaziland</i>) Ethiopia, Madagascar, Mauritania, Mauritius, Morocco, Namibia, Seychelles, Sudan, The Gambia (14)	Angola, Benin, Burundi, Chad, Comoros, Democratic Republic of Congo, Liberia, Libya, Mozambique, Nigeria, Rwanda, Uganda, Lesotho Ghana(14)	Central African Republic, Congo Brazzaville, Equatorial Guinea, Eritrea, Guinea, Guinea Bissau, Sierra Leone, Somalia, South Sudan, (11)	Sao Tomé and Principle (1)

SADC and its hegemon

- Formed as SADCC to counter PW Botha's
‘Constellation of Southern African States’

After the end of Apartheid policy oriented, move to economic and technical coordination and cooperation

In the area of competition

SADC Declaration on Regional Cooperation in Competition and Consumer policies

- It is voluntary
- Loosely worded

Table 1. Regional Competition Law Enforcement Models.

Regional Enforcement Models	Characteristics	Examples of RTAs⁶⁸
1. Soft Harmonisation	Guiding principles and best practices are recommended	APEC, ECCAS
2. Voluntary Cooperation	Aspirational or mandatory adoption of national competition laws	ASEAN, CPTPP, NAFTA, RCEP, SACU, SADC
	Voluntary positive and negative comity provisions	
	Dispute settlement through voluntary consultations and mediation	
3. Mandatory Cooperation	Mandatory adoption and/or enforcement of national competition laws	ANZCERTA, CETA, MERCOSUR, UMSCA
	Mandatory positive and negative comity provisions	
	Dispute settlement through mandatory consultations, arbitration, suspension of FTA provisions	
4. Unified Enforcement	Mandatory national competition law	CAN, CEMAC, COMESA, CARICOM, EU, EAC, EAEU, ECOWAS, EFTA, WAEMU
	Harmonised regional competition law	
	A SCA is established	

Some trade data

- Intra-SADC Trade: South Africa accounts for roughly 66% of intra-SADC exports and 45% of total intra-SADC trade.
- Key Partners: SADC countries trade largely with China, the EU, India, and the US.
- Import Dependence: 80–90% of SADC (excluding SACU countries) imports from the region are purchased from SACU (primarily South Africa)

Protocol on Trade

- Section 25 of the Protocol on Trade state very simply that member states shall implement measures within the community that prohibit unfair business practices and promotes competition

Protocol on transport, Communication and meteorology

- Article 9 on Civil Aviation
- Efforts are aimed safe, reliable and efficient services
- To do this it is anticipated that SADC move towards gradual liberalization of intra-regional air transport markets for the SADC airlines;
- There is a need to create and grow regionally owned airlines;
- member states must set out the economic rules and set up and support concomitant institutional restructuring of the SADC airlines, airports and the provision of air traffic and navigation services in a phased and co-ordinated manner



Missing layer

- AfCFTA protocol on competition set outs to do two things
 - Fill in a lacuna
 - Provide support where institutions already exist
- Other RECs have national Competition authorities in member states and a regional competition authority
- SADC does not have such an institutional structure
- Dispute resolution too has fallen away
- Member some member states have National Competition Authorities

EU SADC case



The member states imposed anti dumping duties



There were grounds of dispute



SADC was found to be lacking as the process of such imposition

Left to ITAC to investigate

Left to impose anti dumping duties



This missing layer was exposed as a flaw in the system

Historical perspective

- **Post-Apartheid Shift:** The 1998 Competition Act marked a significant policy change, aimed at promoting a fair and equitable economy as part of South Africa's democratic transition. Objectives: The Act focused on preventing restrictive practices, controlling mergers, and addressing the abuse of dominance to create a level playing field.
- **2009 Amendments:** Strengthened penalties, especially against cartel conduct, and included provisions for criminal liability in certain cases.
- **2018 Amendment Act:** Enhanced the Commission's powers to tackle market concentration and support economic transformation. Focused on protecting small businesses and addressing issues in sectors with significant inequalities



Competition Authorities in South Africa

- South Africa's competition regulatory bodies include:
 1. Competition Commission - Investigates anti-competitive behavior, enforces the Competition Act, and evaluates mergers.
 2. Competition Tribunal - Acts as the adjudicative body, handling cases referred by the Commission and making rulings.
 3. Competition Appeal Court - Hears appeals against decisions made by the Tribunal.



Scope of Competition Legislation

- The Competition Act, 1998, is the primary legislation governing competition law in South Africa. Its main objectives include:
 - - Preventing anti-competitive practices
 - - Regulating mergers and acquisitions
 - - Addressing abuse of dominance
 - - Promoting small and medium enterprises (SMEs) and economic transformation.

Merger Control

- **Purpose:** To ensure that mergers and acquisitions do not substantially prevent or lessen competition in South Africa.
- **Key Objectives:**
 - Protect consumer welfare.
 - Maintain competitive markets.
 - Promote economic efficiency and growth



Merger Control

- **Decision Outcomes**
- **Possible Outcomes of the Assessment:**
 - 1. Approval:** The merger is approved without conditions if no significant competition concerns are identified.
 - 2. Conditional Approval:** The merger is allowed with specific conditions (e.g., divestitures, behavioral commitments) to mitigate competitive harm.
 - 3. Prohibition:** The merger is blocked if it is likely to substantially prevent or lessen competition.

Merger denial Airlink and Safair

- 2018 Competition Commission denied the merger between Airlink and Safair

The main reason was that it would amount to the removal of an effective competitor (FlySafair) to SA Airlink particularly on the routes in which FlySafair competes against SA Airlink

Further that the proposed merger is likely to result in coordinated effects through the potential exchange of competitively sensitive information between South African Airways (SAA) and FlySafair (and SA Airlink) since SAA has a shareholding in SA Airlink.

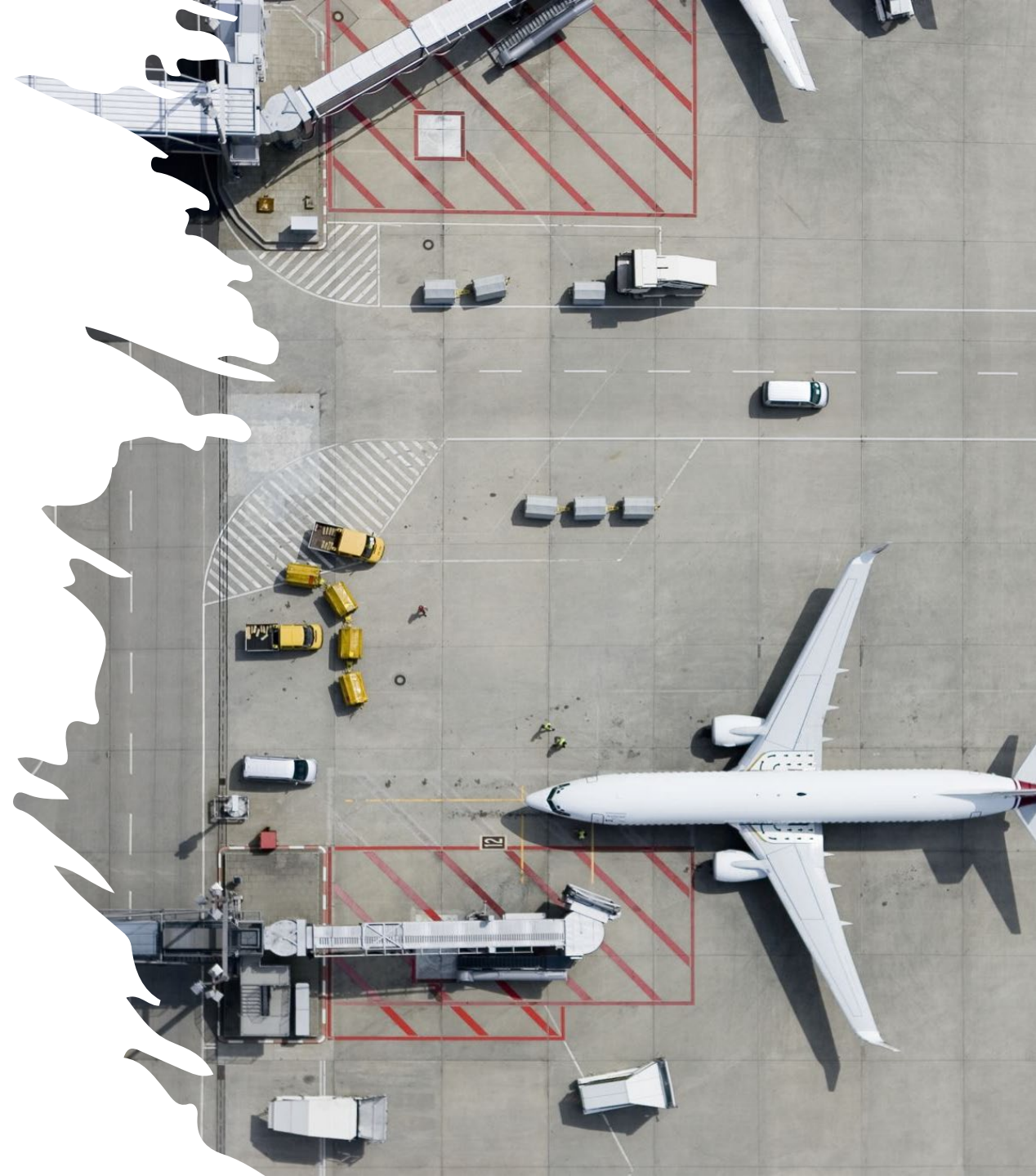


Horizontal Competition

- Horizontal competition occurs between businesses operating at the same level in the market, such as competing manufacturers or retailers. Practices like price-fixing, market allocation, or collusion can reduce competition and harm consumers.
- Set out in Section 4 of the Act

Enforcement against Cartel behaviour

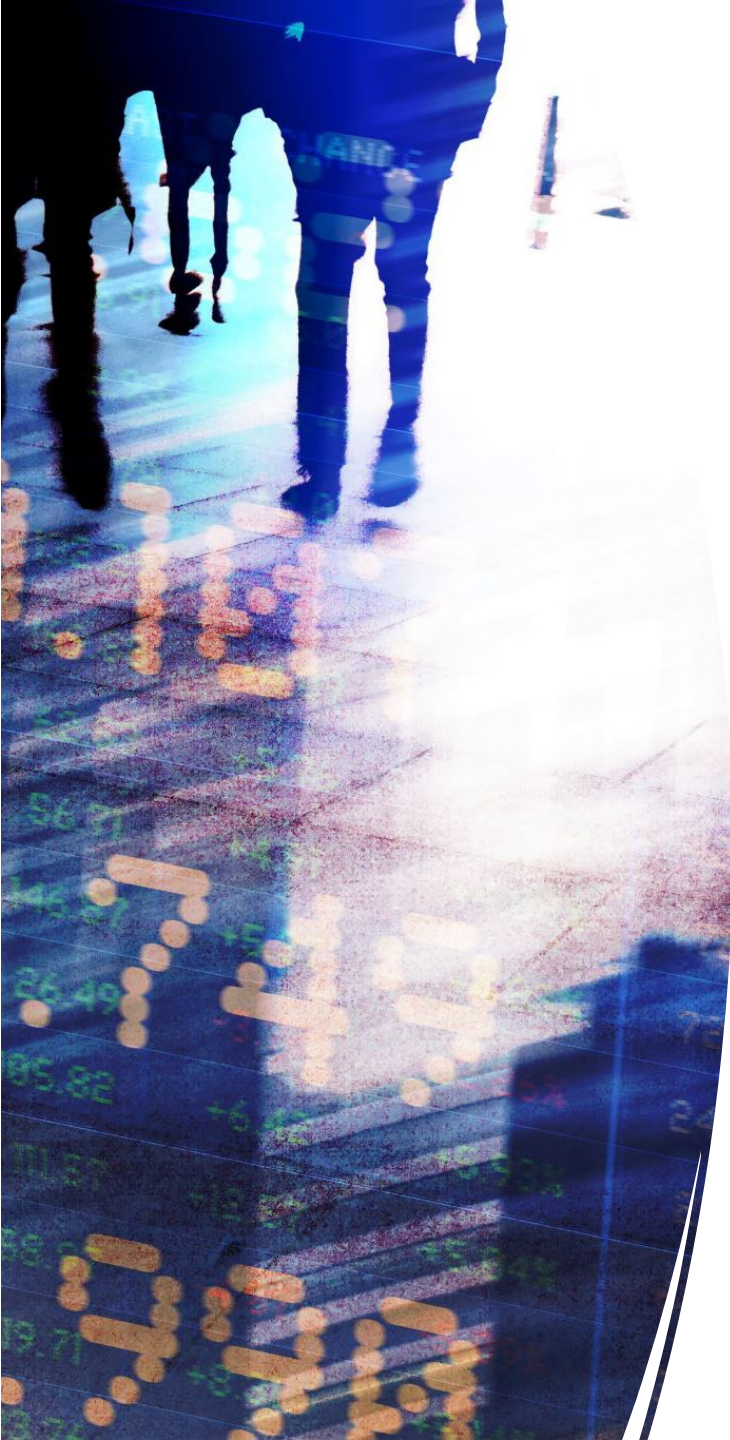
- The Commission found that one of these older bilateral agreements regulated the relationship between Lufthansa and SAA, including meetings and communications relating to price changes and fare harmonization on flights which they both operated between Cape Town/Johannesburg and Frankfurt
- SAA, Singapore Airlines, and Malaysian Airlines for their involvement with Cathay Pacific in a cartel to fix airfare increases on both economy and business class flights into and out of South Africa to the Far East Asia





Vertical Competition

- Vertical competition involves the relationship between businesses at different levels of the supply chain, such as suppliers and retailers. It can include practices like exclusive dealing or resale price maintenance, which may limit competition.
- Found in section 5 of the Act



Abuse of Market Power

- Abuse of market power occurs when a dominant company uses its position to limit competition, which can harm smaller businesses and consumers. This includes practices like predatory pricing, refusing to supply essential goods, or imposing unfair trading terms.
- Example: A large manufacturer may lower its prices temporarily to drive out smaller competitors, then raise prices once they are out of the market.

Section 8

- **Understanding Dominance**
- **Definition of Dominance:**
 - A firm is considered dominant if it can act independently of its competitors and customers.
- **Market Share Threshold:** Generally, a market share of 45% or more is indicative of dominance, though lower shares may also be deemed dominant depending on market conditions.
- **Implications of Dominance:**
 - Dominant firms have the power to influence prices, supply, and market conditions.
 - Must exercise this power responsibly to avoid anti-competitive behavior.

Abuse of dominance

- 2005, the Tribunal found that SAA contravened the Competition Act because it had engaged in prohibited practices in the period from October 1999 to May 2001 (SAA I). The Tribunal found that the travel agent commission payment scheme implemented by SAA during this period was anticompetitive. This was primarily because this scheme had a retroactive (or “back to Rand”) structure. For this conduct, the Tribunal imposed an administrative fine of R45 million.

Abuse of Dominance

- February 2018, the Commission referred to the Tribunal a case levelled against South African Airlink (Pty) Ltd (“SA Airlink”) (“the respondent”). The referral comes as a result of three separate complaints (“the Complainants”) to the Commission by customers using passenger airline services. The complainants allege that Airlink is the only airline that operates on the Johannesburg – Mthatha (“JHB – UTT – JHB”) route, and as such has a monopoly over the route.

Civil Aviation sector



It is particular sector with economic constraints that forces collaboration between airlines



while competition law is meant to work towards a level playing field



Nationalistic pride plays a part

The work to be done

- Add a level of enforceability
- Not linked to South Africa
- Bring in the REC layer at SADC level
OR
- Harmonisation and convergence at National Competition Authority with AfCFTA
- Taking cue from the AfCFTA Protocol on Competition and the tried and tested systems of other RECs and draw from learned history of South African law of competition





Thank you

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