In the wake of collusion findings against a number of construction companies, momentum is now growing to bring damages claims against these firms. The roads agency SANRAL is leading the way by suing seven of these construction companies for up to R760-million of damages flowing from alleged collusion on its projects.

But this raises the difficult question as to how the amount of 'over-pricing' due to collusion should be calculated? Unlike some straightforward claims, the SANRAL matter is complex. To gauge the extent of 'over-pricing' here, it is necessary to determine what the price of the construction projects would have been if no collusion had happened.

This type of complexity in quantifying damages is not unique to SANRAL, or to contraventions of competition law. In many other instances it is also necessary to first question what would have happened to a firm's sales, prices or profits had it not infringed on a contract or statutory requirement.

There are a range of economic and financial techniques to quantify such damages. They most commonly fall into three broad categories:

Before-and-After Approach

In some cases the alleged damage is known to have occurred for only a specific period. Here one can use the firm's information from outside this period to model the sales, prices or profits that would have occurred but for the harmful action. In a previous case Genesis used statistical techniques to compare discounts and selling prices offered by car dealers before and during a period of alleged price coordination. The claimed pricing infringement was shown to have had no impact on the net price (and therefore inflicted no damage) as dealers were able to 'cheat' by offering various forms of hidden discount to customers.

Yardstick Approach

Parallel experiences can also be used to identify the 'but for' volumes, price or profit level. Genesis applied this in the damages quantification flowing from a repudiation of an agreement between two large firms in the communications sector. The challenge was to forecast the loss of profits where no prior business history existed. Genesis was able to gauge profits that would have accrued by applying information on similar business models, observed in other markets and adjusting for country and firm-specific factors.

Financial-based Cost Analysis

Financial analysis is used across the spectrum of damages claims. In some instances, financial-based analysis can also be used to model the 'but for' price or profit level. Genesis previously used underlying cost estimates to predict what the minimum fees charged by an international stock exchange would have been had a competitor not employed a predatory pricing strategy.

These approaches to quantifying damages are not mutually exclusive, and each has its pros and cons. They can be open to competing views, as to what the 'but for' scenario would look like and how it should be modelled. The techniques used in each approach can also range from more straightforward comparisons to highly complicated statistical models.

In quantifying more complex damage estimates, such as in the SANRAL matter, it is important to have a deep understanding of the approaches and techniques available in order to provide a realistic and evidence-based view of the 'but for' scenario.

Genesis, as the preeminent provider of economic and litigation support for competition cases and other contested matters, was one of the first firms in South Africa to pioneer the powerful combination of economic and financial expertise in the area of damages estimation.

Our diverse litigation and expert testimony experience further enables us to provide clients with robust and defendable damage estimates that are able to withstand the most intense scrutiny. We have applied our extensive expertise in the quantification of damages with great success across a wide variety of sectors such as construction, cellular phone technologies, wholesale rates for fixed lines, postal communications, financial markets and agricultural supply contracts.

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