

EXPERTS WITH IMPACT in Competition Damages



Our analysis of damages was used to provide an independent assessment of Comair's lost profits arising from a breach of competition law.

In 2010, the Competition Tribunal of South Africa (Tribunal) concluded that the incentives schemes which the state-owned airline, South African Airways (SAA), had offered travel agents between 2001- 2005 were prohibited under the Competition Act. This followed an identical ruling five years earlier relating to the period 1999-2001. The Tribunal's findings were upheld on appeal by the Competition Appeal Court in 2011.

The schemes in question featured so-called 'override' commissions which provided strong incentives for travel agents to divert sales away from rival airlines and towards SAA. The schemes were held to be an abuse by SAA of its dominant position in the market for the sale of domestic airline tickets through travel agents in South Africa.

As a result of this behaviour, the Tribunal held that there was likely to have been a substantial foreclosure of SAA's competitors in the domestic market. It concluded that the override commissions had a material effect on these airlines' sales of travel agent tickets within the domestic market.

Comair, a rival airline to SAA, engaged FTI Consulting to assess the profits it had lost over the infringement period due to SAA's illegal incentive schemes.

To calculate the lost profits, FTI Consulting compared the position Comair would have been in had SAA's anti-competitive conduct not taken place (the counterfactual scenario) with the position it actually occupied. We developed a complex financial and economic model and employed a wide range of financial and economic analysis techniques, supported by the available evidence, to estimate counterfactual revenues and costs, and the resulting lost profits.

To calculate counterfactual revenues, we:

- deployed qualitative and sophisticated quantitative techniques to analyse Comair's market share;

- carried out a thorough assessment of factors, other than SAA's infringement of the Competition Act, that could have affected Comair's market share.

Our calculation of counterfactual costs comprised a detailed assessment of:

- the various options available to an airline to manage its capacity, and those Comair would most likely have adopted in the counterfactual scenario; and
- how Comair's costs vary as a result of demand and capacity changes.

We performed multiple cross checks to ensure that the resulting lost profits we calculated were reasonable.

In addition, we reviewed and rebutted the analysis performed by SAA's economic expert.

In total, our expert spent in excess of 11 days giving evidence before the High Court in Johannesburg in May 2016.

The High Court rejected the primary position of SAA's expert that Comair's damages would be zero. As regards SAA's expert secondary position, that Comair suffered some loss as a result of the illegal schemes, the High Court agreed with the vast majority of assumptions used by our expert in this complex case. In particular, the High Court agreed that SAA's illegal schemes were likely to have had lingering effects in the market after those schemes had been terminated, and that the calculation of damages should reflect these effects.

IMPACT

In February 2017 the High Court awarded Comair damages of ZAR 554.2m plus interest, the effect of which is make the amount payable by SAA in excess of ZAR 1.1bn.

“
Greg is without a doubt the best expert witness I have had the privilege of working with in my 23 years of practice.
— Partner, leading South African law firm”



Greg Harman

+44 20 3727 1230
greg.harman@fticonsulting.com



John Lisle

+27 (0) 21 487 9030
john.lisle@fticonsulting.com



Henry Pannell

+44 20 3727 1402
henry.pannell@fticonsulting.com

About FTI Consulting

FTI Consulting is an independent global business advisory firm dedicated to helping organisations manage change, mitigate risk and resolve disputes: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities.