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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Israel

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Economic analysis and evidence in abuse cases

– Contribution from Israel –

1. Introduction

1. In this paper, we will discuss economic analysis and evidence in abuse of dominant position cases in view of Israeli competition law. First, we will present the basic normative framework of monopoly regulation under Israeli competition law, including the definition of "Monopoly" and the restrictions that apply to monopolies under Israeli competition law. Second, we will refer to the method of collecting evidence in order to establish a market definition and market power; as well as the method of collecting evidence in order to examine the question of an abuse of dominant position. Lastly, we will explore two case studies in which the Israeli Competition Authority (the **ICA**) determined that an Israeli company abused its dominant position.

2. Basic Normative Framework – Monopoly under Israeli Competition Regime

2. The Israeli Economic Competition Law, 5748-1988 (the **Competition Law**) does not prohibit the status of monopoly. Nonetheless, according to Article 29 and 29A of the competition law, monopolies are prohibited from abusing their dominant position.

3. Under the Competition Law, abuse of dominance position can be enforced by both criminal (article 47 to the Competition Law) and administrative sanctions (article 50D to the Competition Law). According to the Competition Law, criminal enforcement requires intent by the offender. Most of the Israeli experience is based on the use of administrative sanctions, and therefore this contribution will only address administrative enforcement of abuse of dominance position.

4. According to section 26(a) of the Competition Law, an entity is deemed to be a Monopoly in each the following instances:

- The concentration of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of services, in the hands of one person (or entity); or
- Anyone who has significant market power in the sale or supply of an asset or service (even if the person or entity does not hold a market share of more than 50 percent).

5. Notably, under Israeli regime, the Director General of the ICA may declare a Monopoly,¹ but a Monopoly is a matter of status; therefore, the obligations and limitations, which apply to a Monopoly, exist regardless of the Director General's declaration or lack thereof.

¹ The Competition Tribunal can re-examine the Director General's Declaration of a Monopoly.

3. Evidence for Market Definition and Significant Market Power

6. **Collecting evidence** - the ICA is authorized, under section 46(b) of the Competition Law, to require the handing over of information, documents, registers, and other records to ensure or facilitate the implementation of the Competition Law. This is usually done by interviews and requests for information (**RFI**). The breach of the duty to provide information can have criminal or administrative consequences (the Competition Law, Section 50d (b)).

7. In practice, ICA staff – including economists and attorneys – begin by interviewing customers, suppliers, competitors, etc. Interviews of this kind may be conducted to gather information about how the market operates and to find out if there is any abusive behavior. Following such interviews, ICA staff furnishes **RFIs** to the entities which are the subject of the inquiry as well as to customers, suppliers, competitors, etc.

8. Alongside quantitative information regarding prices, turnovers and alike, often, internal documents are requested. Internal documents may include: economic studies, business plans, marketing plans, strategic plans, customer surveys, market surveys, presentations, meetings protocols, text messages and voice messages (on any platform) of the entities. This type of information is analyzed to identify the relevant market, relevant competitors, and to determine if an object to harm competition may exist (or has existed with reference to the examined period).

9. **Market definition** – a variety of evidence is used for determining the product market. This may include interviews with consumers, suppliers, competitors and regulators. This may include Inquiring about, demands patterns; product prices; or internal documents market research and surveys conducted by the parties or by their competitors that indicate the existence of substitutes and geographical purchase patterns.

10. **Market share** – As described above, market share is one of the criteria used to assess the existence of a Monopoly under the Competition Law. This criterion is characterized by certainty and clarity, making it easier to estimate by third parties and the monopoly itself. Market share may also be indicative of significant market power. To determine market share the ICA customarily requires the sales (in quantities and monetary value) of all the parties in a relevant market. This allows the ICA to examine whether there is a concentration of more than half of the total provision or acquisition of a service, in the hands of one entity.²

11. **Significant market power** – In 2019, the ICA published guidelines regarding the method of examining significant market power.³ According to the Guidelines, in order to assess an entity's market power all relevant indications must be examined as follows: First, the characteristics of the market and the product, which affect the level of restraint on the supply side and the demand side. Alongside that, indications regarding the price collected, the margin and the actual conduct of the party under examination, should be examined.⁴

12. Therefore, the margin between the economic costs of a product and the price of the product, as well as the supplier's profitability, can serve as direct indications of the supplier's market power. However, an accurate and reliable assessment of economic costs and profits is a complex task and is not always possible. Very often, the assessment will

² Public Statement 2/19 Regarding the Method of Examination of Significant Market Power (July 21, 2019) **Israel Competition Authority** 501671 (the **Guidelines**), p. 7-9, Chapter C.1.

³The Guidelines, p. 6-17, Chapter C.

⁴ The characteristics presented are not a binding list that will be relevant in all cases.

not fully reflect the competitive status of the entity under examination. Thus, the use of an assessment of a margin will not always contribute to the examination of the existence of significant market power. Regardless, it is not possible to rely on such an assessment in and of itself. At most, it should be integrated with an examination of a variety of indicators relating to the characteristics of the market and the product, which affect the level of restraint on the demand side and on the supply side.⁵

13. The conduct of the party under examination might itself be another indication that reinforces the conclusion that it holds significant market power. In other words, the mere ability and incentive to employ particular practices might serve as an indication that supports the conclusion that the party employing it has significant market power.⁶

4. Evidence for Abuse of Dominance

14. **The facts of the infringement** - Since every case differs from the other, the type of evidence required for each case differs accordingly.

15. **Theory of harm** - There is no single analytical technique that is used to assess the theory of harm in abuse cases. Rather, each abusive conduct and each set of circumstances is examined by the economists handling the case, according to the evidence in hand.

5. Recent Case Studies handled by the ICA: Evidence in Abuse of Dominance Cases

5.1. The Port of Ashdod Case

16. On December 2015, the ICA imposed administrative fines on the Israeli Port of Ashdod (one of two international ports on the Israeli Mediterranean shore, used for unloading goods from the United States and Europe, at the relevant period of time) and exercised, for the first time, its authority to impose individual fines on senior executives. The ICA investigation, which preceded this determination, revealed that Ashdod Port had employed a system of tailor-made retroactive and secret rebates for vehicle importers, which were likely to harm competition with the port of Haifa (the only other international port on the Israeli Mediterranean shore, at the relevant period of time). The port of Ashdod gave vehicle importers, who met individual targets, rebates from the regular price list for handling and storage of vehicles. Therefore, if a vehicle importer diverted a portion of its import to the Port of Haifa, it risked losing its eligibility for the entire retroactive tailor-made rebate it would have been eligible to enjoy.

17. In June 2020, the Economic Competition Tribunal (the **Tribunal**) upheld the ICA's determination; however, it decreased the amount of the administrative fines imposed. The Tribunal's decision included a detailed analysis of the Port of Ashdod's violation. In addition, for the first time, the Tribunal deliberated in detail, the circumstances under which administrative fines, for a monopoly that abused its dominant position, may be imposed; as well as how to determine the level of fine.

⁵ The Guidelines p. 6, Chapter C.

⁶ The Guidelines p. 15-16, Chapter C.3.

18. In terms of ICA's investigation, in order to define the market, the ICA conducted interviews with most of the vehicle importers in Israel, regarding potential substitutes for unloading the vehicles at any of the ports located on the shores of the Mediterranean Sea in Israel.

19. The Port of Ashdod and the Port of Haifa (at the time, its only competitor) provided data of the quantity of vehicles that were unloaded at their port in their answers to an RFI. Based on such responses, market shares were calculated by the ICA.

20. In addition, ICA found evidence of high switching barriers. According to interviews with vehicle importers and transport lines operators, it was almost impossible to divert a transport line to the port of Haifa in light of the high number of importers, as the consent of majority of them was required in order to divert.

21. To determine the rebates' characteristics, the ICA examined the terms of written agreements, internal profit calculations and rebate deliberation. All of these provided evidence for the confidentiality, retroactive and individual nature of the rebates.

22. A main argument raised by the Port of Ashdod was that the rebates were granted to importers regardless of meeting the target and that the Port of Ashdod did not enforce the targets, therefore no harm was caused to the competition. However, it was revealed in internal documents that negotiations had taken place regarding the targets, which indicated that the importers considered them to be binding. Other Internal documents showed that the Port of Ashdod in fact did enforce the targets (when an importer did not divert its unloading to the competing port out of compulsion).

23. The Port of Ashdod also argued that applying an As Efficient Competitor test (AEC) leads to the conclusion that the rebates could not harm competition. In this regard, the ICA argued that AEC is not a binding test but examined the Port of Ashdod analysis. Moreover, since the ICA position was that the contestable part of the demand is not readily available, the ICA economists estimated the number of vehicles that the Port of Haifa had to unload before it could start making a profit (taking variable costs of the Port of Ashdod into account) given the retroactive rebates, and found it was not negligible. The database for this calculation was based on Ashdod Port's answers to RFIs.

24. The Tribunal confirmed the ICA position that it is unnecessary to undertake an analysis of the actual effects of the rebates on competition, rather it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition. To this end, it is necessary to examine all the circumstances of the case, in particular, the criteria and rules governing the grant of the rebates, the extent of the dominant position of the undertaking concerned and the particular conditions of competition prevailing on the relevant market:

*"Although we accept the ICA position that in the circumstances of the case the characteristics of the rebates are sufficient to determine that they were likely to harm competition, we will examine the analysis performed by the ICA... this is because the analysis was presented to us and the appellants raised allegations against it."*⁷

⁷ Case (DC) 16-01-40796 Ashdod Port Company LTD v. the Director General of the Israel Competition Authority, 239 Israel Competition Authority website (June 23, 2020).

25. The ICA also found evidence of an object to restrict competition. An internal memorandum from the Finance Department of the Port stated that a rebate will be granted to importers who do not meet the quantity targets, provided there is no diversion of activity to the competitor. Additional evidence included recordings made by the complainant of the VP of Marketing of the port, stating that the purpose of the rebates was to leverage the market power of the Port of Ashdod in order to maintain loyalty.

26. The decision granted by the Tribunal is currently pending appeal.

5.2. The IEC Case

27. On March 2017 the ICA imposed administrative fines on the Israel Electric Corporation (The **IEC**) and individual fines on senior executives. ICA's decision held that the IEC abused its dominant position and caused harm to customers who began purchasing from private electricity producers by limiting the services provided to large business customers. In January 2021, the Tribunal upheld the ICA's decision.

28. The service that was limited was a VIP service of Account Managers, who are assigned by the IEC to large business customers. Large business customers are shopping malls, factories, offices, hospitals, banks and hotels, for which the uninterrupted supply of electricity is essential to day-to-day operations. The Account Managers provide essential services related to the segments of transmission and distribution of electricity, in which the IEC is a monopoly and continue to control even for customers who purchase their electricity from private producers.

29. There was a dispute regarding whether or not the IEC had indeed instructed its Account Managers to stop providing service to customers who switched to competitors (private electricity producers). The IEC kept its decisions vague and ambiguous. No official and explicit instruction was found. The decision and implications thereof were concluded from internal documents and customers complaints.

30. For example, the IEC circulated scripts of conversations with customers, explaining the change in services following their decision to purchase their electricity from private producers. The script detailed which services would be affected and which would not, and noted that the Account Manager services would be terminated. The IEC changed its account managers procedure at a certain point, so that the entitlement threshold for the services changed from the scope of the customer's demand for electricity to the volume of electricity purchased from the IEC.

31. Furthermore, internal documents and consumer complaints showed that the services had been de-facto eliminated. Evidence was found, among others, through RFIs of the CRM system used by Account Managers.

32. The IEC is a declared a Monopoly. This IEC dominant position was not in dispute, internal documents of the IEC (internal legal opinion⁸) testified to that.

33. The ICA economics did not find any indication of substitutes to the service of Account Managers to business customers. The IEC argued that the private electricity producers could have provided the service themselves. ICA economists refuted these allegations on the basis of interviews with consumers and private electricity producers, and internal documents of the IEC that indicated that such a solution would harm consumers. The IEC also argued that a similar service that was given to non-business customers could be a substitute. Based on internal documents from IEC and a survey conducted by IEC

⁸ The IEC voluntarily delivered its privileged legal opinion in order to argue that it relies on legal advice in its actions.

among its customers, ICA economics refuted these allegations. Most of the information was found in IEC's answers to RFIs.

34. The ICA economics also analyzed the electricity sector regulation and its influence on the theory of harm. According to the regulation, IEC competitors (private electricity producers) could choose to sell their electricity to large business customers or to the IEC. Should private electricity producers struggle to recruit customers, they could decide it is more beneficiary to sell their electricity to the IEC rather than competing with it (for the most part the price at which the electricity was sold to the IEC was lower than the price at which it was sold to a business customer).

35. The Tribunal's decision in this case as well, is pending appeal.

6. Conclusion

36. This paper provided an overview of how the ICA gathers and analyzes evidence in abuse cases. Describing the legal framework, the ICA's authority to collect evidence and the actual use of evidence - identifying and explaining the facts of the violation, as well as whether the conduct may reduce business competition or harm the public.

37. In an ICA decision concerning a case, as well as when a case is presented to the court, the collection, processing, and analysis of evidence play a substantial role. In order to explain the complexity of abuse of dominance cases, ICA's experience shows that when cases of abuse come before the Tribunal, it is paramount to tell the story through the details of the evidence and documentation, which present how the relevant conduct may harm competition.