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The Standard and the Burden of Proof in Competition Law Cases – Note by Israel

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

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Israel

Insights from the Ashdod Port Case

1. Introduction

1. This contribution examines the standard and burden of proof in Israeli competition law abuse of dominant position cases, and in particular on the recent Ashdod Port Supreme Court ruling, which provides valuable insights into the current landscape, challenges, and ongoing debates surrounding the evidentiary standards in Israeli antitrust enforcement.

2. Legal Framework

2. Section 29a of the Economic Competition Law, 5748-1988, which is similar to Article 102 of the Treaty on the Functioning of the European Union, sets out the framework for abuse of dominant position cases.[1]

3. Section 29a(a) establishes a general standard of conduct whereby a monopoly is prohibited from abusing its market position in a manner that might reduce competition or harm the public. In addition to the general norm in Section 29a(a), Section 29a(b) sets out a list of abusive practices that create a presumption of abuse of monopolistic position.[2] The list of presumptions is intended to supplement the general norm in Section 29a(a), so that even if a certain behavior of a monopoly does not fall within the scope of these practices, it may be caught within the general prohibition in Section 29a(a) of the law, if it is proven that it can lead to a reduction in competition or harm to the public.

4. Prior to the Ashdod Port Case, the rather limited body of relevant Israeli case law examined discounts under the general norm in Section 29a(a). Israeli competition law did not require assessing harm to competition with a cost-based test. The standard of proof is set at administrative "balance of probabilities".

5. The Israeli case law divided discounts into three types:

[1] 29 A. (a) A monopolist shall not abuse its position in the market in a manner which may reduce business competition or harm the public.
(b) A monopolist shall be deemed to be abusing its position in the market in a manner which may reduce business competition or harm the public in each of the following cases:
(1) Setting unfair purchase or sale price levels for the monopoly asset or service;
(2) Reduction or increase of the quantity of assets or scope of the services offered by the monopolist, other than as part of fair competitive activity;
(3) Establishing dissimilar contractual terms for similar transactions, which may give certain customers or suppliers an unfair advantage over their competitors;
(4) Setting terms in contracts for the monopoly asset or service which by their nature or according to accepted commercial terms do not concern the subject of the contract.
The provisions of this subsection are in addition to the provisions of subsection (a).

[2] Civil Appeal 1248/19 The Central Company for Production of Soft Drinks Ltd. v. Gafniel, paragraph 25 [Published in Nevo] (26.7.2022).

1. Loyalty discounts – discounts designed to tie the buyer to the supplier by conditioning the discount on the customer purchasing all or a predetermined quantity of the goods they need from the discount-giving supplier;
2. Quantity discounts – discounts given based on the total volume of goods purchased and according to objective and equal economic criteria given to all buyers;
3. Target discounts – discounts given to a customer as a reward for achieving specific business goals that the monopoly has an interest in. Unlike quantity discounts, which rely on objective parameters for all of the monopoly's customers, loyalty and target discounts are "tailored" to each customer's personal characteristics, targeting a specific portion of each customer's sales volume. This means that the monopoly creates an incentive to meet the goal set as a condition for receiving the discount.

6. Discounts individually tailored to each of the monopoly's customers were viewed as having a particularly high potential to reduce competition, because the economic incentive they create to meet the set business goals may result in harming the customer's freedom of choice and the competitor's ability to compete with this discount method. [3]

3. The Ashdod Port case – General Background

7. For most families in Israel, purchasing a private motor vehicle is a significant economic transaction. Since the 1960s, there has been no industrial production of private vehicles in Israel. As a result, most vehicles are imported to Israel from the USA, Europe, and the Far East via Roll-on/Roll-off (RoRo) ships, and are unloaded at one of three commercial ports: Haifa Port; Ashdod Port; and Eilat Port.

8. During the violation period, vehicles imported from Europe and the USA were generally transported by car importers through one of three shipping lines (EUROMED, NEPTUNE, or ADRIATIC) to one of the two Mediterranean ports (Haifa or Ashdod). While the Adriatic line stopped at both ports, the EUROMED line and the NEPTUNE line stopped only at Ashdod Port. Ashdod Port had a monopoly over each of these three shipping lines according to Section 26 of the Israeli Competition law.

9. Ashdod Port adopted a policy of granting discounts to the largest car importers, which amounts to abuse of its monopoly position, in a manner that may reduce competition in each of the relevant markets. Ashdod Port entered into yearly agreements with the largest car importers, setting targets for unloading vehicles in its areas in exchange for discounts on handling fees and storage rates for unloaded vehicles. The average discount rate was about 30% of the storage price and about 40% of the handling price. The targets reflected the expected import volume of each importer individually, in some cases to the point of full exclusivity. Ashdod Port Company renewed these agreements with car importers every year between 2010 and 2014.

10. The characteristics of the discounts implemented by Ashdod Port were:

1. Individualized – Unloading targets were set individually for each importer, based on their expected import volume and import data from previous years. Unloading targets were typically set to reflect the importer's entire expected import volume, aiming to achieve exclusivity in unloading at Ashdod Port. Additionally, in some

[3] Competition Case (Jerusalem) 2/96 The Antitrust Director General v. Yedioth Ahronoth Ltd., District Court Decisions 5759(2) 529, 560-561 [Published in Nevo] (2000)

cases, the discount was given to importers even if they did not meet the target as long as they did not divert vehicles to Haifa Port.

2. Retroactive – Discounts were applied retroactively to the entire unloaded quantity, subject to meeting the annual target set.
3. Confidentiality – The agreements included confidentiality clauses prohibiting importers from disclosing the content of the agreements, including unloading targets and discounts, to third parties including the competing Haifa Port.

11. These characteristics, combined with Ashdod Port's dominant position, were determined to have the potential to harm competition with Haifa Port.

12. The Director General therefore determined that the Ashdod Port abused its dominant position in a manner that could harm competition, and imposed a fine of 9 million NIS (approximately US$ 2.7) on the port. Two senior executives at the port were fined personally 20,000 NIS each. Ashdod Port and the executives appealed to the Competition Tribunal, which upheld the decision but saw fit to reduce the fine imposed on Ashdod Port from 9 million NIS to 3.46 million NIS. Ashdod Port and its executives appealed the Competition Tribunal's Judgment to the Supreme Court, and the Director General appealed the reduction the fine. In January 2024 the Supreme Court issued its ruling (Justices Amit, Baron, Grosskopf) granting the Director General's appeal and denying Ashdod Port's appeal; i.e., the Supreme Court affirmed the Competition Tribunal's upholding of the Director General's decision that Ashdod Port's target discount scheme violated Competition Law, and raised the fine back to 9 million NIS.

4. The Ashdod Port case –Assessing Competition Harm

13. In assessing harm to competition, the Director General examined the discounts' characteristics, combined with Ashdod Port's dominant position. The Director General found the discount system granted by the Ashdod Port Company created a significant expansion barrier for Haifa Port. As stated above, Ashdod Port Company's discount system stipulated that once the annual individual unloading target for each importer was met, a retroactive discount was given on the entire unloaded quantity. Accordingly, failure to meet the importer's individual unloading target resulted in the loss of the discount on all unloaded vehicles.

14. Although the Director General position was that the Israeli competition law did not require assessing harm to competition with a cost-based test, the Director General nonetheless assessed the effect of the discounts based of Ashdod Port's costs, thus going beyond what was strictly necessary.

15. The Director General found that the annual unloading targets stood at a weighted average of about 85% of the total vehicles imported by the large importers in 2013. A significant portion of them had an unloading target of 100% or more of the number of vehicles unloaded the previous year. In other words, on average, by setting retroactive discounts which would go into effect only after meeting the unloading targets, Ashdod Port Company left Haifa Port a small competitive arena of about 15% of the total vehicles. It should be noted that Haifa Port was not aware of the target discounts. Moreover, in practice, it is unlikely that the importer knew at the beginning of the year, and in fact until the last months of each year, whether they were going to meet the unloading target. An importer would tend not to unload vehicles at Haifa Port before meeting the target, or at least until it became clear that they are likely to meet the target set by Ashdod Port for receiving the discount. Additionally, the agreements were renewed every year, so an importer would

avoid diverting vehicles to Haifa Port for fear of not receiving discounts in the following year.

16. Therefore, only limited quantities of vehicles were open to competition. Beyond this small competitive arena, Haifa Port had to unload at least a certain quantity of all the importer's vehicles at a price that would compensate for the loss of the discount due to not reaching the target set by Ashdod Port. The blocked quantity of vehicles varied between importers but stood at a significant proportion of each importer's total vehicles. Based on 2013 data, between 35% - 45% of vehicles that arrived in Israel via the Adriatic line (that anchored in both ports) were unloaded at a price lower than the variable cost. In other words, Haifa Port would start to profit from unloading vehicles in its area only when more than a large amount of the vehicles on the Adriatic line were unloaded in its area.[4]

17. Additionally, in some cases, for Haifa Port to be able to divert a certain importer to unload in its area, it had to receive both vehicles imported on the Adriatic line (which anchor at both ports) and vehicles imported on the EUROMED line or the NEPTUNE line (which anchored only at Ashdod Port). To do this, Haifa Port had to reach an agreement with most of the other importers whose vehicles were together with the individual importer on the same ship to divert those EUROMED and NEPTUNE line. Needless to say, there is no identity of interests between importers, partly due to the unloading targets set individually for each importer, so diverting a particular line to Haifa Port could cause the other importers on that ship not to meet their unloading target at Ashdod Port and thus to lose the discount.

18. This means that Haifa Port was required to operate in the market either on a small scale or only starting from a large scale, which was effectively determined by the dominant competitor in the market - Ashdod Port. The Director General suggested that this constraint cannot be deemed as competition on the merits and that therefore, Ashdod Port, abused its position in a manner that may reduce competition.

19. In addition to the economic assessment, the Director General presented to the Competition Tribunal evidence that Ashdod Port's intention was to harm competition.

20. The Competition Tribunal upheld the Director General decision while stating that for retroactive target discounts given by a monopoly, in the absence of other significant economic benefits, examining the characteristics of the discount is sufficient to determine if the discount scheme deviates from competition on the merits and could unreasonably restrict a competitor's ability to compete. The Tribunal rejected Ashdod Port's argument that the only valid test is whether an equally efficient competitor could not cover its costs. The Tribunal found that the "As-Efficient Competitor Test" is too strict as it requires showing complete market foreclosure. Moreover, the test has practical difficulties in identifying the "contestable" vs. "non-contestable" portions of demand and cannot adequately account for market entry barriers and transition periods. The Competition Tribunal concluded that appropriate tests should be determined based on the circumstances of each case. Policy considerations support maintaining broad discretion in choosing which economic tests to apply, as in some cases it may be appropriate to protect even less efficient competitors (e.g. during market entry periods).

[4] For this calculation, Ashdod Port's profits from unloading vehicles were calculated. Then, the monetary value of the discount was converted to the number of vehicles given at cost price. The examination was based on Ashdod Port's variable costs and revenues. In the next stage, the number of vehicles that Ashdod Port provided to an importer who met the unloading target at a price equal to the port's variable costs was calculated. Finally, the percentage of vehicles out of all vehicles imported on the Adriatic line that Haifa Port would need to unload in order for it to start to profit was calculated.

5. Standard of proof – The Israeli Supreme Court ruling

21. The Israel Supreme Court (Justice Amit, Baron, Grosskopf) upheld the Director General's decision that Ashdod Port's target discount scheme violated Competition Law and raised the fine back to 9 million NIS. The appellants were ordered to pay 200,000 NIS in legal costs.

22. The court allowed for some flexibility in applying the standard of proof. The court considered the potential effects of Ashdod Port's discount policy on competition, rather than relying solely on per se rules. It decided the burden on the Director to prove potential harm to competition or consumers is not heavy and doesn't require support from extensive economic opinions or complex market practice analyses. This is especially true when it's proven that the aim of the practice was to exclude competitors from the market.

23. However, there was disagreement among the Justices about the evidentiary threshold to prove potential harm to competition. While Justice Grosskopf argued for a lower evidentiary threshold given the characteristics of the Israeli market, Justices Amit and Baron warned against easing the burden of proof too much.

24. Justice Grosskopf's opinion suggests that, given the characteristics of the Israeli market as a highly concentrated economy, the potential for a monopoly's improper practice to harm competition is high, thus allowing for a less rigorous evidentiary standard in certain cases. This is especially true in situations where it is proven that the practice was intended to exclude competitors from the market. Justice Grosskopf found that this burden had been met by the combination of the three exceptional anti-competitive characteristics that characterized the discount system: the tying between markets (i.e. between the three different shipping lines), in two of which Ashdod Port enjoyed almost complete exclusivity; the setting of percentage discounts; and granting them on the basis of an annual calculation in an "all or nothing" method. These exceptional characteristics, certainly in their accumulation, create an inherent concern for significant harm to competition, due to their probable effect on importers' incentives to unload at Ashdod Port and not at Haifa Port.

25. Justice Grosskopf also held that an As-Efficient Competitor Test can serve as a supporting test which can strengthen the conclusion that the practice in question could harm competition; however, an As-Efficient Competitor Test it is not sufficient on its own to support the conclusion that the practice in question could not harm competition. In the Israeli market, one cannot conclude that just because an equally efficient competitor could have dealt with the discount policy, excluding a competitor who could not deal with it would not harm competition.

26. Justice Amit and Justice Baron expressed reservations about easing the burden of proof on the General Director too much. While proving that the aim of the practice was to exclude competitors from the market can ease the Director's burden, it doesn't exempt the Director from proving all elements of the violation. That being said, both Justice Amit and Justice Baron joined Justice Grosskopf's conclusion that the Director had met the required burden of proof, and in doing so they relied on factors similar to those on which Justice Grosskopf relied. It may be, therefore, that the disagreement among the Justices was largely semantic, with all three of them ultimately reaching the same conclusion and for similar reasons.

27. It therefore seems to be the case, that translating the burden of proof into a concrete evidentiary requirement is still a task that is done on a case-by-case basis.

6. Conclusion

28. The Ashdod Port case provides valuable insights into the current state of the standard and burden of proof in Israeli competition law. While there is a trend towards deterrence of abusive behavior by dominant competitors, there are ongoing debates about how to balance the burden of proof and the need for effective enforcement. As the Israeli competition law regime continues to evolve, these debates are likely to shape future enforcement practices and judicial decisions.