

## Competition - Israel

### Parliament approves administrative monetary payments amendment

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#### Introduction

In May 2012 Parliament approved a legislative amendment to the 1988 Restrictive Trade Practices Act which further solidifies the enforcement of antitrust laws in Israel. The amendment will enable the antitrust commissioner to impose significant monetary payments unilaterally through a speedy administrative process.

This amendment is expected to increase the Antitrust Authority's enforcement powers significantly with regard to offences that are not hardcore cartel and bid-rigging violations (eg, gun-jumping violations, failure to obtain exemption for restrictive arrangements that pose no danger to competition, technical breach of decrees or undertakings and failure to respond diligently to data requests issued by the commissioner).

The new amendment is yet another chapter in the constant change that Israeli antitrust law has witnessed in the last year (for further details please see "[Winds of change? New commissioner reveals revised policy direction](#)" and "[Antitrust law introduces new measures to deal with oligopolies](#)").

#### Monetary payments amendment

The monetary payments amendment had been advocated by the authority for many years. The authority has argued that criminal enforcement consumes significant resources and requires the authority to meet too high a standard of proof (criminal conviction requires proof beyond reasonable doubt). Thus, criminal enforcement was an ineffective tool and an inappropriate measure for violations that were not hardcore cartel cases (*mala prohibita* (prohibited by law) in contrast to *mala in se* (morally wrong)).

On the other hand, administrative measures were ineffective in deterring against these offences. The main enforcement tool at the commissioner's disposal was a determination of breach – a statement by the commissioner that the law had been breached, which served as a *prima facie* evidence in any legal proceeding. The determination was aimed at boosting private enforcement against offenders, but the authority argued that such enforcement was difficult, since the plaintiff still needed to prove that it had been injured by the alleged breach – which was rarely successfully achieved. The authority could also enter into consent decree with the offenders, which included a monetary payment. However, the authority lacked bargaining power in negotiations with offenders, since it was unable to impose such payments unilaterally.

Against this background - and backed by a public outcry about the high cost of living in Israel, which in part has been attributed to insufficient competition - the government passed the amendment.

The amendment authorises the commissioner to impose significant monetary payments unilaterally on companies and individuals for a range of antitrust offences, such as illegal restrictive arrangements, gun-jumping violations in mergers, abuse of dominant position and failure to respond to data requests.

The payments can reach up to 8% of a corporation's sales, up to a maximum of IS24 million (approximately \$6 million) for corporations and IS1 million (approximately \$250,000) for individuals. For failure to comply with data requests, smaller amounts

were set – approximately \$2 million for corporations and \$75,000 for individuals.

Corporations and individuals cannot be insured or indemnified against such payments.

### **Types of offence**

All of the offences for which the commissioner may impose monetary payments are also subject to criminal enforcement, as well as other administrative measures (eg, a determination of breach, injunctive relief or a consent decree).

The authority recently published draft guidelines in order to clarify when it will convert to monetary payments as the primary enforcement measure (instead of seeking criminal sanctions).

According to the draft guidelines monetary payments are relevant for non-horizontal transactions (non-horizontal restrictive arrangement/merger), while for most horizontal transactions, criminal enforcement remains the main enforcement measure. The guidelines list numerous offences which will typically be enforced through monetary payments, including:

- non-horizontal restrictive arrangements;
- gun-jumping violations;
- information exchange of non-secret information;
- abuse of dominant position; and
- failure to comply with data requests.

The authority clarified that criminal sanctions would still apply to these violations should there be evidence of intent to injure competition or if the offender was aware that its conduct breached the law or the conditions or instructions imposed by the commissioner or the Antitrust Tribunal.

### **Determining the payment amount**

The authority recently published additional draft guidelines, providing guidance on how the commissioner intends to determine the size of monetary payment.

This issue was settled to some extent by the legislature. The amendment lists several parameters which the commissioner must consider while determining the size of payment. These include:

- the duration of the infringement;
- the potential injury to competitors;
- the level of involvement the offender had in the offence;
- prior violations and steps taken by the violator to prevent further violations;
- the violator's financial means; and
- personal circumstances (for individuals).

However, this list is not exhaustive and the commissioner retains a level of discretion with regard to implementation. The draft guidelines attempt to explain how the different parameters will be implemented in practice, noting that the actual payment amount will be determined on a case-by-case basis. The guidelines do not explain the relative importance attributed to each parameter; thus, it is difficult to assess the size of potential payments based on these guidelines.

Once the authority begins to wield this new power, a benchmark will be established and parties will be better equipped to predict the authority's decisions.

### **Comment**

The monetary payment amendment fundamentally changes the commissioner's arsenal of enforcement measures. This new legislation, in addition to the vast increase in the authority's resources (the authority's legal and economic departments have more than doubled during the last 12 months), will likely lead to a sharp increase in the enforcement of antitrust laws. However, the authority will need to take care when expending its new powers.

Now more than ever, it is crucial for corporations operating in Israel to maintain a strict and effective compliance programme in order to prevent potential violations of antitrust laws.

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