Competition & Antitrust - Israel

Monopoly restrictions proposed on businesses with less than 50% market share

Contributed by **Tadmor & Co Yuval Levy & Co**

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On May 3 2015 the general director of the Israel Antitrust Authority published a memorandum of legislation calling for the amendment of the Restrictive Trade Practices Law (5748/1988). The memorandum proposes to apply the statutory restrictions generally applied to monopolies to businesses that hold a market share of less than 50% in situations where such businesses possess market power.

A 'monopoly' is defined by a technical market share test – any party that holds a market share exceeding 50% is deemed a monopoly. This definition disregards the market power, or lack thereof, of the monopoly. The existing definition is flawed, as it imposes monopoly restrictions on firms that may not possess significant market power, while at the same time failing to address the abuse of market power by firms whose market share is below 50%. The new memorandum attempts to resolve this problem.

Monopoly restrictions may formally apply to a business with a market share of less than 50% only if the minister of economy determines – based on the general director's recommendation – that the business has a significant influence on competition in the relevant market. However, this legal possibility has never been applied. A business with a market share of less than 50% is not subject to monopoly restrictions, even if it *de facto* holds significant market power.

The memorandum of legislation proposes to expand the definition of a 'monopoly' to include firms that hold market power while possessing a market share of less than 50%. Contrary to a regular monopoly position, which is independent of any administrative declaration, a firm that possesses a market share of less than 50% will be regarded as a monopoly only if the general director declares that it holds market power.

Firms with market shares that exceed 50%, but which do not possess market power are not excluded from the memorandum's definition of a 'monopoly'. The new legislation could have been expected to apply a consistent standard of market power, but instead this standard serves as a means to expand monopoly restrictions.

Further, the memorandum lacks clear standards for identifying significant market power and does not define the degree of market power that will allow the general director to implement this new authority. Many businesses that operate within competitive markets hold a certain level of market power, especially in differentiated markets. Therefore, the reform poses a regulatory risk for many businesses. The memorandum may affect firms operating in Israel whose market share is below 50%, but which hold a certain level of market power.

On April 1 2015 the general director published another memorandum of legislation aimed at reducing barriers to imports. This memorandum restricts the ability of an official importer to abuse its power in a manner that may diminish competition from parallel imports. The two memoranda seem to deal with the same problem in different ways. They address a concern that under the current definition of a monopoly, a firm whose market share is below 50% may abuse its dominance to harm competition while remaining compliant with the law. Therefore, the second memorandum treats a specific sub-concern of the first memorandum's general concern. It could be asked whether it makes sense to push forward the second memorandum while at the same time enacting the more general amendment to the 'monopoly' definition.

For further information on this topic please contact Shai Bakal or Ayal HaCohen at Tadmor & Co Yuval Levy & Co by telephone (+972 3 684 6000) or email shai@tadmor-levy.com or ayal@tadmor-levy.com. The Tadmor & Co Yuval Levy & Co website can be accessed at www.tadmor.com.

Authors

Shai Bakal

Ayal HaCohen

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