

IAA steps up enforcement of financial sanctions

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Introduction

The antitrust commissioner recently announced her intention to impose unprecedented financial sanctions on several monopolies and market leaders in Israel, as well as some of their senior officers. These announcements indicate a clear trend in the commissioner's use of financial sanctions to enforce antitrust violations and set a benchmark for the imposition of sanctions in future cases. Further, they indicate that the use of financial sanctions to combat abuses of dominant position will likely play a key role in the Israel Antitrust Authority's (IAA) agenda for the coming years.

Background

In May 2012 an amendment to the Restrictive Trade Practices Law 1988 (the Antitrust Law) granted the IAA commissioner the authority to impose financial sanctions for certain antitrust violations. Financial sanctions are an administrative measure and can generally be used in place of criminal sanctions at the IAA's discretion and in accordance with its enforcement policy. Updated guidelines on the manner in which sanctions will be calculated were published in October 2016. Until recently, when imposing financial sanctions, the IAA often noted that it had considered the fact that financial sanctions were a novel enforcement tool when determining the size of the sanctions and that a reduction in the amount was therefore warranted. These reductions were made in addition to the general 50% reduction that the IAA will apply to all sanctions imposed until the end of 2017, in order to gradually introduce the novel enforcement tool. As the cases discussed below demonstrate, it seems that the IAA is moving past the initial stage of implementing its enforcement policy and the relative leniency (in hindsight) with which it has been accompanied.

Israel Electric Corporation

On March 6 2017 the IAA announced its intention to impose a financial sanction of NIS13 million (€3.26 million) on the Israel Electric Corporation (IEC) and over NIS100,000 (€25,000) on two of its senior officers.

The IEC is a declared monopoly in the electricity market in Israel. According to the IAA's announcement, independent power producers have recently begun competing against the IEC. Nonetheless, despite the competition that has developed among electricity producers, the IEC has maintained a monopoly position in the electricity transmission and distribution fields. Electricity consumers and independent power plants have therefore remained dependent on the IEC for transmission and distribution services.

According to the IAA, the IEC provides large corporate clients with an account manager responsible for, among other things, handling the client's needs, coordinating planned power outages and providing up-to-date information on the handling of malfunctions. As of 2013, in parallel with the

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introduction of competition from independent power producers, the IEC allegedly stopped offering account managers to corporate clients that were working with independent producers. The IAA argued that in this way, the IEC had created a strong disincentive for clients to switch to independent power producers, thus raising a concern of significant harm being caused to competition and an illegal abuse of dominant position. The IAA held that this practice also constituted a prohibited reduction in the services offered by a monopoly not in the framework of competition on the merits and constituted illegal discrimination between customers in the electricity transmission segment. Further, the IAA determined that this practice constituted illegal tying between the transmission and production segments. Lastly, the IAA classified the denial of account management services to corporate customers who had switched to independent producers as an unreasonable refusal to supply a monopoly service.

The IAA's decision also stated that conducting business in accordance with legal counsel does not preclude the imposition of financial sanctions. Significant personal sanctions were also imposed on senior officers who, according to the IAA inquiry, had been personally involved in the violations.

The IAA's decision is subject to an appeal before the Antitrust Tribunal.

Central Bottling Corporation

On March 22 2017 the IAA announced its intention to impose a financial sanction of NIS62.7 million (€15.6 million) on the Central Bottling Corporation (CBC) – which is, among other things, the manufacturer and distributor of Coca Cola-branded drinks in Israel – and NIS340,000 (€84,700) on one of its senior officers.

According to the letter of intent, the CBC is the most significant player in Israel's soft drink industry, comprising approximately two-thirds of all soft drink sales in Israel. In particular, the CBC has a monopoly in the cola drink market and has high market shares in the sale of other carbonated drinks and iced tea (the latter under the Fuze Tea brand). The CBC also markets juice, soda water and mineral water – areas in which it faces stronger competition.

An IAA inquiry into the kiosk and fast food segments uncovered practices aimed at maintaining and strengthening the CBC's monopoly status, constituting an abuse of dominance in the soft drink market. According to the IAA's findings, in order to stifle competition the CBC, among other things, conditioned the provision of benefits such as discounts, refrigerators, branded store signs and other merchandise (or the threat of removing or denying any of the above for non-exclusive customers), on the basis of the exclusive purchase of its soft drinks and often used a discounting strategy that bundled its dominant and less dominant products. Further, the IAA stated that the CBC had tried to camouflage such exclusivity arrangements as legitimate cooperation agreements with business partners.

According to the IAA's letter of intent, the CBC had also attempted to prevent parallel imports and had threatened not to sell products to customers that purchased products from parallel importers (in some cases, this threat was realised). Specifically, in the iced tea segment, the CBC had taken pointed actions against its former partner Nestlé – which had tried to reintroduce the Nestea brand to the market. The CBC also allegedly employed various illegal tactics in order to incentivise customers to remove or not install Nestea serving machines and kept a detailed record of its progress in this regard.

The IAA found that such practices constituted:

- an illegal abuse of a dominant position;
- an unreasonable refusal to supply a monopoly product;
- a violation of monopoly instructions;
- a violation of a consent decree between the CBC and the IAA; and
- a violation of merger conditions.

This is the highest financial sanction ever imposed by the IAA. The sanction amount also far exceeds the NIS24 million (€6 million) threshold set under the Antitrust Law. By placing the CBC's actions into several distinct violation categories, each of which warranted a financial sanction in the IAA's

opinion, the IAA was able to aggregate such amounts into a single financial sanction that exceeded said threshold.

The IAA's policy to reduce sanction amounts by 50% until the end of 2017 was applied. Without the leniency period, the sanction amount would have exceeded NIS100 million (€25 million). These are staggering amounts in terms of the local market which far exceed sanctions imposed by other regulators (eg, the Israel Securities Authority). A final decision in this case is pending a hearing before the IAA.

Yenot Bitan supermarket chain

On February 19 2017 the IAA published a letter of intent regarding a planned imposition of financial sanctions of approximately NIS25.6 million (€6.4 million) on the Yenot Bitan supermarket chain and NIS700,000 (€174,000) on one of its senior officers, for its breach of the merger conditions in its recent acquisition of certain branches of the Mega supermarket chain.

In January 2016 certain assets of the Mega supermarket chain were put up for sale by its receiver after it had entered a stay of proceedings. Yenot Bitan purchased a significant portion of the stores. The IAA's approval of the deal was conditioned on Yenot Bitan divesting eight branches in areas in which, according to the IAA's analysis, the merger would have created excessive market power due to limited competition. Strict timetables were set for such divestitures.

By the time the set dates had passed, Yenot Bitan had divested only one branch. The remaining seven branches were thus handed over to a trustee that would oversee their sale. The IAA held that Yenot Bitan had worked to interfere with and thwart the trustee's efforts, among other things, by:

- failing to settle a conflict with the owner of land on which several stores were located in a manner that made it difficult for the land owner to transfer the relevant property rights;
- delaying the transfer of pertinent information to the trustee;
- interfering in the sale of one of the stores to a competitor in order to thwart the deal; and
- attempting to sell the rights to a store after it had already been sold by the trustee and trying to solicit the employees of the relevant store to discontinue their employment.

According to the IAA, these actions constituted a breach of the merger conditions, which required Yenot Bitan to cooperate with the trustee and assist in whatever manner necessary to complete the sale of the relevant stores. The IAA found that Yenot Bitan's actions had led to the relevant branches not being sold and raised clear concerns of harm to competition, leading to reduced competition in certain geographic areas.

A final decision in this case is pending a hearing before the IAA.

Comment

The three cases profiled above mark the direction in which the IAA is moving with regard to the imposition of financial sanctions. First, it seems that the IAA intends to target monopolies by levying significant fines for the abuse of a dominant position, in contrast to its passive approach regarding enforcement against monopolies in the previous decade. Second, the IAA has clearly set a new, much higher benchmark for future cases. By aggregating violations, the IAA was able to exceed the statutory cap. The level of fines is expected to further increase once the 50% early enforcement reduction period ends on December 31 2017. Finally, officers who are involved in or responsible for violations may also face significant financial sanctions that cannot be reimbursed or insured against. IAA decisions and recent statements by IAA officials have also clarified that even qualified legal advice cannot shield against financial sanctions, although it may impact the amounts imposed.

The IAA's enforcement policy in regard to financial sanctions is still being formed and has yet to be reviewed extensively by the courts. While the exact course that will ultimately be taken remains unclear, the general direction seems inevitable: financial sanctions are expected to increase in prevalence and size.

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