

ICA updates methodology for determining monetary penalties

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In February 2019 the Israel Competition Authority (ICA) published for public consultation a draft amendment to Public Statement 1/16: Considerations of the Competition Commissioner to determine the amount of a monetary penalty. Following public comments on the draft amendment (accepting some and rejecting others), the ICA has now published a final amended statement. In doing so, the ICA's new methodology for imposing monetary penalties has taken full effect.

This article provides a summary of the methodology that has been adopted to calculate the monetary penalties imposed on corporations. A similar methodology is discussed regarding personal monetary penalties on office holders; however, this article does not elaborate on this summary.

Monetary penalties

In recent years, the ICA has gradually stepped up enforcement by means of monetary penalties for technical violations and infringements that produce meaningful competitive concerns. In early 2019, in the framework of a major reform to the Economic Competition Law 5748-1988 (the Competition Law), the maximum amount of a monetary penalty was quadrupled from NIS24 million (approximately €6 million) to NIS100 million (approximately €26 million). The competition commissioner may also ultimately exceed this cap by aggregating the penalties imposed for different violations, as she has already done in the past.

Considering the increasing 'popularity' of the monetary penalties tool, paired with the significant amount which may be imposed and the fact that the ICA has recently started to apply more scrutiny over practices used by foreign entities, this amended methodology is of interest to corporations with activities relating to Israel.

New methodology

The amended maximum amount of a monetary penalty on corporations under the Competition Law is the lower of the following:

- 8% of the violator's sales turnover (the 'turnover cap'); or
- a statutory cap of NIS100 million (approximately €26 million) (the 'maximum cap').

Public Statement 1/16 sets out the following seven-stage methodology for calculating monetary penalties of Competition Law violations.

First stage – setting frame amount of monetary payments

The turnover cap is set based on the violating corporation's sales turnover in Israel in the fiscal year preceding the fiscal year in which the violation has occurred, taking into account the turnover of the violating corporation's entire corporate group.

The turnover cap will serve as a guide for corporations with turnover exceeding NIS10 million (approximately €2.5 million), while corporations with lower turnover face a fixed cap of NIS1 million (approximately €250,000).

Public Statement 1/16 stipulates that if the violating corporation can prove that its turnover

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includes sales that originate from areas of activity which are completely distinct from the area in which the violation has occurred, such distinct sales figures will be deducted from the turnover cap. This exclusion of distinct areas of activity is possible only if the relevant turnover is not less than NIS10 million as a result of such exclusion. The statement also sets out the conditions for proving that distinct areas of activity warrant such exclusion.

Second stage – assessing violation severity and setting base amount monetary payment: between 5% and 90% of frame amount

During this stage, the competition commissioner assesses the severity of a violation based on its circumstances, especially its potential harm to competition or the public. The base amount may range from 5% to 90% of the frame amount that was calculated in the first stage. If there is more than one violating corporation, the base amount should be equal for all violators.

The following considerations should be taken into account when assessing the severity of a violation:

- the extent of potential harm to competition or the public;
- the duration of the violation; and
- the legitimacy of the arrangement which is the subject of the violation.

The base amount for 'naked' arrangements that are penalised with monetary payments (rather than criminal penalties) is at least 50% of the frame amount. On the other hand, the base amount for technical violations which pose no potential harm to competition but still warrant enforcement measures (eg, a technical gun-jumping) would normally be set at 5% of the frame amount and up to NIS3 million (approximately €780,000).

Third stage – aggravating or mitigating circumstances relating to violating corporation's behaviour

After assessing the severity of a violation and setting the base amount of a monetary penalty, the competition commissioner considers circumstances specific to the violating corporation, including:

- the corporation's role in the violation and its position in the market compared with the position of other violators – the commissioner may aggravate or mitigate the base amount by up to 20% for this consideration; and
- violation of specific directives issued by the commissioner, such as directives issued to monopolies in accordance with Section 30 of the Competition Law – such violations may aggravate the base amount by up to 30%.

Fourth stage – aggravating or mitigating circumstances external to violation

The competition commissioner may also consider circumstances which are unrelated to the corporation's behaviour in the context of the violation, including:

- deterrence considerations – violating corporations that had part of their turnover excluded from the first stage calculation or those whose turnover exceeds NIS750 million (approximately €194 million) may not be properly deterred by monetary penalties that are relatively insignificant for them. In such cases, the commissioner may add a certain percentage that reflects such discrepancy;
- prior violations – the base amount may be increased by up to 30% if the violating corporation has violated the Competition Law in the past. If there are no prior violations, the commissioner may mitigate the base amount by up to 15%; and
- the date of the violation – since the authority to impose monetary penalties is implemented gradually, a reduction of 25% of the base amount will be applied for violations that occurred before 31 December 2019.

Fifth stage – additional considerations

In special cases, the competition commissioner may consider the following circumstances which may further aggravate or mitigate the base amount of a monetary penalty:

- the time that has passed since the violation – if more than three years have passed since the violation, the commissioner may mitigate the base amount by up to 20%; and
- reliance on legal advice – *bona fide* reliance on legal advice which meets certain conditions (including that the advice was provided formally and in writing, prior to the violation and by a legal expert who had all of the information necessary for forming the advice) may warrant mitigation of the base amount by up to 20%.

Sixth stage – setting minimum and maximum caps

The final amount of a monetary penalty must be adjusted in accordance with the turnover cap and the maximum cap. If the monetary penalty amounts to over NIS100 million, it will be reduced to the maximum cap of NIS100 million. As explained, the turnover cap is calculated based on the corporation's sales turnover in Israel. Further, monetary penalties may not be set under NIS10,000

(approximately €2,500); therefore, monetary penalties for violating corporations whose turnover is exceptionally low will be adjusted to such amount.

Seventh stage – consideration of violating corporation's cooperation with ICA and actions taken to cease violation and prevent its reoccurrence

The competition commissioner may reduce the final amount of the monetary penalty by up to 30%, taking into account the actions that the violating corporation has actually taken to stop the violation and to prevent its reoccurrence (eg, if the violating corporation ceased committing the violation on its own initiative before the commissioner became aware of it or has implemented corrective measures to prevent the reoccurrence of the violation).

Comment

Now that the final amended version of Public Statement 1/16 has taken effect, corporations that have activities in Israel should consider the risk of monetary penalties as well as the circumstances that may aggravate or mitigate the potential level of such penalties.

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