LEGAL UPDATE – NOVEMBER 2013

THE REVIVING OF THE BAN ON MONOPOLY OWNER'S TO CHARGE EXCESSIVE PRICES

In recent days, the General Director of the restrictive trade published a draft of an opinion for public comments regarding the prohibition on monopoly owners charging excessive prices. The purpose of the General Director, in publishing the draft, is to deal with the cost of living in Israel, through forced reduction of prices of monopolized products which comprise a significant monthly expense for Israeli citizens. For example, Coca - Cola, electricity, milk, dairy delicacies, salt, coffee, chocolate, pasta, beer, etc., are monopolized products. As part of the new draft, the General Director examined the difficulties in enforcing the ban thus far and explained why the Israeli law must enforce the ban. Although the overall goal of the General Director, is praiseworthy, it is likely to cause much uncertainty in the commercial lives of the relevant players in the market.

To date, the General Director customarily did not enforce his authority in determining the prices for monopolized items, although in the Restrictive Trade Practice Law there is an explicit clause [29a(b)(1)] which prohibits fixing unfair prices for the purchase or sales of property or services defined as monopolies. What is "unfair price"? By this, the legislature intended not only high prices, but also prices that may be very low in order to induce the monopoly owner's competitors to leave the market, due to the difficulty of dealing with the high efficiency of a monopoly and the low price level. Pricing products lower than the products manufacturing cost itself, will be considered "predatory". Thus, after the monopoly's competitors left the market, the owner of the monopoly may raise the price of its products beyond the competitive price, essentially damaging the public in the form of expensive prices.

In an attempt to create certainty among monopoly owners, the Commissioner tries to examine three methodologies in the draft, according to which, he intends to examine the prices charged by monopolies.

According to the first methodology, the final price will be examined against the product's manufacturing cost. In the first stage, according to this examination, the General Director will determine what costs will be taken into account for the calculation of the cost of production. The second stage will examine the question of the difference between the price and the amount that was set, according to which it can be said that the monopoly owner charged an excessive price. The General Director arbitrarily sets a "safe harbor" – a permissible difference of 20% between the production cost to the price of the product – in which the owner of the monopoly is protected from sanctions by the Commissioner.

According to the second methodology, the profitability of the monopoly owner must be analyzed. This methodology determines a benchmark index and subsequently examines the monopoly owner's profitability in relation to the benchmark index. These indices are based on complex economic models – which will require the monopoly owners to hire the services of economists for defense against the

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claims of the authority.

According to the third methodology, the relevant criteria between similar products or between companies must be compared. For example, the price charged by the monopoly owner may be compared to the price of competing products, or it may be compared to the price of a similar product in another geographic market.

The General Director present us with an open list of considerations that would incentivize the authority to enforce the ban, including: the monopoly achieving its status not via means of competitive advantages; a department in which there is an active regulator, aside from the Antitrust Authority; a saturated market with structural obstacles and entry barriers; when the excessive price was charged by the monopoly over the course of a long period of time; when it is a basic product of the consumer; and the like.

However, the outcome of the draft of this opinion does not increase certainty, but rather increases ambiguity. Following its publication, monopoly owners have inquired how to determine whether their prices are excessive. At first glance, according to the opinion, the answer is: "appoint an economic expert to examine the price according to the different methodologies and advise accordingly." Understandably, this is burdensome and difficult to implement, as with all economic opinions, the General Director may, (or a competing business), display a counter economic opinion which will state different numbers. Not only will the customers spend considerable time and money - the result will be continued uncertainty.

Therefore, only time will tell if the opinion, when published in its final version, in fact was the impetus for a number of monopoly owners to lower the prices of products and thus cause us all to pay less for basic consumer goods which many of us need. Such optimism, notwithstanding, there is no doubt that some monopoly owners will prefer to continue charging excessive prices from the consumer and bear the sanctions - primarily economic –as may be imposed by the Antitrust Authority.

It would be our pleasure to assist you further in analyzing the topic discussed above. Please feel free to contact advocates Ronit Amir-Yaniv (ronita@arnon.co.il)**, Ron Gutman** (rong@arnon.co.il) **and Lior Sendziewski** (liors@arnon.co.il).

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