
# Legal Update – Antitrust Law

# Policy Paper - Public Expression Harmful to Competition

On August 3, 2014 the General Director of the Israeli Antitrust Authority published a draft of a policy paper warning from public disclosures by the business sector that harm competition Policy Paper for public comment (the "**Policy Paper**").

## The Renewal

The Policy Paper was published following growing concern about the competitive difficulties arising from unilateral public disclosures and publications by the business sector that may harm competition, such as announcements to the public, press interviews, advertisements to the Tel Aviv Stock Exchange, discussions with investors, and participation in professional conferences. Public disclosures may constitute an alternative and sophisticated method of transmitting information between business entities, and this being in light of the growing awareness of the prohibitions of the existence of cartels and of transmitting commercial information between competitors. The Policy Paper's aim is to lay out the general principles and legal tools according to which such disclosures will be analyzed.

The General Director acknowledges that public and readily available information encourages market development and aids consumers, suppliers, investors and other entities to calculate their actions wisely. Simultaneously, heightened transparency in the market and bringing commercial information to public knowledge - including competitors - may harm competition and reduce the strategic uncertainty that stimulates the competition. The General Director aims to reduce the parties' ability to create a restrictive arrangement even in the silent understanding or to aid the cartel-like price maintenance by "facilitating practice". An example of such is a press release of an airline company regarding the raising of its rates. Following this, all the companies will raise their rates accordingly and the result will be similar to that of a forbidden cartel.

## The Parameters for Examining the Disclosures

In order to distinguish between a permissible and forbidden disclosure, and to reduce the uncertainty the General Director shall examine a list of parameters - that is not exhaustive - that has the ability to point out the severity of the disclosure:

1. **Nature of the Information** - the more that the information brought in disclosures in the media includes sensitive information from a competitive view, such it will be seen as a forbidden disclosure. Information including information about prices, pricing formulae and production costs and profitability, information regarding future strategic moves and specific information regarding customers or suppliers (existing or potential);
2. **Market Structure** - The more the market structure has a higher tendency for coordination and specifically the market has few competitors and is centralized, has entrance blocks and the more

homogenous the competitors and products - the anti-competitive potential of the disclosure increases;

3. **The Period referred to in the Information** - as a general rule, information relating to the future, or information relating to the past, that in light of the market characteristics one can draw conclusions regarding future behavior, may harm competition in the market and therefore such disclosure will be considered harmful to competition and forbidden.
4. **Reference to Different Scenarios** - when contacting a competitor includes clear conditions for coordinating with each other or scenarios of an "event and reaction" (for example, an announcement according to which in the case of raising prices, there should not be a similar response of competitors - the prices will go back to what they were and go down), it shall be seen as a forbidden disclosure.
5. **Contacting or Referring to Specific Competitors** - disclosures that are directed at competitors as well as mutual disclosures constituting a series of additional disclosures that are connected, is forbidden.

The General Director's authority to examine whether a public disclosure is in line with the Antitrust Law will be exercised according to the tests (criteria) in the law (under the chapter of restrictive arrangements) and according to the case law. The General Director clarifies that the fact that the information was transmitted by public means or in a one-sided initiative manner, in and of itself, may not prevent the application of the Antitrust Law.

## Criticism of the Policy Paper

The Policy Paper delays and brings difficulties to transparent activities of commercial companies and it exposes them to criminal charges, civil claims and monetary sanctions. Every public disclosure in the media may be quoted inaccurately or be misinterpreted. Accordingly the concern will arise (and justifiably!) of each of the companies' officers prior to making any commercial disclosures that he or she may be exposed to sanctions by the General Director. These people will be forced to walk a thin line and to be aided by close legal counsel that will be forced to examine the legitimacy of the disclosures. This situation is not only uneconomic, but it will also harm the professionalism and efficiency of the company.

An acute issue that the General Director failed to acknowledge is the contradiction between the obligation to expose information to investors according to the Securities Law and the prohibition imposed by the General Director regarding exposure of public information. These two entities have enforcement ability while the companies will now find themselves between the two opposing sides. Where does the border lie between commercial transparency that is likely to cause a cartel formation and obligatory commercial transparency according to the law that is required for the consumer and market to be efficient and develop? And further, why might the company not be able to announce that it is raising prices if it will become clear after the act anyway? There is a need to ensure free fulfillment of competition and legitimate transmitting of information.

No less problematic is the General Director's statement that cancels a basic right in the blink of an eye - freedom of expression. His position is that little weight will be given to the fact that these are disclosures that are likely to be protected by freedom of expression as long as in their essence they harm competition and the public and they have a commercial objective. How might we understand from this statement, what is the border that the company would need to cross in order to exit the 'wings' of this basic right? Is the General Director's involvement in this basic right is not a deviation of the boundaries of his authority? And what is the weight of the public's right to know?

The Policy Paper leaves companies in a cloud of fog. Such that it is possible that a director came out in public declaration regarding the company's policy and a week thereafter the CEO of the same company came out with a different declaration, or the media consultant or legal counsel. Do we see all of these as an extension of the company? And what will be their fate?

The General Director's aim is clear: the prevention of coordinating actions in an indirect manner with the aim of reaching restrictive arrangements. However, the General Director is obligated to find the correct balance and to ensure that the least possible harm is caused to fundamental rights such as freedom of expression on the one hand, and the public right to know on the other, and to even bring the mechanism of balance to the

public's knowledge; and as such allow the management of a free and competitive market, which is open and lacking in concern. All this shall be done with the understanding that Israel is a small country, especially in comparison to the United States, Australia and Europe - from where the General Director gains his inspiration for his decisions; however the examples there are concrete and limited. The number of companies in Israel is smaller, there is excessive regulation, and there are selective limitations imposed. It is not inconceivable that the path being currently laid out by the General Director will lead to a slippery slope. As it is said, one will end up with nothing at all by trying to achieve too much at once.