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Competition Tribunal: Target Discounts May Harm Competition

For the first time in two decades, the Competition Tribunal discussed the issue of discounts granted to customers subject to meeting purchasing goals, specifically where the supplier that grants these discounts holds a monopolistic status ("**Target Discounts**" or "**Goal Discounts**"). Although this is a well-known issue in competition law, its application in Israel is quite rare. The previous case brought to the Competition Tribunal was in the matter of the newspaper Yediot Ahronot, in the late 1990s.

This time, the Competition Tribunal heard an appeal filed by Ashdod Port Ltd. ("**Ashdod Port**") against the decision of the Competition Commissioner to impose financial sanctions on Ashdod Port in the amount of NIS 9 million. The sanctions were imposed on Ashdod Port due to the fact that it set Target Discounts in its agreements with car importers, regarding unloading of vehicles at the port. In addition, financial sanctions in the amount of tens of thousands of shekels were imposed on officials in Ashdod Port, who were also a party to the appeal.

The recently published tribunal decision clarifies the issue of Target Discounts, and outlines the rules for examining them in the light of competition law, hence its importance.

What is a Target Discount?

The Competition Tribunal defines a Target Discount as a discount given to a customer individually when it reaches the goal the supplier personally set for it for the entire quantity purchased. According to the tribunal, Target Discounts inevitably create a forced "loyalty" of the customer to the supplier, until the customer has reached the target set for it by the supplier.

In the case of a supplier who enjoys a monopolistic status (as a result of a high market share or market power that the supplier holds), the competitive concern is that the monopoly owner exploits its power and that the Target Discount will set a goal that aims for the customer to

purchase most or all of its required capacity, **exclusively** from the supplier. As a result, a competing supplier will not be able to offer the customer an equivalent offer.

In which cases is it prohibited to provide Target Discounts?

Section 29A of the Economic Competition Law, 1988-5748, prohibits a monopoly from exploiting its position in the market in a manner that may reduce competition in business or harm the public.

The Competition Tribunal ruled that the appropriate test for the element of harm under this section is the probability test ("**Feasibility**") for actual harm to competition or the public.

According to the tribunal, the appropriate economic test in order to examine the probability of harm, will be determined according to the circumstances of each and every case. Nonetheless, the questions that need to be asked in this regard are: (a) whether the Target Discount has a significant economic benefit other than suppressing competitors; and (b) whether from the characteristics of the discount it can be deduced that the discount method adopted exceeds the framework of legitimate competition; and (c) whether it may make it difficult for a competitor to compete in a matter-of-fact manner, or not. As a general rule, the tribunal held that a Target Discount that has a significant economic benefit in the context of legitimate competition, can be justified.

The tribunal also ruled, that there is no need to prove **actual** harm to competition or the public in order to pass the Feasibility test of harm to competition.

The case of Ashdod Port

In the case of Ashdod Port, the tribunal ruled that Ashdod Port holds a monopoly in the market of unloading vehicles imported from Europe and the United States on each of the three shipping lines - Neptune, Euromed and Adriatic. It was further determined, that Ashdod Port conditioned the granting of discounts for car importers regarding the rates it charges for collection and storage, on the importers' compliance with the quantitative targets the Port set for the unloading of vehicles in its territory (the "**Unloading Targets**"). The Unloading Targets were set **individually** for each importer, in most cases to the extent close to the full expected capacity of imports, and they reflected an aspiration for exclusivity. In addition, the discount was conditioned on meeting the unloading targets, in such a way that the right to receive the discount was formed **retroactively**. Furthermore, the agreements included a commitment to **confidentiality**, so that the importers were prohibited from disclosing the contents of such discounts to third parties.

The Competition Tribunal ruled that no other significant economic benefit for the Target Discounts was proved, in the framework of legitimate competition, and that this was a method of discounts introduced to make it difficult for the Port of Haifa to compete in the market. Accordingly, the tribunal concludes that Ashdod Port has abused its monopolistic status.

In conclusion, the Competition Tribunal reduced the amount of the financial sanction imposed by the Competition Commissioner from a total of NIS 9 million to NIS 3,460,000, mainly since the tribunal saw that the Competition Commissioner's estimation of the potential harm resulting from the granting of Target Discounts was exaggerated.

To read the full ruling of the Competition Tribunal regarding Ashdod Port, please [click here](#).

Please note that this document was written by way of summary, and only reflects the position of the authors. It is also clarified that this document does not form a substitute for legal advice.

We will be happy, of course, to be at your disposal for any question or clarification.

For further information please contact:



Avner Finkelshtein, Partner

✉ avnerf@gornitzky.com



Noa Schweitzer Amar, Associate

✉ noas@gornitzky.com