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## The Supreme Court Sets Limits on Granting Rebates by Dominant Firms

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Last month, the Supreme Court rendered a judgment following the Competition Commissioner's (the "**Commissioner**") decision to impose financial sanctions on Ashdod Port Company Ltd. and two of its officers for abuse of dominance. The judgment denied Ashdod Port's appeal, upholding the Commissioner's decision, holding that Ashdod Port's pricing policy of target rebates abused its power as a dominant firm in unloading vehicles imported to Israel from Europe and the United States. Moreover, the Supreme Court upheld the financial sanction of NIS 9 million, imposed by the Commissioner on Ashdod Port, after the lower instance Competition Tribunal had reduced it to NIS 3.5 million.

This is the first Supreme Court judgment addressing the legality of rebates granted by a monopoly, and the first judgment on the matter since the Competition Tribunal's decision on Yedioth Ahronoth from the late 1990s. Hence the great importance of the judgment in setting the adequate policy and the limits that should be applied to the granting of rebates by a monopoly.

The Supreme Court's ruling addressed the Ashdod Port's practice regarding rebates granted to importers of vehicles from Europe and the United States. This policy involved offering rebates for unloading, storage, and handling services within the port area, contingent upon importers meeting individual annual targets for the total number of vehicles they unload at the port. Notably, the rebate was retroactively applied from the first vehicle unloaded at the Port of Ashdod. Importantly, if an importer failed to meet their annual target, they would forfeit the rebate for all vehicles unloaded at the port during that year.

### Quantity Rebate and Target/Loyalty Rebate

The Court reiterated and stressed in its judgment the distinction between quantity and target rebates. **Quantity Rebates** are fixed and uniform rebates provided depending on a

certain quantity purchased by the customer, which apply to all customers without any distinction (objective criteria). **Target Rebates** are differential rebates provided depending on a certain quantity, which is adjusted to a particular customer and its needs (subjective criteria). In this regard, the Honorable Court clarified for the first time that a rebate provided on the basis of the same share of demand to all customers should be considered a target rebate. Thus, for example, a rebate provided to those, who purchase 70% of the services from the provider, as opposed to the rebate based on absolute values, should be considered a target rebate, even though the same purchase share of 70% has been set for all customers in the aforementioned example, given the fact that for each customer it will be a different amount in absolute terms, which does not reflect the same cost savings for the provider. The Court noted that the practice of providing a quantity rebate will be generally considered a desirable one, allowing a monopoly to share the economies of scale with a customer, albeit at times it could also raise competition concerns. On the other hand, target rebate raises competition concerns of being used by a monopoly to block the entry or expansion of competitors. At the same time, the Court clarified that the offering of rebates, whether quantity or target, should not be prohibited categorically, but rather when it has been proven that it has the potential to harm competition or the public.

The Honorable Court also noted that **retroactive rebates** – whether the rebate is given from the beginning and the accounts are settled at the end of the term, or whether the rebate is given only at the end of the term – in themselves give rise to anti-competition concerns, as customers may be deterred from purchasing products from the competitors before meeting the target entitling them to a rebate on the entire volume, and therefore, retroactive rebates may prevent competition based on the merits and circumstances of each transaction.

As to the burden that must be met to prove that a monopoly's rebate policy has the potential to harm competition, the Court clarified that no actual harm to competition has to be proven, but rather whether the rebate policy in question raises a reasonable concern of significant harm to competition. As far as a uniform and permanent quantity rebate applying to all customers is concerned, the burden of convincing that the rebate is improper and does not merely reflect cost savings, rests with the plaintiff (whether it is the Commissioner or a plaintiff in a civil case). On the other hand, as far as a target rebate or a retroactive rebate is concerned, the burden of convincing that this is a legitimate practice that is not intended to harm competitors will rest with the monopoly.

Even if a monopoly cannot provide justification for the rebate policy that it has implemented, it must still be proven that as a result of the said policy, there is a "reasonable concern" of significant harm to the competition or to the public (similar to the standard used in merger approvals).

In this regard, the Honorable Justice Grosskopf stated in his decision that given the concentrated structure of the Israeli market, the ability to argue that there is no real potential to harm competition due to the improper rebate policy is limited and requires substantiated and convincing evidence on the part of a monopoly. However, the Honourable Justices Baron and Amit expressed their reservations about this statement out of concern that the burden on the party claiming a breach will be too low, to the extent of eliminating the requirement to prove potential significant harm to competition, and therefore, the approach of the Honorable Justice Grosskopf in this regard was not accepted.

In their defense, the Port of Ashdod and its officials sought to demonstrate that their rebate policy did not harm competition. They presented data indicating that during the relevant period, the market share of the competing Port of Haifa, which unloads vehicles from the same shipping lines, actually increased. Essentially, Ashdod argued that their rebate policy

didn't lessen competition. However, the Court rejected this argument. They pointed out that it's conceivable that without the Port of Ashdod's rebate policy, the Port of Haifa's market share could have grown by even more. Moreover, the growth in market share occurred towards the end of the rebate policy period, limiting its relevance to the case.

We recommend that any company whose products or services could constitute a monopoly, either due to holding over 50% market share in the relevant market or because the company has significant market power in connection with such products or services, to review its rebate policy concerning such offerings.

Our Firm's Competition and Antitrust Group is available to support in formulating a rebate policy that complies with the guidelines established by the Supreme Court.

To the Supreme Court Judgment (in Hebrew) click [here](#).

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**For additional information** about our firm's Antitrust and Competition group, click [here](#).

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