

Competition - Israel

Antitrust Commissioner Applies 'Illegal *Per-Se*' Approach to Information Exchanges

July 30 2009

Decision Comment

Decision

On April 26 2009 the antitrust commissioner made a declaratory decision pursuant to Section 43(a)(1) of the Antitrust Law, according to which information exchanges concerning fees that were allegedly held between five major banks in Israel constituted an illegal restrictive arrangement.⁽¹⁾ The declaratory decision was published after a prolonged investigation which began in 2004.⁽²⁾

According to the commissioner's decision, from the early 1990s to November 2004 when the investigation commenced, bank executives exchanged information regarding already collected fees, as well as future conduct concerning fees. The commissioner further argued that the Israeli banking industry suffered from ongoing competitive shortcomings, and that it was characterized by substantial entry barriers for competitors and considerable switching barriers for consumers.

While the commissioner acknowledged in her decision that information may play an important role in making markets more competitive, she claimed that such a beneficial outcome was unlikely with respect to the supply of banking services to small businesses and households.

According to the commissioner, the information exchanged between the banks was potentially anti-competitive for two main reasons: (i) it was held in a concentrated market with high entry and transition barriers; and (ii) the information exchanges increased transparency between only the market participants and not between the banks and their customers.

Comment

The commissioner's decision is rather exceptional. While touching upon all the issues raised by the decision is clearly beyond the scope of this update, two principal observations may be made.

First, as a matter of law, the commissioner's decision seems to have deviated from past court rulings, which have stressed that while information exchanges may facilitate the formation of restrictive arrangements or assist in detecting deviation from such arrangements, they are not classified by themselves as restrictive arrangements.

Second, the commissioner's decision seems to have taken a very general, non-case-specific approach to information exchanges in oligopolistic markets, condemning such exchanges based on general assumptions, without making a detailed economic enquiry into their probable effects on competition. The decision seems to apply an 'illegal *per-se*' approach to information exchanges made in oligopolistic markets.

For instance, very little attention was given by the commissioner to the type of information that was allegedly exchanged, even though forward-looking information is associated with completely different theories of harm than current or historic information. Similarly, detailed forward-looking information which contains reference to the timing and rate of a fee change differs dramatically from information which only generally points towards a tendency to raise fees in an unknown rate at an unknown time.

A *per-se* rule which condemns information exchanges among members of an oligopoly is highly debatable: information exchanges should be condemned based only on proper economic analysis, which demonstrates that under the specific circumstances, the practice is harmful. If such detailed analysis does not reasonably suggest that the practice is likely to assist in the creation or maintenance of collusion (tacit or implicit), it

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should be permitted.

This conclusion, which seems to be consistent with economic literature, stems from the fact that information exchanges may be benign in many cases and often even pro-competitive. It is impossible to tell whether information exchanges are harmful based on general 'rule of thumb' tests. Such an approach might yield a less than optimal flow of information in the markets, which would in turn make markets less competitive.

Given that the banks are likely to appeal the commissioner's decision, it seems that the last chapter in this book is yet to be written.

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Endnotes

(1) The banks in question are HaPoalim Bank Ltd, Leumi Le-Israel Bank Ltd, Discount Le-Israel Bank Ltd, the United Mizrahi Bank Ltd and the First International Bank of Israel Ltd.

(2) Tadmor & Co represented First International Bank of Israel Ltd in the hearing process which preceded the antitrust commissioner's decision.

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