

The Ethics of Competition: A Comparison Between Jewish and Antitrust Law

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OUTLINE

1. Modern Antitrust/Competition Law
2. The Jewish Approach to Competition
3. Conclusion



MODERN ANTITRUST/COMPETITION LAW

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GUIDING PRINCIPLES OF MODERN COMPETITION LAW

- Competition enhances consumer welfare and leads to economic efficiency
- Ease of entry is a fundamental component of competitive markets
- The goal of the law is to protect competition and not competitors

THE THREE PILLARS OF MODERN COMPETITION LAW ENFORCEMENT

- Cartels (Section 45 of Competition Act)
- Abuse of Dominance (Section 79 of Competition Act)
- Mergers (Section 92 of Competition Act)

A Beginner's Guide to Competition Law

The purpose of competition law is to make consumers happy.
Competition law can be divided into three broad categories.



Cartels

What is a cartel?

A cartel is when companies gang up with each other to hurt people. Ganging up is bad.

A cartel is where 2-or-more businesses agree not to compete on factors, such as:

- the price of goods/services;
- the level of how much stuff they make;
- the location they supply.

How are cartels harmful?

Cartels lead to consumers paying more for products/services than if businesses were competing. This means that cartels are stealing your money. Stealing is bad.

How are cartels dealt with?

If you gang up as part of a cartel, you go to jail. You also pay a fine for lots of money.

What is a merger?

A merger happens where 2-or-more companies combine into one company. An example would be if Coke merged with Pepsi – would you call it “Pepsi-Coke”, “Coke-Pepsi” or just “Something that kids should not drink because it has caffeine and sugar”?

How can mergers be harmful?

More often than not, mergers are good for consumers because the combined company can be more *efficient* (that is a fancy word for *better*). But sometimes a merger in a market can lead to situations where you have either bullying or ganging up.



Monopolization

What is monopolization?

Monopolization is bullying by a single company. Bullying is bad. It is also against the law. Monopolization happens when a bigger company acts in such a way that it is able to control prices or exclude others to unfairly make money (profits) at the expense of the other companies. Put differently, the big company is mean to the little companies. Being mean and being unfair is bad.

How is monopolization harmful?

Without the bullying, prices could be lower than if the monopolist's (the bully's) behavior was not harmful. Lower prices means more money for you to have to save for college, buy ice cream or toys.

How are monopolists dealt with?

Sometimes you fine the monopolists (make them pay lots of money). You can also get them to stop their bullying.

The Happy



Consumer

Mergers



How are mergers dealt with?

Competition law allows you to stop the merger from happening if the merger would be harmful, or force some of the combined business to be sold to new or smaller competitors. Either way, there won't be any bullying or ganging up to worry about.

COMPETITION LAW AND THE PROFESSIONS

- Canadian competition law has been concerned with the conduct of professional and other trade associations from the start (1889)
- By one count, associations have been implicated in over 50 competitions cases in Canada, involving a wide range of industries and activities

WHY THE CONCERN?

- Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*:
 - "People of the same trade seldom meet, even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."

EXCLUSIONARY CONDUCT

- In a speech earlier this year, Commissioner of Competition John Pecman highlighted several competition law risks for trade associations including:
 - Efforts to exclude new and innovative forms of competition
- Examples of cases/investigations focussing on this issue:
 - Interac
 - Canadian Real Estate Association
 - Toronto Real Estate Board
 - NHL franchise relocation

COMPETITION AND THE LEGAL PROFESSION

- Several leading competition cases in Canada have involved enforcement action against conduct by governing bodies of the legal profession:
 - *Jabour* (advertising restrictions)
 - *Kent County Law Association* (enforcement of rate schedule)
- Bureau study of self-regulated professions in 2007 identified several additional areas of concern:
 - Restrictions on entry to profession;
 - Restrictions on mobility;
 - Restrictions on business structure;
 - Restrictions on scope of services/practice

REGULATED CONDUCT DEFENCE

- Canadian law recognizes that professions may be exempt from competition law enforcement if satisfy criteria of "regulated conduct defence" ("RCD")
 - Conduct is mandated or authorized
 - Validly enacted provincial or federal legislation
 - Authority to regulate has been exercised
 - Conduct has not hindered or frustrated regulatory regime
- Competition Bureau intent on narrowing scope of RCD



JEWISH LAW AND COMPETITION



THE "ETHICS" OF COMPETITION

- In contrast to the "modern" approach, competition is suspect from a Jewish ethical/moral perspective:
 - *Yevamot* 78b – Eliminating an individual's ability to earn a livelihood is the equivalent of murder
 - *Makot* 24a – According to David HaMelech, one of the eleven principles of halachic life is that one should not compete with another person's business

APPLICATION IN PRACTICE: THE *MAVOI* SCENARIO

- Focus of today's discussion will be on a specific competition issue: What is the attitude of Jewish law towards entry of new competitors?
- The scenario is set out in *Bava Batra* 21b:
 - A resident of a *mavoi* (alleyway) operates a flour mill. A fellow resident of the *mavoi* subsequently establishes a competing mill next to his.
- Issue: Does the law enjoin the new entrant from competing against the incumbent?

THE *MAVOI* SCENARIO: RAV HUNA'S RESTRICTIONIST VIEW

➤ Rav Huna says:

- The incumbent mill owner is entitled in all circumstances to stop the new entrant from operating on the grounds that the new mill owner would deprive him of customers and interfere with his livelihood

THE *MAVOI* SCENARIO: REVIEW OF PRECEDENTS

- The Gemara considers several precedents to assess whether Rav Huna's view is supported by authority:
 - The fisherman and his net
 - The storekeeper's nuts
 - The boys in the bathhouse
 - The craftsmen *b'raita*

THE *MAVOI* SCENARIO: RAV HUNA II'S MORE PERMISSIVE VIEW

- Rav Huna, son of Rav Yehosha ("Rav Huna II"), offers a synthesis with a more permissive approach:
 - A resident of a *mavoi* cannot prevent another resident of his own *mavoi* from operating a competing flour mill in that *mavoi* but he can prevent a non-resident from another town from doing so

RAV HUNA II's PROTECTIONIST PRINCIPLE

- Based on Rav Huna II, we learn that one basis for restricting entry is to protect local businesses from external competition
- Certain exceptions:
 - itinerant pedlars selling cosmetics
 - freedom of entry on market days
 - debt collectors
 - teachers (*kinat sofrim tarbeh chochma*)

RAV HUNA II's PROTECTIONIST PRINCIPLE (cont'd)

➤ Questions:

- How does one define local vs. external?
- Is there any way for the external competitor to "go native"?

THE "RUINOUS" COMPETITION PRINCIPLE

- Another basis for restricting entry developed by later authorities is if it would expose the incumbent business(es) to financial ruin
 - This rule even trumps Rav Huna II's holding that a resident of the same *mavoi* can open a competing business
 - The *Chatam Sofer*: a community may administer lashes to a new competitor who eliminates the original business's ability to earn a living

"RUINOUS" COMPETITION: EXAMPLES

- *The Aviasaf:*
 - It is forbidden to open a store at the entrance of a *mavoi satum* (dead-end alley) if a similar store is already located further inside the alley
- *The Rama (Darchei Moshe 156:4):*
 - A rival publisher of the *Mishneh Torah* is prohibited from competing against the original publisher because this would ruin the latter's business
- *Mas'at Binyamin:*
 - A new entrant cannot start up a business where it is clear that the community can only support one business of this kind

WHAT IS "RUINOUS" COMPETITION:

➤ The broad view:

- Rav Moshe Sofer: It is only necessary to demonstrate that a particular line of business or source of revenue is ruinously affected, not the business/livelihood as a whole
- Rav Moshe Feinstein: Not limited to destroying the original business owner's livelihood – extends to taking away his/her ability to afford as much as an average person in that socioeconomic class

WHAT IS "RUINOUS" COMPETITION: (cont'd)

- The narrower view:
 - The *Rama*: Prohibition does not apply if the new merchant is offering better prices or better quality of merchandise
 - Rav Ezra Basri: One can open a competing business but not solicit existing customers (no advertising)
 - *Chavot Ya'ir*: Competing is technically permitted (for local residents) but it is a sign of piety not to do so
 - Aaron Levine: Prohibition does not apply if the original business has the ability and resources to modify its operations in order to compete

A "WURST" CASE SCENARIO: LEVITTS v. COR

- Toronto case involving rabbinical prohibition on importation of meat from outside the city (ban on *shechitat chutz*)
- Prospective importer sought ruling in civil courts
- Held: this issue is to be decided by religious not civil law

CONCLUSION

- In contrast to modern competition law, Jewish tradition:
 - Acknowledges the importance of competition, but does not hold it up as a pre-eminent value
 - Is prepared to restrict entry in certain circumstances
 - Is prepared to protect specific competitors (based on incumbency/location) in certain circumstances
- To what extent is Jewish law now influenced by the approach of modern antitrust law?

ADDITIONAL READING

- Rabbi Chaim Jachter, "Hasagat Gevul: Economic Competition in Jewish Law", from *Gray Matter: Discourses in Contemporary Halacha*
- Carlton and Weiss, "The Economics of Religion, Jewish Survival, and Jewish Attitudes Toward Competition in Torah Education", 30 *Journal of Legal Studies* 235 (2001)
- Aaron Levine, *Free Enterprise and Jewish Law* (1980)
- Meir Tamari, *With All Your Possessions: Jewish Ethics and Economic Life* (1987)

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