Israel

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Overview of the law and enforcement regime relating to cartels

On January 1, 2019, the Israeli parliament enacted a significant amendment to the Economic Competition Law Act, 5748-1988 ("**ECL**"), which regulates cartel activity as well as other forms of anti-competitive behaviour. As will be described below, the amendment strengthened both criminal and administrative sanctions for violations, and introduced stricter levels of responsibility for officers and managers in firms where anti-competitive activity has taken place. This amendment reflects a broader trend in the halls of Israeli government and general public discourse is taking competition law increasingly seriously.

The ECL regulates four main areas of commercial activity: restrictive arrangements; mergers; the abuse of monopolistic power; and oligopolistic behaviour in concentrated markets. Cartels are treated as a specific instance of a restrictive arrangement. Violation of the ECL's provisions is a tort actionable by anyone injured by such violation, a criminal offence, and can lead to the imposition of administrative sanctions including fines. The Israel Competition Authority ("ICA"), headed by the Director General, is the administrative agency tasked with protecting and promoting competition in the Israeli market. It is divided into legal, economic, and investigative branches, and has the authority to prosecute criminal violations of the ECL. The ICA also issues memoranda and directives aimed at developing Israeli competition law. Chapter 5 of the ECL established a designated judicial tribunal, residing within the District Court of Jerusalem. This Tribunal has the exclusive authority to hear appeals on the Director General's decisions, and to approve restrictive arrangements.

Due to its small size and relative economic insularity, the Israeli market has historically been prone to cartelisation. In order to establish maximum oversight over cartels and other forms of restrictive arrangements, Section 2 of the ECL adopted an expansive definition of "Restrictive Agreement":

> " 2. Restrictive Arrangement
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> (a) (…) an arrangement entered into by persons conducting business, according to which at least one of the parties restricts itself in a manner liable to eliminate or reduce the business competition between it and the other parties to the arrangement, or any of them, or between it and a person not party to the arrangement.
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> (b) Without derogating from the generality of the provisions of subsection (a), an arrangement involving a restraint relating to one of the following issues shall be deemed to be a restrictive arrangement:
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> 1. The price to be demanded, offered or paid;
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> 2. The profit to be obtained;

3. Division of all or part of the market, according to the location of the business or according to the persons or type of persons with whom business is to be conducted;
4. The quantity, quality or type of assets or services in the business."

Israeli caselaw has interpreted the above definition as containing four elements: **A)** the existence of an "arrangement"; **B)** between persons conducting business; **C)** the restriction of a party to the arrangement; and **D)** the restriction is liable to impede competition, or falls into one of the *per se* categories listed in sub-section (b).

Each of these elements has been given a broad interpretation by the courts in order to achieve the ECL's purpose of maximum administrative oversight over cartelistic behaviour. The ECL itself defines an "arrangement" as any arrangement "whether express or implied, whether written, oral or by behaviour, whether or not legally binding". "Conducting business" includes "the production, sale, marketing, acquisition, import or export of an asset as well as engaging in the provision or the receipt of a service". The element of "restriction" has been interpreted somewhat inconsistently, and recent judicial decisions have opined that it should be treated as secondary in importance. As a result, the courts have emphasised the final element in the ECL definition – liable to reduce competition. The reduction in competition does not have be proven, or even to occur; liability to reduce competition in any measure (beyond *de minimis*) and in any market is sufficient to fulfil this final element. The end result is that the ECL's probation has very broad scope indeed.

In order to temper the broad definition, the ECL exempts several categories of restrictive arrangements from the prohibition on enacting a restrictive arrangement, and the Director General has issued several "block exemptions". An arrangement will fall under the ambit of the relevant block exemption if it does not significantly affect competition and if it does not include any unnecessary restraints. Some of the major block exemptions passed include: Joint Loans Arrangements (2018); Joint Ventures for Marketing and Supplying Military Equipment Abroad (2015); Restraints Ancillary to Merger Agreements (2014); Arrangements Between Air Carriers (2013); Non-Horizontal Arrangements that do not Contain Certain Price Restraints (2013); Arrangements Between Air Transportation Carriers Engaging in the Marketing of Flight Capacity to Destinations Subject to "Open Sky" Arrangements (2012); Operational Arrangements Between International Maritime Transportation Carriers (2012); Restrictive Arrangements Causing Immaterial Harm to Competition (*De Minimis*) (2011); Joint Ventures (2011); Research and Development Agreements (2011); Exclusive Purchase Agreements (2011); Exclusive Distribution Agreements (2011); Franchise Agreements (2011); and Arrangements Between Related Companies (2011).

The Director General is empowered to grant specific exemptions for restrictive arrangements that don't present a threat to competition. The General Director's exemption – or alternatively, the refusal to grant such an exemption – is subject to appeal before the Antitrust Tribunal. The Tribunal is also empowered to grant exemptions for restrictive arrangements, and has broader discretion to do so for general "public interest", even if the arrangement will impede competition.

Overview of investigative powers in Israel

Sections 45 and 46 of the ECL grant the ICA significant investigative powers, including powers of search, seizure, interrogation and detention. The ICA's investigative department may initiate investigations into a suspected violation of the ECL, or may investigate on the basis of third party complaints. Investigations may be executed secretly or publicly, and the

ICA may obtain a search warrant to enter private premises, seize evidence including evidence stored on electronic media, and interrogate witnesses. The ICA's investigations are frequently conducted in conjunction with other investigative authorities, such as the Israeli Securities Agency. The ICA may also obtain warrants to arrest suspects if the need arises. Suspects and witnesses are afforded the same rights and protections in ICA investigations as they are in general criminal investigations, including the right to counsel, rights to fair procedure, and the right against self-incrimination during investigations. Non-cooperation with investigations, including the exercise of the right to remain silent, may be used as supporting evidence in a criminal trial. Additionally, the ICA may impose administrative fines for refusal to produce documents required for an investigation.

Overview of cartel enforcement activity during the last 12 months

This year the courts finished the proceedings in the Water Metre Cartel, wherein six companies and their executives faced criminal charges for a series of cartel actives over the course of several years. Six executives were given prison sentences (between a month-and-a-half to six months), as well as disqualification from serving as companies directors for five years, and the companies were fined between 40,000 NIS (12,000 US$) to NIS 750,000 (215,000 US$) per company. In the appeal, the Supreme Court upheld the district court's decision while noting that antitrust punishment should be more stringent.

In September 2019, several IT companies and officers therein were convicted of bid-rigging state tenders. The court ruled that the defendants exhibited a clear pattern of collusion and cartelisation and cost the state millions of NIS in cartelistic overcharges. As of the time of writing, the punishments for the convicted parties have not yet been set.

Earlier in the year, the Competition Authority, along with the Tax Authority, indicted several contractors for bid rigging and money laundering. According to the letter of indictment, the contractors established fictitious companies in order to hide illegal payments and to rig tenders for public works and building projects.

The Competition Authority is pursuing the prosecution of four travel agencies and eight executives involved in rigging tenders released by the Israeli Ministry of Education for youth delegations to Poland as part of the Holocaust memorial studies. According to the indictment, as a result of the cartelisation the companies received hundreds of millions of NIS in surplus charges.

The ICA has also opened criminal investigations for suspected cartel activity in various sectors of the Israeli market, including cooking gas and elevator repair.

Class action suits remain the preferred avenue for civil cartel enforcement, and several class actions have been submitted to Israeli courts regarding cartel damages. Actions have been submitted against Israeli cartels under investigation by the ICA, such as the cooking gas and mentioned above. However, plaintiffs have also lodged suits against foreign corporations whose activities fall outside of the ICA'S jurisdiction. These actions are often based on the findings of foreign courts and investigative authorities.

Key issues in relation to enforcement policy

The past several years have witnessed a clear trend towards stricter enforcement and harsher punishment for violations of the ECL. Throughout the early 2000s, courts often employed rhetoric regarding the severity of cartel activity and the need to incarcerate offenders. Such rhetoric was, and remains, common regarding all white-collar crimes. In practice, however,

sentences for cartel activity tended not to exceed fines and a suspended minor prison sentence or community service. In the past several years, however, the level of punishment has risen significantly, with longer sentences and higher fines becoming more common. In a recent decision regarding a cartelisation attempt by a major grocery chain, the Supreme Court made it clear that punishments should continue to involve prison terms, and that those terms should become more severe. The Court sentenced the supermarket's CEO to prison for an attempted vertical restrictive arrangement – a form of restrictive arrangement that is viewed as less severe than horizontal arrangements. A similar trend can be observed regarding administrative fines. The 2019 amendment to the ECL increased the maximum prison sentence for a restrictive arrangement from three to five years (even without proof of aggravated circumstances). The offence is now classified as a felony and not as a misdemeanour, raising the prescription period from five years to 10 years.

Key issues in relation to investigation and decision-making procedures

Oversight of the ICA's investigative, criminal and administrative decisions is broadly similar to the oversight of police and other law enforcement agencies' decisions. Prior to reaching a decision that has the potential to inflict significant harm upon a party, such as imposing an administrative fine or issuing an indictment for a felony offence, the party is entitled to a hearing to make his case. Most decisions taken by the ICA, including decisions regarding the seizure of materials, interrogations or any other decision that may impinge on the defendant's rights, are subject to judicial review before the Antitrust Tribunal or the High Court of Justice.

A recent development regarding the ICA's investigative powers was made in response to recommendations made by a 2011 government commission on restructuring certain aspects of Israel's economy (the Trajtenberg Committee). The ICA established a Competitiveness Division which extends the ICA's investigative powers, allowing it to undertake in-depth research into various sectors of the Israeli market and appraise its level of competitiveness. This means that the ICA is not restricted to investigating specific violations of the ECL regarding which it has received information; rather it can uncover and address such violations through its own pro-active research. The Division is empowered to demand information from private actors in the relevant market sectors, and those who refuse to cooperate face the criminal sanctions for non-cooperation listed above. The results of the Division's research are published in public reports, which can then be used for civil, administrative or criminal enforcement, as is relevant, or for regulatory policy decisions.

Leniency/amnesty regime

In 2005, the Attorney General issued a directive announcing that the ICA would operate a whistleblower leniency programme that operated under principles similar to those of the state witness programme. The programme offers immunity from prosecution to the first member of a cartel (either an individual or a corporation) who provides the ICA with information regarding the cartel activity and fully cooperates with the investigation. Any party involved in previous cartels is not eligible for the leniency programme. Leniency granted to a corporation will be extended to all officers, directors and employees who fully cooperate with investigations. The ICA's leniency programme does not provide protection from civil suits filed for damages caused by the cartel's activities. In a recently published memorandum, the General Director stated that administrative fines would not be imposed on a party that was granted criminal immunity. As the programme has been used infrequently, it is difficult to appraise the programme's effectiveness.

Administrative settlement of cases

The ICA has two main administrative tools for settling cartel cases: consent decrees and administrative fines. Under a consent decree, a party being investigated for violations of the ECL may agree to cease offending behaviour and pay a fine to the state treasury in exchange for the ICA agreeing not to press criminal charges. The sum of the fine varies widely based on the severity of the infraction and the size of the company being investigated. A consent decree must be approved by the Antitrust Tribunal before taking effect.

The ICA may instead opt to impose an administrative fine for breaches of ECL.

The ECL stipulates certain factors that the ICA must consider when assessing the fine to be imposed. A fine imposed on an individual may not exceed approximately 1 million NIS (263,000 US$), and a fine imposed on a corporation may not exceed 8% of its annual turnover, up to a maximum sum of approximately 100 million NIS ($29 million US$). These maximum sums reflect the baseline from which the actual fine will be determined, after taking into account the extent and severity of the violation, as well as mitigating circumstances of the violator or the violation which would justify increasing or decreasing the severity of the fine. Prior to imposing a fine, the IAA must invite the offender to a hearing. The decision to impose a fine is subject to appeal before the Antitrust Tribunal.

Third party complaints

The ICA has an open "public complaints" line, through which third parties may submit complaints regarding cartel activity or provide information regarding ongoing investigations. Complaints and information may be submitted anonymously. The ICA sees third-party complaints as an important component of its activities, as they augment the ICA's investigative resources. The ICA is afforded broad discretion with regard to follow-up on third party complaints, but a decision not to investigate a complaint, or to cease such investigation without imposing a sanction, is subject to judicial review before the High Court of Justice.

Civil penalties and sanctions

Violation of the ECL's provisions is a tort, and can be brought to court under the general rules of civil procedure. As such, plaintiffs bear the burden of proof regarding all elements of the tort (cartelistic behaviour, damages, and causation), and only proven pecuniary and non-pecuniary damages will be awarded. There is no provision in the ECL allowing for treble damages, and the general approach of Israeli tort law is to award exemplary damages only in rare and extreme circumstances. The General Director's determination that an agreement amounts to a restrictive arrangement in violation of the ECL is considered *prima facie* evidence in civil proceedings. Plaintiffs can also petition the court for injunctive relief from cartel activity, although such proceedings are rare. The Israeli Class Action Law provides that violations of the ECL can be brought to court as class actions. Due to the significant damages that class actions can yield, such actions have become an especially effective device in deterring cartelistic activity.

Right of appeal against civil liability and penalties

Defendants have the right to appeal all rulings imposing civil, administrative or criminal liability for breach of the ECL provisions. A ruling by a competent civil court of first instance can be appealed by the plaintiff or the respondent, as the case may be, within 45 days. Administrative fines imposed by the ICA can be appealed before the Antitrust Tribunal within 30 days. The Antitrust Tribunal's judgments can be appealed before the Supreme Court within 45 days.

Criminal sanctions

Criminal sanctions for violation of the ECL include fines (up to approximately 4.5 million NIS (1,292,000 US$) for a corporation or approximately 2.2 million NIS (645,000 US$) for an individual). The amended law increased criminal penalties for restrictive arrangements to up to five years' imprisonment.

Officers of an offending company are subject to a judicial presumption of guilt for the criminal actions of the companies that they serve. The ECL specifically provides that an acting officer or senior manager will be held criminally responsible for the company's actions, unless he proves he did everything possible to fulfil his duty to prevent breaches of the ECL".

Officers in the corporation have an independent duty to supervise and do everything possible to prevent the breach of law by the corporation or employees. Breach of the supervisory duty is punishable by up to one year in prison and a financial fine, whether or not an actual violation of the ECL was committed by the corporation. This is a significant change to the criminal liability of officers who were not personally involved in the violation of the law. The Antitrust Tribunal may also decide to bar individuals from holding directorial positions in publicly traded companies and impose suspended sentences.

Cross-border issues

The ECL does not have extra-territorial application, meaning that the ICA only has jurisdiction over cartels that operate within Israel. There is no need, however, for the cartel members to be Israeli or for them to have met within the borders of the country. In the Gas-Insulated Switchgear Cartel, for example, it was decided that the fact that the cartel rigged tenders issued by the Israeli Electric Company and sold cartelised products directly to Israeli companies was sufficient for the ICA and the Israeli courts to establish jurisdiction over the cartel's members. The territorial limitations of the ECL do not impede civil suits filed against foreign cartel members, as damages incurred in Israel establish Israeli jurisdiction in tort suits. In such cases, plaintiffs are required to petition the court for leave to serve court documents outside of the jurisdiction. Defendants may convince the Israeli court that the leave should be cancelled based on the doctrine of *forum non conveniens.*

Developments in private enforcement of antitrust laws

The use of class action suits as a tool for private enforcement of antitrust laws – especially as a tool to sanction foreign cartels that indirectly affect the Israeli market – remains the most significant development in this area. The typical foreign-cartel class action involves a situation wherein a foreign cartel produces components that are purchased by a third-party and incorporated into products assembled outside of Israel. Those products are then sold down-stream to Israeli consumers who purchase them and incur damage due to the overcharge included in the cartelised component being passed on to the price paid by the end consumer. In such instances, plaintiffs often rely on foreign investigations and criminal or civil proceedings regarding international cartels. While such proceedings are not "adopted" by the courts outright, plaintiffs can rely on the evidence submitted and the economic models employed to prove the elements of tort and quantify the damages. Israeli class actions are often settled outside of court due to the extended processing times and uncertainty involved in seeing a case through to conclusion. Due to the importance of class action suits to the integrity of the antitrust regime, the ICA has a representative on the Ministry of Justice's Class Action Support Fund, which provides funding to class action plaintiffs to ensure that such actions can be successfully pursued.

Another major development in private enforcement of antitrust laws is the ongoing debate regarding excessive monopolistic pricing. Section 29A of the ECL prohibits a monopolist from abusing its dominant position, including by: "Establishing an unfair buying or selling price for the asset or service over which the monopoly exists". In 2016, the Director General of the ICA issued a memorandum stating that a monopolist may be accused of excessive pricing if it charges a price that exceeds the competitive price for the same product, if there is no reasonable relation between its economic value and its price, or if the profit margins greatly exceed the profits reaped from similar products in competitive markets. A precedential ruling by the Supreme Court clarifying the binding judicial stance on excessive pricing has not yet been issued, but district courts have certified several class action suits based on this cause of action.

Reform proposals

In 2005, a draft amendment to the RTPA was presented to the Knesset, with the intent of amending the definition of "Restrictive Arrangement" in Section 2. The draft amendment was not accepted, but it still has many supporters, and its propositions are re-introduced from time to time. The definition of a restrictive arrangement (see above), as it stands now, is overly broad, and can be applied to almost any commercial arrangement, whether or not it has any impact on the competitiveness of the market. This, combined with the fact that the ECL imposes a regime of strict criminal liability, creates a situation of high-stakes uncertainty which can impede legitimate business activity. On the other hand, a literal reading of the definition indicates that the arrangement must impede competition in the restricted parties' market. This reading could exclude arrangements wherein only one party restricts itself, but the restriction affects the other party's market (for example, if a food producer agreed to sell only to one grocery chain, thereby impeding the competition in the grocery resale market).

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