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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

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Israel

1. Introduction

1. The Israel Competition Authority (hereafter – the "ICA") is responsible for maintaining and promoting competition in the Israeli economy.
2. The Economic Competition Law-1988 (hereafter – the "Competition Law"), which is the primary normative source for the competition regime in Israel, provides the Director General of the ICA with various powers that make it possible to address anti-competitive behavior in all its forms. The Director General has supervision authority, mainly on merger control and regulating restricted arrangements by allowing or denying exemptions from obtaining judicial approval. Furthermore, the Competition Law offers various tools to enforce the provisions of the law when they are violated. These measures contain both criminal and administrative enforcement powers, concerning *inter alia* restrictive arrangements (i.g cartels), monopolies which abuse their dominant position, refusals to deal and unlawful mergers (i.g gun jumping).
3. In addition to its mandate to enforce the provisions of the Competition Law, the ICA serves as an expert advisory body to the Israeli government and parliament in competition issues. Subsequently, one of the key capacities of the ICA involves offering its professional know-how and expertise to various government bodies and disseminating competition principles among them.
4. Access to information held by the ICA varies according to the legal framework in which it is petitioned and the identity of the discovery petitioner.
5. The scope of access to the case file ranges from broad discovery, which typically applies with reference to defendants in criminal cases; a narrower discovery in administrative procedures; more limited discovery granted to petitioners under the Freedom of Information Law.¹
6. This paper intends to provide an overview of various scenarios relating to access to case files and protection of confidential information held by the ICA.²
7. The paper will begin with an introduction to the normative framework under which a discovery could be made, followed by an analysis of the Israeli Competition Tribunal (hereafter – the "Competition Tribunal") substantive approach as reflected in decisions concerning merger transactions; and will conclude with a discussion of recent Israeli case law on the subject.

¹ The Freedom of Information Law-1998 (hereafter - the "Freedom of Information Law")

² Note, that this contribution does not purport to address all aspects of the issue.

2. Access to file in a criminal procedure

2.1. Defendants' rights to access a case file - legal framework

8. As mentioned above, Israeli Competition Law consists of both criminal and administrative/civil procedure.

9. The primary target of criminal prosecution under the Competition Law is anticompetitive restrictive arrangements by hard-core cartels. Criminal cases brought by the ICA are adjudicated in the District Court instance,³ and its rulings are subject to appeal before the Supreme Court of Israel (hereafter - the "Supreme Court"). Accordingly, criminal violations are enforced through Israel's criminal procedure.

10. Section 74 to the Criminal Procedure Law [Consolidated Version]-1982 (hereafter – the "Criminal Procedure Law") states that:

"(A)(1)After the filing of an indictment for a felony or a misdemeanor, the defendant and his defense attorney...will be entitled at any reasonable time, to inspect the prosecution's investigation material and the list of material gathered or recorded by the investigating authority as it pertains to the indictment, and to make a copy of it....

.....

*(B) A defendant is entitled to ask the court in which the indictment was filed to instruct the prosecutor to allow him to inspect materials, which in the defendant's opinion, constitute **investigation materials** and which were not made available for his inspection."*

11. The Supreme Court defined "investigation materials" as the evidential material which the indictment was based upon. This includes any relevant information, which can provide assistance, in a direct or indirect manner to the defense.⁴

12. In general, under Israeli law, the rule of thumb regarding access to file for the defense in a criminal procedure is the superiority of the defendants' rights to defend himself in court.⁵

2.2. Defendants' rights to access a case file - Exceptions

13. A defendant's right to inspect investigation materials does not typically include access to internal records of the State. The reason for this rule lies in the public interest to allow civil servants the opportunity to bring forward their personal opinion freely in the course of their work, without fear that this information will be provided to external parties.⁶

14. Another exception to section 74(A) of the Criminal Procedure Law is that generally, any material that is classified as confidential by the Evidence Ordinance⁷ will

³ According to a temporary order (one year as of 31 March 2019), excluding pending cases, criminal antitrust matters shall be deliberated before the Central District Court of Lod.

⁴ Appeal (criminal) 2043/05 State of Israel v. Gad Zeevi (15.9.2005), Section 15.

⁵ Appeal (criminal) 7064/08 State of Israel v. Liora Berko (13.8.2009), Section 30.

⁶ Appeal (criminal) 6507/09 Moshe Katzav v. State of Israel (13.9.2009), Section 14.

⁷ Evidence Ordinance [New Version] – 1971, Chapter C.

not be disclosed to the defense.⁸ The grounds for classifying information as confidential are mainly due to privilege in interest of the state and privilege in the public interest.⁹

15. Notably, while it is possible to disclose trade secrets in the framework of a criminal proceeding, the court has discretion to direct the disclosure in a manner, which would minimize the commercial harm. An example for such instructions, granted by court, was in the "Frozen Vegetables Cartel".¹⁰ In that case, when the ICA's investigators videotaped a production line of one of the defendants, the defendant filed a motion to deny access to the tape from the other defendants, based on the argument that it contained trade secrets. The court rejected the motion, but ordered all of defendants' counsel to keep the information on the tape confidential and instructed that the trade secrets included in the tape, will not be made public.¹¹

16. Maximum disclosure to defendants is one of the most important rights in the criminal procedure that assure a fair and transparent judicial process. Therefore, defendants have a unique privilege to appeal before the Supreme Court, during the trial, on a decision denying disclosure of information. This is an unusual right granted to defendants, as most interim decisions can be challenged at the end of a trial.

2.3. Third party's rights for access to information obtained in a criminal investigation

17. The guidelines on access to a criminal case file held by an investigating authority, by various governmental or private entities, is set forth in the State Attorney Guideline on this matter (hereafter – the "Guideline").¹² Notably, although the Freedom of Information Law – the remit of which shall be discussed below – does not extend to such information, the Guideline allows in the appropriate circumstances, access to information that was obtained during a criminal investigation.

2.3.1. Criteria for granting or denying access

18. The Guideline defines the identity of the party, its linkage to the information, as well as the cause for requesting access to the information - as principles for making a balanced decision. In general, the willingness to disclose information will increase if disclosing the information will serve a tangent cause to the purpose of gathering the information – law enforcement (e.g. a complainant that is considering appealing against a decision to close a case, an official appointed by the court such as a liquidator, estate manager, official receiver, etc.).

19. Another criterion effecting the decision whether to grant access to the information could be the public interest in revealing the information. Public interest in the due function of law enforcement agencies is considered a major element of the decision over the

⁸ Criminal Procedure Law, Section 78.

⁹ Evidence Ordinance [New Version] – 1971, Sections 44-45.

¹⁰ Criminal Case (antitrust) 960/05 State of Israel (the General Director of Competition) v. Avi Margalit (12.12.2005).

¹¹ Ibid, Section 20.

¹² State Attorney Guideline 14.8 - Request from various parties to access the information the information contained in an investigation file (last updated on 4.9.2019).

disclosure process. This stems from the necessity of the information gathered by the agencies for their effective enforcement in the criminal court system.

20. Therefore, the state will not allow access to information that can damage current or future investigations, exposure of methods, means and technics used by law enforcers. Such information, the access to which would be denied by the state, can include internal opinions and records, exchanging data amongst law agencies etc.

21. Moreover, assuring the public trust and preserving cooperation with the authorities is another main component of the public interest. Any attempt to misuse the investigation proceedings in a way that can damage witnesses or impact privacy issues and so on will be taken into account.

22. Finally, the Guideline states that no access will be granted to information that is protected by law, e.g criminal records, wiretapping, sentencing and victim impact reports made by the probation service, identification and biometry database, personal data of victims.

23. To conclude this chapter, under Israeli law, broad access to information acquired in a criminal investigation is granted to defendants. The only exceptions are those that are specified in the relevant-specific law. Conversely, the law applies considerable restrictions when third parties request access to the same information. The public interest to disclose such information (to third parties) has to be high in order to justify such access. This is because of the concern of misusing information gained in a criminal investigation.

3. Access to file in an administrative procedure

3.1. General – Conflicting interests

24. The Director General's administrative decisions (such as merger blocking or imposing administrative fines due to certain violations of the Competition Law) can be appealed before the Competition Tribunal, residing within the District Court of Jerusalem, which has exclusive jurisdiction over non-criminal regulatory competition proceedings.¹³ The Competition Tribunal's rulings are subject to appeal before the Supreme Court.

25. Disclosure proceedings in an administrative procedure are complex and require significant input from all parties involved. Nevertheless, this is a necessary and vital stage due to the conflicting interests of the parties involved.

26. Firstly, the public interest in ensuring the Director General's ability to make informed decisions, as he must receive information from various market players in order to make an accurate decision. Naturally, such information contains trade secrets, sensitive and valuable commercial information. There is no alternative for collecting confidential information when making such decisions that the Director General is authorized and even obliged to make.

¹³ In this regard, elaboration on the specialized nature of the Competition Tribunal can be found in the ICA's Submission in the OECD Working Party 3 meeting on 4 June 2019. See [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2019\)11/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2019)11/en/pdf)

27. Secondly, the parties that are required by law to disclose the information have a legitimate interest in keeping it confidential, preventing commercial harm as a result of being exposed to competitors or subsequent links in the supply chain.

28. Thirdly, the right of the appellant to conduct an effective and fair judicial review of the Director General's decision.

29. The different and conflicting interests required a thoughtful and creative flexibility by all parties involved. Over the years, solutions were created and evolved in order to allow the necessary balance.

3.2. The legal framework for obtaining information

30. Under its mandate to review mergers, enforce violations of the Competition Law and to conduct market research, the ICA requires information from different parties - the competitors in relevant markets, their customers, suppliers or any other third parties that can provide relevant information relating to the question at scrutiny.

31. Such requirements can include information from competitors in the relevant market and their market shares, barriers to entry, switching costs, capacity level, expected technological changes and so on. Some of which are hard-core trade secrets.

32. The main normative source for collecting data by the ICA in an administrative procedure is set forth in section 46(b) to the Competition Law:

46.

(b) Every person is obliged, upon the demand of the Director-General or a civil servant authorized by him for this purpose, to give him the information, documents, registers and other records which in the Director-General's opinion may ensure or facilitate the implementation of this Law.

3.3. The parties that are granted access to the case file

33. The Competition Tribunal is vested *inter alia* with the authority to review decisions made by the Director General. Such decisions include an approval or an objection to a merger, determinations of abusive behavior by a monopoly and other determinations made by the Director General (concerning for instance, a restrictive arrangement),¹⁴ as well as on the Director General's decisions to impose administrative fines on corporations and on individuals with reference to certain violations of the Competition Law.¹⁵

34. The Israeli Administrative Tribunals Law-1992 (hereafter – the "Administrative Tribunals Law") sets forth in Section 30(a) titled "Review of the Authority's Case File" that *"Anyone who is entitled to appeal on a decision of an administrative authority is entitled to review documents held by the authority relating to the decision (hereafter – the "file"), and to copy documents from the file."*

35. Only Corporations, individuals and organizations that have standing to appeal before the Competition Tribunal can request the ICA to access the case file.¹⁶ Such a

¹⁴ The Competition Law, Sections 22, 26(a) and 43.

¹⁵ Ibid, Section 50(13).

¹⁶ Noted that third parties that wish to challenge ICA's decisions before the Competition Tribunal will receive standing after showing that they may suffer from an "antitrust injury" as a result from

request, to the ICA can be made prior to submitting an appeal (hereafter – the "Preliminary Stage").¹⁷ Access at the Preliminary Stage will be limited, compared to a wider right to access the case file when it is facing judicial review.

3.4. Excluded information

36. Section 30(b) to the Administrative Tribunals Law excludes from the right to review certain types of documents or partial documents (hereafter – the "excluded documents") such as: documents that have no bearing on the decision which is appealed; documents that contain a professional or trade secret, or confidential knowledge within the meaning of any law; state security, foreign relations or an important public interest requires that they would not be allowed to be reviewed; confidential evidence under the law; internal material, such as: records from internal discussions, reporting to superiors, proposals and draft decisions; reviewing documents that may infringe on another person's right or personal interest; documents that are relate to the appointment, assignment, personal appraisal, competence of a person or position, including the appellant. Provided the preclusion of reviewing the excluded documents for the reasons mentioned above, will not accede the necessary degree needed.¹⁸

3.5. Discovery procedure – Preliminary Stage

37. The standard procedure in the preliminary stage is to approach the different parties from which the information was gathered and request their approval for disclosing the relevant documents. Once a party objects to the disclosure, they must specify the reason for their objection under the law. The ICA usually offers measures in order to cope and reduce the potential harm to the parties in question. These measures may consist of granting access merely to the lawyers and economic experts of the potential appellants after signing confidentiality agreements. Other measures can be to erase or redact highly sensitive information from the documents; paraphrasing the information; aggregating raw data so information such as specific market shares or quantity of sales will not be exposed.

38. When the case file consists of highly sensitive information or when there is another just cause for a higher level of protection than the measures specified above, the ICA may suggest that the counsel and economic experts of the appellants, after signing confidentiality agreements, will be granted access to information in an information room located at the ICA (hereafter - the "Information Room").

39. At the Preliminary Stage, the ICA will do its best to mediate between the parties opposing interests in order to reach an understanding that will disclose as much information as possible before the potential appellant. However, if the parties insist not to disclose information, the ICA will not grant access to the information.

the ICA's decision – Ibid, Section 22(b); Antitrust (Jerusalem) 5/98 Adgar Investment & Development Ltd v. the General Director of Competition (26.10.1998), Sections 10, 22.

¹⁷ Antitrust (Jerusalem) 61660-05-15 Selcom Ltd v. the General Director of Competition (13.11.2016), Section 4.

¹⁸ The Administrative Tribunals Law, Section 30(b).

3.6. Discovery procedure – Judicial review stage

40. After submitting an appeal, the Competition Tribunal may decide, on its own initiative or at the request of the appellant, that it will review the excluded documents.¹⁹ The Competition Tribunal may allow the appellant, upon request, to review the excluded documents if, in the tribunal's opinion, the need to review for the purpose of making justice surpasses the reasons for denying the right to review.²⁰

41. The Competition Tribunal usually requests to receive the position of the parties that object to the discloser of their documents, and can also summon them along with the ICA's representative and the appellants, in order to reach a decision that will balance the appellants' and third parties' rights with the resources invested by the judicial system. In practice, such court sessions, include deliberations regarding specific documents. In cases consisting of many documents and trade secrets, which the parties object to their discloser, the Competition Tribunal may call for categorizing the documents as a solution that will reduce the types of documents at dispute (as elaborated below, in section 57 which discuss a recent case on the subject).

42. As opposed to the preliminary stage conducted by the ICA, the Competition Tribunal can order to disclose information contrary to the position of the parties that provided the information.

43. Notably, the Competition Tribunal grants significant weight to the ICA's position, as they have been exposed to all of the information, and can assess the importance of the sensitive information to the appellant in conducting due process compared to the potential harm to other parties of the disclosure. This can help the Competition Tribunal propose a proper interim solution.

44. A common framework that is often used by the Competition Tribunal is providing access to data containing trade secrets solely to the appellants' legal counsel and economic experts (without exposing it to the appellants). This is after the party privy to the information signs a commitment to keep the data confidential, not to pass it on to anyone else and make no use of it except for the purpose of the present procedure.²¹

45. The confidentiality commitment includes detailed obligations to keep the information in absolute secrecy, not to disclose it to any person, and to take all necessary precautions to prevent lose or discloser to another person. This solution has proven to be both efficient and balanced when the Competition Tribunal is convinced of a good justification not to disclose the information to the appellants and when disclosing such information solely to counsel and experts of the appellants does not harm the purpose of making justice and the appellants right for due process. Indeed, the Supreme Court stated

¹⁹ Except for documents that may harm the security of the state or its foreign relations, or other documents that the tribunal considers it not appropriate, under the circumstances, to hand in. *Ibid*, Section 30(c).

²⁰ *Ibid*, Section 30(d).

²¹ Civil Appeal 4524/01 Maariv Intelligence Publishing Ltd. v. the General Director of Competition (4.6.2003) (hereafter - the "Maarive Case")

in the Maariv Case: "Like the tribunal, we also believe that it is an appropriate and effective means of protecting the trade secret".²²

46. The ICA believes it is essential to find the proper way in which to protect confidential information of the different parties. Thus, in cases which involve highly sensitive information, solutions such as an Information Room that minimize the potential harm of disclosing such information are promoted by the ICA, although they involve allocation of resources. The goal is to protect the interests of the third parties who delivered the documents and information to the ICA, and to assure continuing cooperation and effective information gathering in the future, along with assuring the appellant's right for due process.

47. It should be noted, that these solutions for the protection of confidential information bring about certain challenges to the legal procedure. For instance, using any confidential information by the Appellant's counsel in the framework of the latter's oral arguments brought before the Competition Tribunal, can only be done behind closed doors without the presence of their clients. Furthermore, confidential information included in court submissions, is redacted. As a result, the verdict of the Competition Tribunal is usually redacted as well before it is made public. Hence, violating the principle of "open court" and publicity of the justice procedure.

48. Nevertheless, all disclosure proceedings are essential for conducting due process in order to review the ICA's administrative decisions.

4. Freedom of Information Law

49. The Freedom of Information Law mandates that every resident and citizen of Israel has the right to receive information from a public authority, in accordance with specifications of the law. The law grants Israeli citizens the right to obtain information from the authorities' actions including statistical data, personal information, etc. The Freedom of Information Law also stipulates a list of exceptions under which information may not be given or that may only be given according to a decision made by the relevant authority.

50. An individual may request information with no explanation, and the officer in charge of compliance to the Freedom of Information Law, within a relevant authority, is required to examine the request and respond according to the guidelines mandated by the Freedom of Information Law.

51. The Freedom of Information Law specifies principles under which the public authority may reject requests for information. One of such principles is when responding to the request requires unreasonable resource allocation.²³ In this regard, the Israeli Supreme Court ruled that where there is a genuine personal interest in the request, this would strengthen the right for public scrutiny and, accordingly, extend the test for resource allocation.²⁴

²² Ibid, Section 9; See in this regard also Different Civil Requests 110/06 El Al Israel Airlines Ltd. V. the General Director of Competition (14.12.2006), Section 11.

²³ Freedom of Information Law, Section 8(1).

²⁴ Appeal (Administrative Petition) 2398/08 Ministry of Justice v. Elitsur Segal (19.6.2011), Section 34.

52. A public authority is not allowed to deliver information, the disclosure of which constitutes a concern to state security, foreign relations, public security or the security or safety of a person and a violation of privacy (within the meaning of the law).²⁵

53. Notably, a public authority has the discretion not to deliver information such as: information the disclosure thereof may jeopardize the proper functioning of the public authority or its ability to perform its functions; information pertaining to policy in the design stages; records of internal discussions; trade secrets and more.²⁶

54. Often, Parties who seek to appeal upon the Director General's administrative or criminal decisions, use simultaneously, standard disclosure proceedings under the Administrative Tribunals Law or the Criminal Procedure Law as well as requests made under Freedom of Information Law. A decision made by the ICA to accept or reject disclosure under the Freedom of Information Law is subjected to appeal before the Israeli administrative court.

5. Examining access to file in a recent case: the ICA's objection to a merger in the banking sector

55. On 30 May 2018, after an in-depth examination, the ICA decided to object to a proposed merger between two Israeli banks (hereafter - the "Merging Banks") on the basis that the disappearance of a competitor would likely harm the already limited competition over private customers in the Israeli banking sector (hereafter - the "Decision").²⁷ The Merging Banks appealed the ICA's decision before the Competition Tribunal and requested access to the case file.

56. All of the other banks, information of which was included in the case file (hereafter - the "Third Parties"), refused to allow access to their information, claiming that many of their documents contain hard-core trade secrets and that they are not relevant to the ICA's decision. In addition, the Third Parties claimed for banking confidentiality, under which the information should be protected, thereby denying access to the Merging Banks even through the solution of an Information Room, suggested by the ICA.

57. The Competition Tribunal was required to decide on the outline of discovery for thousands of documents and data on millions of customers. The ICA mapped the file, dividing it into different categories to enable the Competition Tribunal, the Merging Banks and the Third Parties to obtain a comprehensive view of the different types of documents contained in the case file.

58. The ICA's stance was that all documents listed in the case file and categorized, are relevant to its decision. However, in light of the desire to balance the right of the Merging Banks to inspect the information, alongside with the protection of trade secrets of the Third Parties, a distinction was made between the relevant documents for the decision and the documents needed for the legal proceeding (which are more limited - focusing on disputed issues before the Competition Tribunal). The Third parties reiterated their objection before the Competition Tribunal to the solution of an Information Room framework.

²⁵ Freedom of Information Law, Section 9(a).

²⁶ Ibid, Section 9(b).

²⁷ <https://www.gov.il/en/Departments/news/mergerassociationeastern>

59. After allowing the Third Parties to plea their full arguments both orally during the hearings and through the completion of a written plea, the Competition Tribunal ruled in favor of the Information Room framework, instructing to erase the customers' personal details in view of banking confidentiality.

60. The Third Parties appealed the ruling before the Supreme Court (hereafter also - the "Appellants"), arguing that the Competition Tribunal erred when it failed to properly balance their right to protect trade secrets with the Merging Banks' right to review the material. The Third Parties' argument was based on the fact that the ruling was furnished without individual examination of each document by the tribunal.

61. After an extensive hearing, the panel recommended that the appellants withdraw the appeal in view of past precedents, the special circumstances of the case and the fact that the expiry date of the merger transaction is close.

62. The Supreme Court accepted a request of the appellants that, when the Merging Banks wish to use the confidential information, they must submit a motion to the Competition Tribunal to which the specific third party and the ICA will be able to reply.²⁸

63. The proceeding before the Supreme Court confirmed the ICA's stand and the Competition Tribunal's ruling that in a case file with a considerable amount of confidential documents the Competition Tribunal is enumerated to draw guidelines for different categories of information without the necessity to rule on each individual document, there by conducting a more efficient and timely process.

64. To conclude, the ICA believes that access to a case file and protecting confidential information is a central and significant issue that is associated with almost every implementation of power by the Director General – both criminal and administrative, since it is essential to enable judicial review of the Director General's decisions. Over the years, and currently, great efforts have and are being made to ensure the existence of a balanced and due discovery process. In this task, the participants are the information providers, the appellants, the ICA and the Competition Tribunal.

²⁸ Appeal (civil) 1027/19 Israel Discount Bank Ltd. v. Bank Mizrahi Tefahot Ltd. (2.5.2019).