



## COUNTRY STUDIES

# Israel – Accession Report on Competition Law and Policy 2011

### Introduction

This Review of Competition Law, Policy and Enforcement in Israel is part of a series of reviews of national policies undertaken for the OECD Competition Committee. It was prepared as part of the process of Israel's accession to OECD membership. The Competition Committee was requested to examine Israel's position with respect to core competition features and to provide OECD Council with a formal opinion on the willingness and ability of Israel to assume the obligations of OECD membership. In doing so, the Competition Committee assessed the degree of coherence of Israel's competition law and policy with that of OECD Member countries. This report, prepared as part of the Competition Committee's accession review, highlights some of the key challenges facing Israel in its implementation and enforcement of competition policy. After completion of its internal procedures, Israel became an OECD member on 7 September 2010.

### Overview

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Competition Law and Policy Reviews

# Competition Law and Policy in Israel 2011



# **Competition Law and Policy in Israel**

**2011**



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## FOREWORD

This review of Competition Law, Policy and Enforcement in Israel is part of a series of reviews of national policies undertaken for the OECD Competition Committee. It was prepared as part of the process of Israel's accession to OECD membership.

The OECD Council decided to open accession discussions with Israel on 16 May 2007 and an Accession Roadmap, setting out the terms, conditions and process for accession, was adopted on 30 November 2007. In the Roadmap, the OECD Council requested a number of OECD Committees to provide it with a formal opinion. In light of the formal opinions received from OECD Committees and other relevant information, the OECD Council decided to invite Israel to become a Member of the Organisation on 10 May 2010.

The Competition Committee (the "Committee") was requested to examine Israel's position with respect to core competition features and to provide Council with a formal opinion on the willingness and ability of Israel to assume the obligations of OECD membership. In doing so, the Competition Committee assessed the degree of coherence of Israel's competition law and policy with that of OECD Member countries. This report, prepared as part of the Competition Committee's accession review, highlights some of the key challenges facing Israel in its implementation and enforcement of competition policy.

The review found that Israel's comprehensive Restrictive Trade Practices Law (the "Law") deals substantively with restrictive agreements, monopoly and mergers. Hard core cartels are ordinarily prosecuted as *per se* violations. The review noted that administrative and judicial decisions applying the competition law show methodological sophistication informed by close attention to contemporary judicial and academic analysis both in Israel and world wide. The Israel Antitrust Authority (IAA) which was established as an independent body has now matured into a highly respected agency, and it is expected that the resource challenge will be overcome to maintain the IAA's current stature.

The review also stressed the need to devote particular attention to improve IAA's capacity to cooperate with foreign competition agencies, specially by modifying the statute that limits exchange of confidential information to cases involving criminal conduct. Other priority areas for improvement include increasing deterrence through stricter sentencing of hardcore cartel participants, increased use of leniency and injunctions, adjustment of market share criteria in merger control to improve objectivity.

The review of Competition Law, Policy and Enforcement in Israel was conducted on the basis of a comprehensive self assessment by the Israeli authorities and Israel's answers to a detailed questionnaire, supplemented by information gathered from a Secretariat fact finding mission, interviews with public officials, markets participants, academics and relevant literature. The draft report was discussed with representatives from Israel at the Competition Committee meeting in October 2008. This final version of the report reflects the situation as of February 2009. It is released on the responsibility of the Secretary General of the OECD.

This review was prepared by Jay Shaffer, Michael Wise and Patricia Hériard Dubreuil, under the overall supervision of Robert Ley of the Directorate for Enterprise and Financial affairs.

This background report was submitted to assist the Competition Committee in assessing Israel's willingness and ability to assume the obligations of OECD membership with respect to competition policy. It is based on the Initial Memorandum that Israel submitted concerning the compatibility of its laws and policies with OECD principles, responses to the Secretariat's follow-up questionnaire, and findings from the Secretariat's fact-finding mission and research. The report describes the context and foundations of competition policy, substantive law and enforcement experience, institutions, special exclusions and sectoral regulatory regimes, and the treatment of competition issues in regulatory and legislative processes. The concluding section summarises these findings in accordance with the three themes that the Committee prescribed for its assessment: the current situation of competition policy and enforcement, the magnitude and direction of change in competition policy over the past five to ten years, and the extent of Israel's conformity with the particular recommendations in the OECD competition policy instruments .

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\* The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

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## EXECUTIVE SUMMARY

Israel adopted its comprehensive competition law, the Restrictive Trade Practices Law, in 1988, replacing a law dating from 1959 and embodying a new approach to promoting market competition. Hard core cartels are now prosecuted as *per se* violations, while other agreements are subject to rule of reason analysis. Block exemptions that excuse parties from obtaining specific exemptions for restrictive arrangements are based on EU models. In monopoly law, provisions like Article 102 TFEU (Treaty on the Functioning of the European Union) have been added to an earlier design keyed to market share. Mergers are reviewed using a contemporary, effects-based analysis, but the Law's employment of market share as a criterion for notification does not conform to recommendations that criteria be objective. Although improvements in procedures have reduced the time expended to evaluate mergers, appellate review of IAA merger decisions has sometimes been delayed. Pending amendments would focus the law's restrictive arrangements prohibition on conduct that impairs market competition, limit *per se* treatment to horizontal collusion affecting price, and provide more effective tools for addressing oligopoly markets. The proposals mirror and support the general trend to reduce the scope of *per se* and categorical treatment, as the IAA and the courts have become better able to assess competitive effects.

The Israel Antitrust Authority ("IAA") was created in 1994 as an independent agency to enforce the competition law. An impressive body of fully elaborated decisions by the IAA and the specialised appellate Tribunal has applied the Law to a wide range of conduct, developing in the process a methodological sophistication informed by close attention to contemporary judicial and academic analysis both in Israel and worldwide. The IAA has put competition law compliance on the business community's agenda, and has won the esteem of practitioners, academics, business associations and even the Supreme Court, which has praised the "exceedingly high calibre" of its expertise. The IAA ascribes high value to predictability, transparency, efficiency, and expedition; its decisions are well regarded for the quality of their analysis; and the agency and its staff have a reputation for responsiveness and sensitivity to confidentiality.

Maintaining the IAA's stature faces resource obstacles, notably in retaining staff who are drawn away by higher salaries in the private sector. The IAA also expects to increase cartel prosecutions, which are particularly resource-intensive since they require specially trained staff and sophisticated technological capacities and equipment. Resource demands will escalate even further if new powers for dealing with oligopoly are added to the Law.

The IAA has a large set of tools it can apply in enforcing the RTPL, ranging from advisory opinions to criminal indictment. Investigative authority is comprehensive. The Law's maximum fines and prison terms would be sufficient to deter hard core cartels if they were actually imposed, but the courts have been reluctant to order significant sanctions. The absence of direct authority for civil financial sanctions is a gap in the IAA's powers, and the agency's leniency program has been little used. The IAA's enforcement record reflects more actions against attempts to exclude foreign imports from Israeli markets and a decline in the number of monopoly cases. In merger cases, the IAA increasingly tries to avoid rejecting a problematic transaction outright by implementing conditions to make it acceptable. The IAA has reduced its use of older formal tools, such as instructions to monopolists, and now relies more frequently on its authority to negotiate consent decrees, including consents that entail payment of a civil penalty. The agency's authority to seek injunctions against ongoing anticompetitive conduct, in contrast, has gone largely unemployed. The IAA is willing to share confidential information and to cooperate in investigations with foreign authorities as permitted by Israeli law, which limits information disclosure to criminal investigations.

Reforms in telecommunications, transportation, energy, and financial markets have been structured to encourage entry by facilitating network access or lowering barriers. The full reform tool-kit has been deployed, including structural separation of competitive from non-competitive activities. Competition law enforcement is generally well coordinated with regulatory regimes. With the recent repeal of the exclusion for international air transport agreements, the only remaining sector exclusions from the competition law are for agriculture and international sea transport. Most commercial activity, including that of government companies and agencies operating in a commercial capacity, is subject to the competition law, and other laws and regulatory regimes displace the RTPL only in cases of irreconcilable conflict. Exemptions from the Law's restrictive arrangements provisions are construed narrowly, but the exemption for intellectual property licenses may be insufficiently specific.

The IAA has been closely involved in virtually all of Israel's reform efforts. Successful IAA advocacy has facilitated pro-competitive reform in

numerous markets, and IAA enforcement efforts have supported reform in others. The IAA's function in the development of regulatory policy is not formalised however, even though an increasing number of statutes require regulators to consider competition as a public policy objective. The Supreme Court has supported an IAA role in restricting anticompetitive agency action, by rejecting agency decisions that the IAA warned would lead to a violation of the competition law. Israel has no general program for regulatory impact analysis of proposed laws and regulations, nor has there been a systematic review of existing laws and regulations to correct those that unnecessarily impair competition.

Improvements are recommended with respect to sentencing of hard core cartel participants, conditions affecting the availability of leniency, civil penalty authority, employment of injunctive relief, sharing of confidential information and development of cooperation agreements with foreign competition agencies, adjustment of merger notification criteria, appellate review of IAA merger decisions, the IAA's role in advocating reform and advising regulatory authorities on decisions affecting competition, appointment of competition policy officers in agencies having statutory responsibility to promote competition, and review of the exemption for intellectual property licences and the sectoral exclusions protecting restrictive arrangements in agriculture and ocean shipping. Other recommendations deal with the allocation of increased resources to the IAA; amendment of the competition law's provisions relating to the status of restrictive arrangements, the definition of monopoly, the treatment of oligopoly markets, and the consummation of anticompetitive mergers; and the addition of a statutory provision forbidding unauthorized disclosure of confidential information.



## 1. Foundations

Israel is a small country, its population of seven million about the same as that of Switzerland. Its GDP in 2007, at purchasing power parity, was approximately USD 190 billion. Per capita GDP, at USD 26,000, is roughly two-thirds down the ranking of OECD economies. Services account for two-thirds of GDP, with industry and construction representing most of the remainder. Agriculture accounts for less than 3%. Well-developed high-technology sectors include aviation, communications, computer-aided design and manufacture, medical electronics, and pharmaceuticals. GDP has grown by about 5.2 per cent yearly since 2003.

Israel is frequently referred to it as an “island economy,” since it is not part of a regional trade consortium and conducts relatively little trade with the economies contiguous to its land borders. Nonetheless, trade in goods and services is equivalent to roughly 90% of Israeli GDP. Major imports include grains, crude oil, and raw materials, while leading exports are high-technology products, cut diamonds, and perishable foods. The European Union is the principal importer to Israel (35 per cent), followed by Asia and the United States. The EU is also the leading export partner (34 per cent), followed closely by the US and Asia. Israel has free trade agreements with the EU and EFTA, the United States, Canada, Egypt, Jordan, MERCOSUR, Mexico, and Turkey. About 90% of Israel’s international trade is conducted under such agreements.

Small size and entry barriers explain why some Israeli economic sectors look unusually concentrated. There are more than eighty markets in which a single firm has been found to hold a share exceeding 50%, including telecommunications, energy, and transportation. In other markets such as banking, retail gasoline, credit card transaction processing, liquid petroleum gas, and mobile telephony, HHI indices are in the 2200 to 3000 range. In oil refining, multi-channel television, movie theatres, seaports, and elements of telecommunications such as fixed line telephony, internet service providers, and international call service, HHIs exceed 3000.

High concentration levels also have roots in Israel’s history. After the State of Israel was established in May 1948, a decade-long austerity program followed. Faced with military threats and a severe shortage of supplies and foreign currency, the government imposed food rationing, price regulation, and direct control over production of some commodities. During the 1950s, net capital inflows from outside sources enabled the government to undertake a massive investment program. Strong protectionist measures fostered import-substitution, and subsidies promoted new industries such as textiles and auto

manufacturing. Many business enterprises were created and operated by the Israeli government. Companies created by two other bodies, the Jewish Agency and the Histadrut, also represented a form of public asset ownership. The Jewish Agency, created in 1929 to serve as a shadow government during the British mandate, was primarily responsible for the settlement and integration of immigrants, but it was also involved in establishing the national airline (El Al), the water supply company (Mekorot), land development and agricultural companies, and cultural facilities such as theatres and museums. Histadrut, established in 1920 as a labour federation for Jewish workers, eventually came to represent about 85 percent of all wage earners in Israel. Histadrut also owned and operated Israel's largest bank (Ha'Poalim), its leading department store chain (Ha'Mashbir), large industrial conglomerates, and other enterprises.<sup>1</sup> Its comprehensive health care system substituted for government services. Histadrut and the Jewish Agency were closely allied with Israel's reigning Labour Party and, like the government, operated companies more to provide employment and fund social services than to earn a profit.

As the 1950s drew to a close, the socialist bent of the government began to weaken. Policy makers concluded that the scope of government intervention in the economy was excessive and saw that the new European Economic Community posed an economic challenge to Israeli exports. Israel began a lengthy process of economic liberalisation. Quantitative restrictions on imports were replaced by tariffs, which were themselves slowly reduced. Import-substitution and exports were encouraged by more realistic exchange rates rather than by protection and subsidies. Free trade agreements were reached with the European Economic Community (1975) and the United States (1985). Non-sustainable enterprises such as auto manufacturing were permitted to expire. Politically, the 1977 general election was a key turning point, as the Labour-led coalition was ousted by a more economically liberal coalition led by the Likud Party. In the 1980s, measures were undertaken to improve monetary policy and domestic capital markets. Government intervention in domestic economic activity decreased, particularly after high inflation led to a stabilisation plan in 1985. A privatisation program for government companies was initiated in 1986, and the Histadrut also began to divest its commercial enterprises.

Privatisation has continued and the number of companies in which the government has an ownership interest has now been reduced to about 100. Many are small, but about 20 have been declared "monopolies" under the competition law, primarily in the energy sector and in infrastructure, including electrical power and railways. The government's ownership share of the economy stands at approximately 6 percent of GDP. Important divestitures since 2003 include El Al airlines and the Zim container shipping company

(2004), Bezeq, the monopoly fixed line telephone company (2005), and the refineries in Ashdod and Haifa (2006 and 2007) that had previously been operated by the government monopoly Oil Refineries Ltd. Also in 2007, the government privatised Pi Gllith Petroleum Terminals & Pipelines Ltd., a joint venture that was the principal supplier of petroleum distillates in Israel. Current privatisation activities involve an agricultural products export company, housing projects for the elderly, and an aerospace technology firm. Future possibilities for privatisation include bank holdings (Bank Leumi, Bank Yahav, and the Postal Bank), road construction, postal delivery services, the Mekorot water supply company, port facilities, and electricity generation.

Israel adopted a competition law in 1959, early in the economic reform process. Although a clear step toward a competition-based market economy, the 1959 law had notable deficiencies. It did not reach mergers and many vertical restraints. More fundamentally, its underlying philosophy and application reflected a belief that competition was to be controlled, not promoted. The antitrust agency, an office in the Ministry of Trade and Industry headed by a General Director, routinely approved creation of anticompetitive arrangements. The law emphasised the regulation of monopolists' prices rather than the interdiction of monopolistic practices. The courts considered the law to be ill-written and were unsympathetic to its vigorous enforcement.

A new law, reflecting a new approach, was adopted in 1988. The Restrictive Trade Practices Law ("RTPL" or "the Law") was designed to correct defects of the 1959 law and to target enforcement more closely on protection of competition. Reinforcing the new approach, an independent body was established in 1994 to enforce the RTPL. The Israel Antitrust Authority ("IAA"), operating separately from government and with its own funding and personnel, increased enforcement dramatically. Many observers consider that the modern era in Israeli antitrust enforcement dates from the creation of the IAA. Later amendments to the Law added enforcement powers and sharpened substantive provisions. In 2005, the Ministry of Industry, Trade and Labour established a committee (titled the Goshen Committee after its chairman) to make proposals for modernising the RTPL. The Goshen Committee has issued recommendations dealing with restrictive agreements and oligopolies, and it continues work on additional topics.

The policy objective of the RTPL is the prevention of harm to competition. The Law has no express statement of purpose, but the substantive standard in its key prohibitions is "harm to competition" or "substantial harm to competition". Enforcers and reviewing courts, including the Supreme Court, uniformly confirm that the Law's objective is to protect competition and thereby advance consumer welfare, rather than to promote fairness or other social goals.<sup>2</sup> Other

benefits of competition, such as innovation, are not identified as objectives, although they are treated as positive factors in competition analysis. Efficiency gains that profit the parties or increase total surplus are not sufficient to justify restrictive practices or mergers; rather, a successful efficiency claim requires a demonstration that consumers will enjoy substantial benefits.

## **2. Substantive issues: content and application of the competition law**

This section of the report discusses the content and application of the competition law to horizontal and vertical restrictive arrangements, monopolies, and mergers, and examines how unfair competition and consumer protection laws relate to the competition law regime.

Substantive provisions of the RTPL deal with restrictive arrangements, monopoly, and mergers. Hard core cartels are ordinarily prosecuted as *per se* violations, while other agreements are subject to rule of reason analysis. Block exemptions that excuse parties from obtaining specific exemptions for restrictive arrangements are based on EU models. Monopoly law similarly reflects the EU's Article 102 TFEU approach, overlaid on an earlier design keyed to market share. Mergers are reviewed using a contemporary, effects-based analysis. The Law's development and application have been affected by the fact that the only statutory penalties for violation are criminal fines and imprisonment. Other remedies involving structural and behavioural injunctive orders are available, but civil monetary penalties may be obtained only through negotiation of a consent decree.

### **2.1 Restrictive arrangements**

The Law's approach to concerted actions approximates a licensing scheme: being a party to "a restrictive arrangement" is prohibited unless the arrangement is exempted (Sec. 4). If an arrangement is not covered by a block exemption, then the parties must obtain a specific exemption from the IAA's General Director or approval from a specialised court (the "Antitrust Tribunal"). An arrangement can be found restrictive if it poses any cognisable prospect of competitive harm, whether substantial or not. Certain *per se* conduct is irrebuttably

presumed to have such effect. Although the courts have cautioned that the Law is to be construed in accordance with its ultimate goal of protecting competition, the restrictive arrangements provision has a broad sweep and this makes the block exemptions, the IAA's specific exemption authority, and Tribunal approvals important features of the antitrust regime. Some types of

agreements are excluded by statute from the definition of “restrictive arrangement;” those exclusions are detailed in Section 4 of this report.

- *Elements of a restrictive arrangement*

A “restrictive arrangement” is one in which at least one party “restricts itself” in a manner likely to prevent or reduce competition between it and the other parties to the arrangement or anyone else (Sec. 2(a)). Five elements comprise a “restrictive arrangement.” The element of “arrangement” is broadly defined to cover any form of mutual understanding, express or implied (Sec. 1). By judicial interpretation, parallel behaviour in an oligopoly is insufficient to constitute an “arrangement.”<sup>3</sup> The second element, which requires that the parties to the arrangement be “persons conducting business,” also sweeps widely to cover individual entrepreneurs and business organisations, as well as non-profit organisations and government entities engaged in commercial activities. The third requirement, that a party “restrict itself,” is typically met by an obligation to take (or refrain from taking) some action. The fourth element requires that the restriction must be “likely to prevent or reduce competition,” but any cognisable prospect of any harm to competition is sufficient. The prospective harm need not be probable or substantial.

The final element, which targets harm to competition between the “restricted party” and other identifiable parties, limits the Law’s reach in two unconventional ways: it addresses harm to parties rather than harm to market competition, and it fails to reach competitive harm in the market where the non-restricted party operates. Both deficiencies have been corrected through authoritative interpretations. As to the “harm to parties” issue, a 2005 court decision (*Tagar*) held that the purpose of the Law is to prevent harm to competition in the market at large. The court permitted the defendant in that case to rebut a *prima facie* showing of potential harm between particular parties by proving the absence of broader marketplace harm. Under IAA policy, a restrictive arrangement case will not even be commenced if the evidence merely shows a *prima facie* case. Rather, the agency will prosecute only if there is evidence that the arrangement either could harm competition in the market as a whole or has no purpose other than the suppression of competition.

As to the second issue, the Law’s requirement in section 2(a) for an anticompetitive impact on the restricted party’s market is anomalous. An exclusive dealing agreement, for example, is more likely to impair competition among manufacturers than among dealers. The Antitrust Tribunal has held that Section 2(a) also covers arrangements affecting competition between the non-restricted party and third parties. An amendment proposed by the Goshen Committee, and now pending before Parliament, would modify Section 2(a) to

cover restraints “likely to eliminate or reduce competition in the marketplace.” This change would resolve both deficiencies in Section 2 by conforming the statutory language to its judicial construction.

Certain kinds of agreements are presumed to cause competitive harm. Arrangements involving any restraint “that relates to” price or profit-fixing; geographic or customer market allocation; or restraints on output quantity, quality, or type, are irrebuttably presumed to be restrictive (Sec. 2(b)).<sup>4</sup> The presumption makes no distinction between horizontal and vertical restraints, but another amendment proposed by the Goshen Committee would confine *per se* treatment to hard core horizontal restraints. A special rule, applicable to trade association activities, provides that a “course of action” established by an “industry association” (or recommended by the association to its members) is deemed to be a restrictive arrangement (Sec. 5).<sup>5</sup> The association and any of its members “acting in accordance” with the course of action are treated as parties to the arrangement.

- *Exemptions*

The IAA may exempt restrictive arrangements from prosecution. The Law sets substantive limits on block and individual exemptions, to ensure that anticompetitive impact does not substantially outweigh pro-competitive benefits and to screen out “naked” restraints that have no purpose other than to harm competition. Thus, the arrangements protected may not substantially harm competition, nor may they have as their objective the reduction or elimination of competition or include restraints that are unnecessary to accomplishing the arrangements’ objectives (Sec. 14, Sec. 15(a))

Block exemptions protect classes of restrictive arrangements and thus excuse the parties from applying for a specific exemption or approval. A block exemption is issued by the IAA General Director, following a notice and public comment. It takes effect only after it has been ratified by the Exemptions and Mergers Advisory Committee (an entity created under Section 23 of the RTPL) and signed by the Minister of Trade, Industry, and Labour.<sup>6</sup> Block exemptions remain in force for five years, unless the rule itself provides for a shorter period.<sup>7</sup> Once a block exemption has been adopted, the General Director may determine that it will not apply to protect a particular arrangement (Section 15A(g)).<sup>8</sup>

An omnibus rule specifies definitions and conditions applicable to all exemptions.<sup>9</sup> The omnibus rule excludes from individual block exemptions arrangements that can be expected to harm competition substantially. Unless stated otherwise in a particular exemption, no block exemption will protect an

agreement between competitors that has as its “primary concern or main result” coordinated behaviour directed to the objectives that the Law presumes to harm competition -- price or profit-fixing, geographic or customer market allocation, and restraints on output quantity, quality, or type. In addition, a block exemption may not protect an arrangement that involves refraining from the sale or purchase of products or services, or from submitting bids for such sales or purchases (Section 4(a)). For most exemptions, market share limits determine the scope of coverage.<sup>10</sup>

The seven block exemptions now in effect deal with general topics: arrangements of minor importance, joint ventures, research and development agreements, restraints ancillary to mergers, and agreements that involve exclusive purchasing, exclusive distribution, and franchising. A proposed eighth block exemption, covering agreements relating to international air transport, has been published for public comment and will become effective no later than January 1, 2009.

The block exemption for agreements of minor importance excuses many arrangements involving small firms. It sets market share thresholds below which an agreement is presumed to have no appreciable effect on competition: 10% for agreements among actual or potential competitors, 15% otherwise.<sup>11</sup> The exemption does not apply to “naked restraints,” agreements with respect to which any party is a monopolist in an adjacent market (*i.e.*, immediately upstream or downstream), or to most agreements involving the purchase of ownership rights in a competing firm. An arrangement that meets the conditions for this exemption other than the market share thresholds, and does not in fact cause substantial harm to competition, is unlikely to be criminally prosecuted even if the parties fail to obtain a specific exemption. The IAA has never prosecuted parties to a restrictive arrangement merely for failing to file an application for a specific exemption.

Other *de minimis* doctrines or defences may also apply. There is no criminal liability for conduct “which, in light of its nature, circumstances, effects and the public interest, is of minor importance” (Penal Code, Sec. 34(17)). The defence is interpreted narrowly in antitrust cases, particularly in light of the IAA’s authority to grant both specific and block exemptions. Its application depends upon whether the conduct causes insignificant harm to the *public interest in competition*, not merely whether its direct competitive consequences are trivial. Thus, a finding that an antitrust violation does not appreciably restrict competition (or does not harm competition at all) might not sustain this *de minimis* defence. Although a cartel that fails to raise prices may not have caused any competitive harm, its conduct may still warrant sanctions that will promote the public interest in competition by deterring future cartels.

In a prosecution where competitive harm is presumed under Section 2(b) from the nature of the conduct, invoking the Penal Code's *de minimis* defence could present a conflict between statutory provisions. The Supreme Court has noted that the legislature's purpose in enacting Section 2(b) was to conserve judicial resources by establishing an irrebuttable presumption, so the trial court may therefore refrain from a meticulous effort to define the relevant market or otherwise measure actual competitive harm.<sup>12</sup>

- *Specific exemptions*

The IAA General Director may exempt specific restrictive arrangements from Section 2's prohibition, after consultation with the Exemptions and Mergers Advisory Committee (Sec. 14). Applications must be decided within 90 days.<sup>13</sup> The applicable standard is the same as for approving a block exemption. Analysing an application for a specific exemption can entail a comprehensive "rule of reason" analysis requiring, among other things, that the General Director define the relevant market and determine whether the arrangement can be expected to create or increase market power. In granting an exemption, the Director may impose conditions designed to assure that the arrangement will have the anticipated effects.<sup>14</sup>

Much of the IAA's enforcement activity involves dealing with specific exemption applications. Over the past five years, 381 applications were resolved, most of them (79%) involving primarily horizontal restraints. Only a few of the applications were denied outright (12, or 3%), but many were approved subject to conditions (120, or 32%) The Director's decisions about these exemption applications are fully detailed and constitute a voluminous and comprehensive body of antitrust law.

The IAA recognizes that the EU terminated a comparable exemption application system in 2004, and that the EU now expects firms to determine for themselves whether restrictive agreements that fall outside the scope of the block exemptions are lawful or not. The IAA believes, however, that the RTPL's specific exemptions procedure should be retained until the private sector in Israel has had more experience with block exemptions (which have only been part of the competition law since 2001) and market conditions are better suited for self-policing compliance.

- *Tribunal approval*

The Antitrust Tribunal can approve a restrictive arrangement, with or without conditions, under a "public interest" standard (Sec. 9),<sup>15</sup> that requires consideration of whether the arrangement's "expected utility to the public is

substantially greater than the damage,” and an evaluation of the arrangement’s contribution to seven specified public interest objectives (Section 10). Three of these objectives could be considered relevant in a conventional competition analysis: (1) increasing efficiency in production and marketing, assuring product quality, or reducing prices to the consumers; (2) preventing “unfair competition” by a third party that could “reduce competition for the supply of assets or services in which the applicants deal;” and (3) enabling the parties to obtain assets or services on reasonable terms from a third party who controls “a considerable share” of the supply. The remaining four objectives, vestiges of the original 1959 competition law that invoke public policy concerns other than competition, focus on assuring a sufficient supply of assets or services to the public, preventing severe damage to an important national industry, safeguarding the continued existence of factories as a source of employment in areas in which substantial unemployment may otherwise result, and improving the balance of payments by reducing the volume or price of imports or by increasing exports.

The Tribunal has narrowly construed these elements, to conform as closely as possible to the principles of standard antitrust analysis and to deny approval to “naked” restraints that harm competition without any redeeming contribution to consumer welfare. According to the IAA, no Antitrust Tribunal decision has relied on Section 10 to approve a proposed restrictive arrangement that actually had the potential to harm competition substantially. Once granted, an approval may be revoked or amended, on application by the General Director, if the Tribunal concludes that a substantial change in circumstance has occurred (Section 12(a)).<sup>16</sup> Third parties may apply to the Director, requesting that she petition the Tribunal for revocation or amendment (Sec. 12(b)).<sup>17</sup>

Tribunal approvals ordinarily involve lengthy and complex proceedings.<sup>18</sup> Applications are infrequent. In the past five years, the Tribunal resolved ten applications for approval, nine of which involved primarily horizontal restraints. Two were rejected, both involving horizontal restrictions, and the other eight were approved, six of them with conditions.

- *Criminal prosecution and other enforcement*

Criminal indictment is the principal enforcement tool employed against restrictive arrangements that are not covered by a block exemption or protected by a specific exemption or Tribunal approval. The IAA is authorised to prosecute such arrangements in criminal court (Sec. 47(a)(1)).<sup>19</sup> From 2003 to 2007, the IAA commenced 17 criminal cases and resolved 22. Of the latter, 20 were horizontal and 2 were vertical. Twelve were settled by plea agreements or consent decrees.<sup>20</sup>

Other enforcement tools include injunctions and “determinations.” The IAA may seek an injunction from the Tribunal forbidding action in violation of the Law and requiring “any action necessary for the prevention of such violation” (Section 50A). In the past five years (2003 to 2007), one such injunction has been issued in a horizontal case, entered in the form of a consent decree. The IAA General Director may also determine that an arrangement constitutes an unlawful restrictive arrangement under Section 2 (Section 43(a)(1)), or that a “course of action” established or recommended by an industry association constitutes an unlawful restrictive arrangement under section 5 (Section 43(a)(2)). Such a determination is *prima facie* proof in another legal proceeding, and parties may therefore rely upon it to seek damages or to escape an unlawful contract. Over the past five years, the Director has issued five such determinations, four of them in horizontal cases.

### **2.1.1 Horizontal restrictive arrangements**

The Law applies a strong *per se* prohibition to hard core cartel activity and a rule of reason approach to other forms of horizontal collaboration. Block exemptions or enforcement guideline statements cover joint ventures, research and development agreements, joint activity in petitioning the government, creditor relationships among competitors, and credit consortiums. Two-thirds of the horizontal cases resolved from 2003 to 2007 involved hard core cartels, including one that entailed an attempt to collude. Half of all horizontal cases were resolved by consent. Other enforcement tools, such as injunctions and declarations of unlawful arrangements, were less commonly used. Applications for specific exemptions or approvals were typically approved, but a substantial portion (one-third of IAA exemption cases; two-thirds of Tribunal approval cases) was subjected to conditions designed to permit legitimate cooperation while minimising opportunities for anticompetitive collusion.

Two block exemptions, for joint ventures and for research and development agreements, focus exclusively on horizontal arrangements. The joint venture exemption is based on market share and structure thresholds, which vary depending on whether the venture operates in the same market in which the venture parties are competitors.<sup>21</sup> The exemption does not apply if a party has a monopoly in the venture’s product market or an adjacent market, if the venture agreement’s duration is greater than ten years, if a party is a monopoly in another product market and the other party competes in that market, or if the joint venture is expected to constitute a monopoly in its product market and is not creating a new product. The block exemption for research and development agreements is structured similarly to the joint venture exemption.<sup>22</sup> The maximum permissible duration for an R&D agreement is fifteen years.

Guidelines detail the IAA's approach to certain classes of horizontal restraints. A guideline opinion dealing with joint activity by competitors to petition the government was issued in February 2000. The IAA will not take enforcement action against joint petitioning if five conditions are met: (1) the purpose is to seek action that is within the government's authority to undertake; (2) the petitioning includes full, correct, and reliable information; (3) the parties do not transfer information among themselves that is likely to diminish actual or potential competition among them; (4) the parties do not advise one another regarding the measures they will take if the desired change ultimately does or does not occur; and (5) all contacts among the parties are made in a manner that raises the fewest competitive concerns. This protection does not apply if any of the parties is a monopoly; the petitioning involves commercial negotiations with the government or focuses on matters that are resolved on an individual basis or entail policies that do not affect all competitors identically; the parties undertake additional steps in the nature of "private regulation" to promote the petitioning objective; or the petitioning is a "sham" designed to threaten third parties.

Creditor relationships among competitors may constitute restrictive arrangements. Guidelines issued in February 2006 discuss how granting a loan to a competitor can impair competition in two ways. First, the loan may entail guarantees that diminish the debtor's incentives to compete vigorously with the creditor. Second, the creditor's interest in being repaid may moderate its own competition with the debtor. The guidelines list elements that should be addressed in evaluating such situations. In March 2008, the General Director issued a position statement about "credit consortiums," which are formed by credit providers to spread the risks of extending a line of credit. According to the statement, no enforcement action will be taken against a credit consortium if credit would not have been extended to the customer on reasonable terms absent the consortium, the customer consents to formation of the consortium in advance, and the customer is afforded the opportunity to negotiate credit terms individually with the consortium's members.

From 2003 to 2007, the IAA has commenced fifteen horizontal arrangement cases in court, eight of which involved hard core cartels. During the same period, twenty horizontal cases brought by the IAA have been resolved, ten of them wholly by plea agreements or consent decrees. Of the twenty, thirteen were hard core cartel cases. Some of the sectors involved, and the sanctions that resulted, include:

- LPG distribution: multiple company officers fined from ILS 50,000 to 1.25 million (USD 13,900 to 347,500) and sentenced to public work ranging from two weeks to six months; one officer

sentenced to 100 days imprisonment<sup>23</sup>; companies sentenced to fines in the range of ILS 4 million each (USD 1.1 million);

- lighting products: ILS 900,000 fine by plea bargain (USD 250,000);
- ready mix concrete: thirteen defendants consented to a collective fine of ILS 2 million (USD 556,000);
- frozen vegetables: company officers fined from ILS 5,000 to 250,000 (USD 1390 to 69,500) and sentenced to public work ranging from three to six months; one officer sentenced to 30 days imprisonment; companies fined from ILS 325,000 to 900,000 (USD 90,350 to 250,200);
- paper envelopes (bid rigging): company officers sentenced up to six months public work and up to ILS 90,000 fines (USD 25,000); companies fined ILS 250,000 each (USD 69,500).<sup>24</sup>

In one of the cartel cases, involving the health snacks market, the defendants were convicted for attempting to participate in an unlawful restrictive arrangement. Officers were sentenced to three months public service and a fine of ILS 100,000 (USD 27,800); companies were fined ILS 200,000 each (USD 55,600). This case reflects the IAA's policy to indict persons who attempt to establish cartels, or who aid and abet their operation.

The IAA's non-hard core cartel horizontal cases involved such restraints as an arrangement between Israel's only two salt companies, one a monopoly in edible salt and the other a monopoly in inedible salt, under which the parties agreed to serve as each other's exclusive suppliers (parties consented to a collective ILS three million fine (USD 834,000); and an agreement among three competing television broadcasters to coordinate programming (parties consented to a collective ILS 300,000 fine (USD 83,400)). An important 2005 case, described more fully elsewhere in this report, involved an arrangement under which the leading gasoline station chains and the State of Israel jointly operated Israel's major petroleum distillates supplier. The IAA's investigation led to a consent decree providing for the company's privatisation.

Few injunction actions have addressed horizontal issues. The IAA sought an order in 2003 to terminate an arrangement involving Tnuva, one of Israel's largest food conglomerates, whereby Tnuva served as the marketing agent for its own poultry slaughterhouse as well as for the other four slaughterhouses competing in the retail market. The IAA's petition was settled by an agreement

under which the joint marketing arrangement was terminated. Older section 50A cases include a 2000 Tribunal injunction issued *ex parte* against all of Israel's principal suppliers of matzo and matzo flour, prohibiting them from coordinating prices for matzo and matzo flour on the eve of Passover, and a 1999 order barring joint business activity between two adjacent kayak rafting sites.

The General Director made four determinations that horizontal arrangements were unlawful. In a 2007 case involving a business association's "course of action" under Section 43(a)(2), the Director examined coordinated action by an industry association and its members that the parties characterized as government petitioning. The Director concluded that the conduct was in fact a concerted attempt to thwart a government bidding procedure.<sup>25</sup> Subjects of the other determination actions were an arrangement among all thirteen members of the European Mediterranean Trade Agreement (North Europe-Israel) to impose a standard fixed surcharge on their customers for shipping freight by sea; an agreement to allocate markets between the monopoly provider of edible salt in Israel and a foreign salt producer; and the conduct of the Society of Authors, Composers & Music Publishers in Israel (ACUM) in assessing, collecting, and distributing performance royalties. The Director declared ACUM to be a monopoly and determined that its activities constituted a restrictive arrangement that had never been cleared.

The General Director resolved 300 applications for specific exemptions involving horizontal restraints from 2003 to 2007, approving 198 (66%) without conditions, 94 (31%) with conditions, and denying eight (3%). One 2008 application, submitted by AIG Israel, an insurance company owned by the International AIG group, and Menora, an Israeli-owned insurance corporation, involved an arrangement designed to enhance the parties' ability to make competitive offers of insurance to large companies. The agreement, which combined the parties' "automatic capacity" (the maximal amount of risk an insurance company may undertake given its agreements with secondary insurers), also contained certain restrictions on AIG's ability to approach Menora's clients. The Director, finding that sufficient competition existed in the relevant market and that the agreement's scope was limited compared with the parties' overall activity, concluded that the arrangement did not pose competitive concerns and therefore could be approved without conditions. In 2004, another approval without conditions permitted a voluntarily-formed group of lawyers to cap, for a limited period of time, the fee that they would charge for preparation of a will.

Other decisions illustrate the conditions that may be imposed and the arrangements that warrant rejection. A 2008 agreement whereby a group of

competing TV broadcasters submitted a joint application for membership in the European Broadcasting Union (EBU) was permitted upon the conditions that the group would designate one person to be the exclusive negotiating agent with the EBU; that such person would not be responsible for acquiring broadcast programs for any of the parties; and that the parties would not collaborate on advertising, program acquisition, or any other matter unrelated to EBU membership. In a 2007 approval of a joint venture formed by two firms to develop an unmanned military vehicle, the IAA focussed particular attention on the issue of long term dynamics and imposed a condition requiring that both firms retain full rights to exploit in other applications any newly-developed technology. The IAA denied applications for various arrangements, such as (1) an industry-wide agreement among banking institutions to fix the interchange fees charged among banks for providing direct deposit services for one another's customers (denied because the banks automatically passed on such fees as a customer surcharge); (2) a joint venture for salt export formed by the only two salt manufacturers in Israel; and (3) an agreement between a soldiers' welfare association and Israel's national lottery company, under which the lottery would pay the association to distribute lottery tickets, provided that the association refrained from entering the lottery market. The association was one of only two entities in Israel (other than the national lottery) licensed to raise money by conducting a national lottery.

The Antitrust Tribunal resolved nine applications for approval involving horizontal restrictions. One application, involving a plan by Israel's leading daily newspaper (*Yediot Aharonot*) to insert into its weekend editions local supplements produced by other publishers, was approved without conditions.<sup>26</sup> Two applications were rejected, both in 2005. The first entailed a proposal by several newspaper publishers to consolidate their distribution channels. The second involved a proposed settlement of a water meter patent rights dispute, under which one party would withdraw from the market in exchange for monetary compensation from the other.

The other six Tribunal application cases, all of which involved approved with conditions, dealt with such arrangements as a performance rights licensing association operated by music production companies (the conditions imposed by the IAA constrained the association's market power and provided a dispute resolution process for licensing fees contested by customers): a collaboration by two competing insurance companies for the joint provision of car parts appraisal software (the conditions prohibited the insurers from requiring appraisers to use the insurers' software and assured that price data from all parts manufacturers would be carried in the system); and the establishment of a plastic bottle recycling company by essentially all of the manufacturers and importers of beverages in Israel (the conditions required the declared company to have a

monopoly in the beverage bottle collection market, permitted any company to join the consortium, and provided that fees for company services be determined by a disinterested third party). In a notable 2006 case, the Tribunal approved an arrangement for cross-clearing Visa card transactions between Israel's two Visa card companies. The parties were required to use a general methodology developed by the Tribunal to assure that cross-clearing fees are calculated in a pro-competitive manner. A Tribunal approval proceeding extending this methodology to MasterCard transactions is presently pending, awaiting issuance of an expert report employing the general methodology to determine specific multilateral interchange fees for all credit card transactions.

### **2.1.2 Vertical restrictive arrangements**

Vertical agreements are treated under a rule of reason, although the text of the Law authorises a *per se* approach to certain vertical restraints. The pending Section 2(b) amendment would confirm the rule of reason approach by confining *per se* treatment to hard core horizontal restraints. Block exemptions or enforcement guideline statements cover exclusive purchase and distribution agreements, franchises, and arrangements between dominant food suppliers and large retail grocery chains. The few vertical restraint enforcement cases typically entail upstream suppliers whose distribution contracts are either exclusionary or facilitate market coordination. Injunctions and declarations of unlawful arrangements are rarely employed. The bulk of vertical enforcement activity entails exemption and approval applications. Most such applications in the past five years were granted, with conditions imposed in a third of the cases. Exemptions are ordinarily granted for restrictions on maximum resale price, but not for minimum price restraints.

Three of the IAA's block exemptions, covering exclusive purchase agreements, exclusive distribution agreements, and franchise agreements, focus on vertical arrangements. All three share certain common elements, among them provisions that deny coverage where (1) the parties to the agreement are actual competitors, (2) a party has monopoly power in the relevant product market or in an adjacent market, or (3) the agreement's duration is ten years or longer. All three also protect ancillary restrictions included in a covered arrangement, provided that the restrictions are required to realise the agreement's main objective and do not cause substantial harm to competition. The exclusive purchase exemption applies if no party has a market share exceeding 30% and the agreement entails no contract provisions controlling resale prices.<sup>27</sup> The exclusive distribution exemption employs essentially the same approach, but requires that there be a "regular supply of alternate goods" available for purchase in the downstream market and permits maximum resale price maintenance.<sup>28</sup> Franchise contracts, which are covered unless the

franchisee's market share exceeds 30%, can control resale prices without restriction and may also forbid the franchisee from engaging in "active sales" promotion outside the assigned franchise area.<sup>29</sup>

Arrangements between dominant food suppliers and large retail grocery chains are addressed in guidelines issued by the IAA in January 2005. The opinion was developed after an IAA investigation of such arrangements found that "the entire field ... is tainted with illegitimate arrangements and practices that obstruct the existence and development of competition in the food and grocery industry." Among the objectionable practices identified by the IAA were demands by dominant suppliers that retail chains refrain from selling competing "private label" products, that shelf space for private label products be reduced to less than half that available for the suppliers' products, and that retailers appoint suppliers as "category managers" for the purpose of increasing the supplier's share of sales in that category. The General Director's opinion determined that such practices are illegal unless approved by the Antitrust Tribunal or exempted by the General Director. The opinion was employed as the basis for an August 2006 IAA consent decree with the dominant food suppliers, which imposed on the suppliers various restrictions designed to forestall the practices identified in the guidelines.

Most vertical restrictions are examined under the "rule of reason" approach in Section 2(a). The General Director typically approves exemption requests involving vertical arrangements unless they will block a rival's access to customers or inputs, or otherwise raise costs, strengthen a cartel, or preclude potential competition. Resale price maintenance agreements, however, are typically addressed under the irrebuttable presumption of competitive harm provision in Section 2(b)(1), which covers restraints relating to "the price to be demanded, offered, or paid." This approach does not mean that such agreements are invariably barred. Several of the block exemptions permit RPM in certain circumstances,<sup>30</sup> and specific exemptions are often approved for maximum RPM provisions. Exemptions for minimum RPM, however, are usually denied, although that approach may change. In a recent exemption proceeding, the General Director discussed at length the evolving legal treatment of RPM agreements, focussing particularly on the U.S. Supreme Court's 2007 holding in *Leegin*, which terminated *per se* treatment of minimum RPM in the United States. The Goshen Committee's proposals would modify the language of Section 2(b) to exclude vertical arrangements from *per se* treatment, with the effect that RPM would be examined under the more lenient rule of reason standard in Section 2(a). Given the proposal's pendency, the IAA's current policy is not to assert the Section 2(b) presumption against a vertical arrangement unless a Section 2(a) case can also be made.

Over the past five years (2003 to 2007), the IAA has commenced two vertical cases in court, and resolved two others, both by consent decrees.<sup>31</sup> One case arose from an earlier agreement between the IAA and the three leading gasoline companies that barred the companies from imposing exclusive supply requirements on gasoline stations. Subsequent to that agreement, the companies began to lease gas stations and operate them directly. In 2003, the IAA reached an agreement with Delek (a leader with a 23% market share) providing that any contract by which Delek leased a gas station for a period exceeding seven years would be treated as a merger requiring prior approval from the IAA. The second case, also resolved by consent, is the August 2006 food suppliers case described above.<sup>32</sup> The most recent criminal resale price maintenance indictment was in a 1996 horizontal arrangement case against a joint venture by two competitors to import and market frozen meat. The companies agreed to split the market 80% and 20%, and employed RPM to more easily calculate their respective shares. The defendants were acquitted at trial, but convicted by the Supreme Court on appeal. The case was finally closed in 2008, when the Court imposed sentences fining the two companies ILS 600,000 and 500,000 (USD 166,800 and 139,000) and two corporate officers ILS 100,000 and 10,000 (USD 27,800 and 2780).

In recent years, the General Director has issued only one Section 43 determination that a vertical arrangement was unlawfully restrictive. The 2005 decision, which involved a 10-year contract between a bank and the only shopping mall in the relevant geographic area, condemned a provision that prevented the mall owner from leasing store space to a competing bank.

Most of the IAA's enforcement activity with respect to vertical restraints is comprised of specific exemption determinations under Section 14. The General Director has resolved 81 such exemption applications from 2003 to 2007, approving 51 (63%) without conditions, 26 (32%) with conditions, and denying four (5%). In 2006, the IAA approved with conditions an arrangement whereby PalTov, a producer of polycarbonate boards, agreed to purchase 80% of its polycarbonate input from Bayer AG, a manufacturer that held a 20% share in PalTov. Bayer also held a 26% share in PolyGal, another polycarbonate board producer. The agreement accorded MFN treatment to the PalTov and included a reciprocal non-compete clause. The Director approved the agreement because there was no significant foreclosure effect at either the polycarbonate manufacturing level or at the board production level. The approval was conditioned by capping Bayer's stake in PalTov at 25% and prohibiting Bayer from exercising its ownership rights in PalTov in a way that might hamper potential competition between PalTov and PolyGal.

A 2008 approval without conditions permitted IBM Israel to employ a standard product distribution contract imposing various marketing restrictions

and service quality requirements. The General Director approved the contract because it involved no pricing or exclusivity clauses and had a pro-competitive purpose. The IAA's four vertical restraint denial cases all occurred in 2003 and all involved a standard contract employed by Tnuva for transportation of raw milk from dairies to Tnuva's milk processing facilities. The contract, which was negotiated between Tnuva and various dairy cooperatives, imposed exclusive territories on the transporters and required them to purchase and install certain milk handling equipment specified by Tnuva. The General Director rejected the contract because of concerns that it might eliminate competition in the milk transport market and that its cumulative effect could foreclose access to raw milk by competing milk product manufacturers. In a recent 2008 case, the Director denied approval of a restraint ancillary to a vertical merger in the market for retail sale of CD and DVD products. The restraint barred the purchaser from competing with certain businesses that the seller retained.

Approximately 10 percent of the vertical exemption proceedings during the period involved RPM issues. In a 2003 case, the Director approved a maximum RPM provision employed by a cigarette manufacturer in its distribution contracts, but imposed conditions obliging the manufacturer to notify the distributors that they could charge less than the maximum and requiring that the maximum be set at a level lower than the average price charged to the distributors during the previous year. In 2008, the Director approved implementation for a limited period of time of a paint manufacturer's recommended retail price because, as a practical matter, the specified price functioned as a maximum rather than as a minimum.

55. The Antitrust Tribunal resolved one application for approval involving vertical restrictions. The case involved the same set of milk transport exclusivity agreements between Tnuva and dairy cooperatives that the Director had previously rejected. The Tribunal approved the contracts without conditions, concluding that the arrangements were efficient and finding little risk that other competitors would be foreclosed from either the milk transport market or access to raw milk supplies.

## **2.2      *Monopoly***

Recent monopoly cases have focused on the use of market power to exclude competitors or extend dominance into an adjacent market through tying. The IAA's approach has evolved to rely less on "instructions" to monopolists and much more on consent decrees, which often include penalty payments. The Law's unused provisions about joint dominance may be replaced by a proposed amendment under which the IAA could more effectively remedy market conditions that lead to "slight" competition.

Status as a monopoly is not itself unlawful under the RTPL, but monopolists are subject to various conduct prohibitions and may also be subjected to instructions issued by the IAA. A “monopoly” is defined as the concentration in the hands of a single party<sup>33</sup> of more than 50 percent of “the total supply or acquisition” of any asset or service in a relevant market, and thus includes monopsonists (Sec. 26(a)). Status as a monopoly depends solely on control of the requisite market share, and does not require a showing of actual market power, although market power is a necessary element for the imposition of certain remedies.<sup>34</sup> A party with a 50% or smaller share of the relevant market cannot be characterized as a monopoly unless the Minister invokes special authority provided by Section 26(c) to determine that the party has “decisive impact” on the market. This power has never been used.

The General Director is authorized to “declare the existence” of a monopoly (Sec. 26(a), and such a declaration is treated as if it were a declaration under Section 43(a). A monopoly declaration therefore constitutes *prima facie* proof of its content in any legal proceeding and, in this context, establishes a rebuttable presumption supporting the Director’s underlying market definition and market share determinations. The IAA employs monopoly declarations to put monopolists on notice that their conduct is subject to the RTPL’s monopoly provisions and to assist parties who may be contemplating private actions against anticompetitive conduct by such firms. From 2003 to 2007, the Director entered monopoly determinations in ten cases, involving such markets as air transportation (El Al, in flights between Tel Aviv and four cities outside Israel), flour production, credit card transaction clearing, Internet infrastructure, water meters, and security services.

The prohibitions applicable to a monopolist’s conduct are established in Sections 29 and 29A and apply to any firm that meets the statutory definition, whether or not the Director has made an applicable monopoly declaration. Under Section 29, a monopolist may not “unreasonably refuse to provide or purchase an asset or a service over which the monopoly exists.” As construed, a “refusal” is not limited to a flat rejection, but also includes price discrimination, tying, and imposition of other anticompetitive terms. Although the prohibition alludes to “unreasonable” refusals, the Tribunal has construed that clause as a provision intended to prevent competitive harm, and not to protect competitors.

Section 29A, adapted from EU Article 102, was enacted in 1996 to supplement Section 29, but effectively subsumes it. Section 29A(a) provides that a monopoly “shall not abuse its position in the market in a manner which might reduce competition or injure the public.” The Tribunal interprets the phrase “injure the public” to comprehend only such harm as is associated with the public interest in preventing harm to competition. In other respects, the

language of the section has been construed broadly. No overt action by a monopolist is required, for example, as inaction can also constitute abuse. The source of the competitive harm need not be the monopolist's market position; nor must the competitive harm impact the market in which the monopolist holds a dominant position. A demonstration of market power is, however, required to prove a Section 29A(a) offence, and a market share exceeding 50% does not itself constitute sufficient evidence of such power.<sup>35</sup>

The critical language in Section 29A(a), referring to reduced competition or injury to the public, has been construed by the IAA to include two overlapping categories of conduct viewed as inconsistent with "competition on the merits." The first comprises conduct that harms actual or potential competitors in a manner that hinders marketplace competition ("anti-competitiveness"). The second covers exploitation of a monopolistic position in order to secure supra-competitive profits ("exploitation"), in circumstances where such conduct conflicts with the Law's purpose of preventing harm to competition.

Section 29A(b) supplements sub-section (a) by listing four types of conduct by a monopolist that will be "deemed" to constitute an unlawful abuse of position. As under EU Article 102, an irrebuttable presumption of abuse will arise (thus obviating the need to show competitive harm) if the monopolist (1) establishes an "unfair buying or selling price" for a monopoly product or service; (2) reduces or increases the quantity of a monopoly product in a manner "not within the context of fair competitive activity;" (3) establishes discriminatory contractual conditions that are "likely to grant certain customers or suppliers an unfair advantage over their competitors;" or (4) regarding a monopoly asset or an service, includes contract conditions "that, by their nature or according to accepted trading practices, are unrelated to the subject matter of the contract."

The IAA treats the abusive pricing clause in sub-section (b)(1) as the proper basis to attack predatory pricing, although no predatory pricing prosecution has ever been commenced. The Tribunal has observed that predation constitutes a violation and that proof of such a violation requires a demonstration that post-predation recoupment by the defendant would be possible. The IAA is cautious in employing the unfair pricing provision to attack high prices, in recognition of the difficulties associated with attempts to control monopoly pricing through antitrust litigation. In particular, the IAA interprets the reference to "unfair pricing" as requiring more than a mere showing that the price charged exceeds the price that would prevail in a competitive market. Rather, there must be demonstration that such pricing threatens competitive harm.<sup>36</sup>

### **Box 1. Monopoly power and direct price regulation**

Exploitation of monopoly power to charge high prices can be addressed by the government through direct price control legislation. The Minister of Finance has statutory authority to regulate wholesale and retail prices for any product, to be exercised jointly with the minister having jurisdiction over the product at issue.<sup>37</sup> The two ministers may issue an order without separate government approval for a product or service (1) that is controlled by a monopoly, as defined in Section 26 of the RTPL; (2) the supply of which only one or two persons control in a manner that substantially affects the market; (3) where the suppliers or purchasers of the product face no or only slight competition; or (4) where the supply of the product is subsidised by the Government. An order may be issued with separate government approval where (1) the product is essential and the public interest warrants regulation of its price; (2) there is a shortage of the product based on exceptional circumstances; or (3) regulation is needed in order to halt inflation or achieve the objectives of the government's economic and social policy. At present, retail price caps apply to a limited number of basic foodstuffs.

The IAA's enforcement approach to the remaining three sub-sections in Section 29A(b), relating to output restrictions, discrimination, and tying, is similar to that for unfair pricing. The IAA considers that sound policy and the statutory references to "fairness" and "accepted practices" oblige it to identify some prospect for competitive harm before initiating a case, even if a court would not require such a showing. The IAA states that its examination of a monopolist's conduct in this respect might be called a "quick look," which focuses on determining whether the conduct at issue has a legitimate pro-competitive purpose.

Violations of Sections 29 and 29A are criminal offences, but the newer offence is subject to more severe punishment.<sup>38</sup> In the past five years (2003 to 2007), two IAA cases involving abuse of dominance were resolved, both by Tribunal consent decrees. In 2007, Strauss-Elite (a declared monopoly in the chocolate bar market) agreed not to impose any sanctions on retailers or wholesalers who chose to carry a competitor's product, and paid a civil penalty of ILS 5 million (USD 1.4 million). The case arose from an attempt by Strauss to prevent entry by Cadbury. In a 2005 consent decree, the Central Bottling Company, the exclusive bottler of Coca-Cola in Israel and a declared monopoly in the carbonated cola beverage market, agreed not to tie bottled water products to purchases of its soft drink products, and paid a civil penalty of ILS 500,000 (USD 139,000).<sup>39</sup>

The General Director, in addition to her authority to declare the existence of a monopoly, is also empowered by Section 43(a)(5) to declare that a monopolist has abused its position in violation of Section 29A. As is the case for all Section 43 declarations, such a determination has *prima facie* effect in any legal proceeding. Two decisions declaring an abuse of dominant position have been issued by the IAA since 1988, both involving the Bezeq telecommunications group. In 1997, the Director determined that Bezeq International, then a declared monopoly in the international telephone calls market, had abused its position by engaging in a strategy of “price obfuscation” at a time when the market was opening to newly-licensed competitors. The company advertised international calling plans that were deliberately designed to confuse consumers attempting to compare Bezeq’s plans with those of its rivals. The Director concluded that this conduct harmed competition because it both illegitimately hindered entry by Bezeq’s competitors and corrupted consumer choice in a competitively significant way.<sup>40</sup>

A decade later, in 2007, the Director concluded that Bezeq, a declared monopoly in the local landline telephone calls market, had abused its position in dealing with new entrant HOT Telecom Ltd. Partnership (“HOT”). Specifically, Bezeq’s management failed to reconnect the interface between its telephony network and that of HOT, after Bezeq’s employees had disabled the interface in protest against industry reform initiatives. Bezeq’s conduct, which left HOT functionally impaired for 34 hours, was found not only to have harmed HOT by casting doubt on its capacity to provide landline telephone service, but also to have stifled competition in the marketplace by deterring consumers from switching from Bezeq to HOT or any other new service provider.<sup>41</sup>

The RTPL also includes two provisions, Sections 27 and 30, which empower the Director to issue certain instructions to a monopolist. If the firm at issue has not previously been declared a monopolist under Section 26(a), the General Director will make such a finding before issuing instructions. Section 27, under which the General Director may oblige a monopoly to comply with requirements in two other Israeli laws (the Contracts of Adhesion Law and the Standards Law), is rarely exercised and has not been employed at any time in recent years.<sup>42</sup>

Substantially more significant is Section 30, which empowers the General Director to issue remedial instructions to a monopolist in circumstances where the existence or conduct of a monopoly causes demonstrable harm to “market competition or the public” (subsection (a)), or where the monopolist’s conduct poses a *risk* of significant harm to market competition or the public (subsection (b)). As with similar language in other provisions, the Tribunal has ruled that harm to “the public” comprehends only such harm as is associated with the

public interest in preventing harm to competition. Subsection (c) supplements subsections (a) and (b) by providing that harm to competition or the public is irrebuttably presumed to exist if the monopolist's conduct causes any harm relating to (1) the price, (2) quality, (3) quantity, or (4) supply (including the continuity and conditions of supply) of an asset or service, or (5) "fair competition in the marketplace." The latter phrase, referring to "fair competition," has been construed as an antitrust rather than as an unfair competition provision, and hence does not appreciably expand subsection (c) beyond the scope of the other four clauses.<sup>43</sup>

In practice, all instructions issued thus far have invoked Section 30(b), the relevant standard for which is whether the Director can demonstrate "reasonable likelihood of substantial harm" to competition as a result of the monopolist's conduct. A demonstration of market power is necessary to justify Section 30(b) instructions but that requirement will be satisfied automatically if the monopolist's conduct falls under one of the irrebuttable presumptions of competitive harm in Section 29A(b).

Power to issue Section 30 instructions was assigned to the Tribunal until 1998, when the authority was transferred to the General Director. Since that time, instructions have been issued in five cases, all but one of which occurred in 1998. In that year, for example, Elite Industries, a monopoly in the markets for chocolate, instant coffee, and cocoa powder, was barred from including resale price maintenance, tying, and exclusivity provisions in its distribution contracts. The single post-1998 case involved an instruction issued in 2000 to Yediot Aharonot, a monopoly in the Hebrew-language daily newspaper market. Yediot was ordered to discontinue offering to distributors loyalty rebates that had the effect of excluding rival newspapers. No Section 30 instructions have been issued in recent years because, after the consent decree authority in Section 50B was adopted in 2000, the IAA began employing that provision as the usual method for resolving monopoly cases.

In issuing instructions to a monopolist, the General Director may require any action necessary to prevent competitive harm. The Law does not limit this authority to conduct requirements, and the IAA reserves the option to impose structural remedies. The RTPL includes a separate, express reference to restructuring authority vested in the Tribunal, which may be exercised to require divestiture of a monopolist's assets, on application by the Director, if the Tribunal concludes that (1) the monopoly causes substantial competitive harm and (2) such harm "cannot efficiently be avoided" by instructions regulating the monopolist's activities under Section 30, but may only be achieved by divestiture (Section 31(a)). The Tribunal may select any method of divestiture it finds appropriate, including transfer of shares to an unrelated body or to a

newly-created firm (Section 31(b)). The Tribunal's Section 31 authority has never been invoked.<sup>44</sup>

In enforcing Sections 29 and 29A and in applying Section 30, both the IAA and the Tribunal may employ the "essential facility doctrine," under which the owner of an essential asset is required to grant access to other parties. The leading Israeli case in which the theory was applied is a 1999 decision involving exclusive contracts between two monopolies (bus company Egged and bus terminal operator Nitzba) that were under common ownership. The Director determined that the contracts unlawfully excluded other bus companies from competing with Egged by denying them access to critical bus terminal facilities.

The RTPL contains no provision that prohibits "monopolising" conduct by a firm that employs illegitimate means to *acquire* monopoly power. The IAA has not, however, faced any situation in which this feature of the RTPL has posed a problem for effective law enforcement. The IAA observes that, if a firm with monopoly power in one market seeks to extend its power to another market through tying or bundling, such conduct can be reached under the tying clause in Section 29A(b)(4).<sup>45</sup>

The Law addresses joint dominance in Section 26(d), which defines a "concentration group" as two or more persons "who are not in competition or are only in slight competition." Where such a group controls more than half of a relevant market, the General Director may declare that the group is a "monopolist" for purposes of all the monopoly provisions in the RTPL (Section 43(a)(4)). Because a determination by the Director is a requisite for liability, a concentration group (unlike a monopolist) is not subject to the prohibitions in Sections 29 and 29A merely because it holds a market share exceeding 50%. The General Director has never attempted to designate an oligopoly group as a monopolist under Section 26(d). The IAA observes that it is extremely difficult to prove that the firms in a typical oligopoly market are "only in slight competition." Even if a concentration group were successfully declared as a monopoly, the remedies provided in the RTPL are not well designed for dealing with oligopolists.

The Goshen Committee has developed a legislative proposal to address the deficiencies in Section 26(d) by expanding the circumstances under which the Director could act and the remedies she could impose.<sup>46</sup> The proposed language empowers the General Director to declare the existence of a concentration group upon finding that there are conditions for slight competition. Such conditions would be determined by considering such market features as the presence of entry barriers, impediments faced by customers in switching suppliers, and cross-ownership arrangements among industry participants. A

declared concentration group would not, however, be subjected to the prohibitions in Sections 29 and 29A. Rather, the declaration would entitle the Director to issue instructions to the members of the group. This authority would extend beyond forestalling competitive harm, and could be exercised to enhance competitive vitality in the industry by eliminating or mitigating entry and switching barriers, prohibiting practices that may facilitate coordination (including information exchanges), and ordering divestiture of cross-ownership interests.<sup>47</sup>

### 2.3 *Mergers*

Mergers are evaluated for anticompetitive effects according to a contemporary analytic scheme. Concentration is not determinative, efficiencies can save an anticompetitive transaction if consumers benefit, and the failing firm defence applies. The pre-merger notification system is standard, except that notification is required if one of the merging parties is a monopolist or if the parties' post-merger market share exceeds 50%. Improvements in procedures have reduced the time expended by the IAA to evaluate mergers, but appellate review of IAA merger decisions has sometimes been delayed. A high portion of merger applications (87%) are approved without conditions, and only a few (1%) are rejected outright. Of the mergers conditioned, slightly less than half (44%) involved structural conditions. The IAA prefers to impose conditions rather than to prohibit transactions outright. Failure to notify where required has resulted in some prosecutions, which have typically been settled with a civil penalty payment; one major pending<sup>48</sup> case involves an anticompetitive consummated transaction that the IAA is seeking to unwind.

For merger control, Israel employs a pre-merger notification and clearance system. Notifiable transactions may not be consummated without the General Director's approval, and the parties may not undertake any act toward integration during the thirty day period after the notification is filed. Approval is granted unless the Director finds a reasonable likelihood that the merger will cause significant competitive harm.<sup>49</sup>

The notification requirement applies to any "corporate merger," defined to include the direct or indirect acquisition of (1) "most of the assets" of the target firm, (2) more than 25% of the target's issued share capital, or (3) control over more than 25% of the target's voting power, directors, or profit rights (Sec. 1).<sup>50</sup> The statutory definition is not exhaustive, and the IAA considers that a broad range of transactions can qualify.

In 2008, the IAA published procedural merger guidelines to provide guidance on issues associated with the merger notification process.<sup>51</sup> Under the

guidelines, the statutory reference to acquisition of “most of the assets” is interpreted to cover any acquisition by which the acquirer obtains “a significant element in [the target’s] ability to compete” in a particular relevant market.<sup>52</sup> With respect to the acquisition of rights (as opposed to assets), a merger occurs if the transaction creates or strengthens “a substantial influence link” between the decision-making mechanisms of the merging parties, a condition that is met by the acquisition of any form of influence equivalent to holding more than a quarter of a right listed in the definition of a merger.<sup>53</sup>

Advance notification is required for any merger transaction where (1) as a result of the transaction, the market share of the combined entity exceeds 50% of a relevant market,<sup>54</sup> (2) the combined sales turnover of the merging entities in the previous year was at least ILS 150 million (USD 41.7 million) and the sales turnover at each of at least two merging firms (on opposing sides of the transaction) was at least ILS 10 million (USD 2.8 million)<sup>55</sup>, or (3) a party to the transaction is a monopoly under Section 26 (Section 17(a)). For cases involving a company that conducts business both in Israel and overseas, sales turnover and market share are calculated only with respect to the Israeli portion of the business (Sec. 18).<sup>56</sup> The notification requirements are fully applicable to acquisitions carried out in privatising government-owned assets.

In determining whether the merged entity’s market share exceeds 50%, the notifying parties must identify the relevant markets involved in the transaction and include in the share calculation any market share held by firms in the same control group of either of the merging entities. The market share threshold applies separately to each of the relevant markets in the production chain in which firms from either of the control groups operate, including production, sales, marketing, and input acquisition. Calculating sales turnover likewise requires the parties to aggregate the turnover of all the firms in each merging party’s control group. A significant qualification to this principle is that, in a transaction completely severing all structural links between the acquired entity and the seller, the IAA requires recognition of only the acquired entity’s turnover.<sup>57</sup>

Section 17(a)(3), requiring notification where one of the parties to the transaction is a monopoly, is triggered without regard to whether the IAA has issued a monopoly declaration under Section 26. The parties may therefore be obliged to ascertain the relevant market for purposes of applying this threshold as well. The market so defined need have no relation to the merger market, because the notification requirement for a monopoly applies if a merging party is a monopoly in any market. Further, a merger involving a non-monopoly firm must still be notified if the firm has a monopoly anywhere in its control group. In that circumstance, however, the IAA will waive the filing requirement, in

response to an application for advice from the merging parties, if the monopoly firm has no “competition-based connection” to any of the markets in which the other merging party operates. For this purpose, a competition-based connection will usually be found if the parties to the transaction deal in goods or services that are substitutes for each other (either actually or potentially), or if items produced on one side of the transaction serve as inputs to the manufacture or marketing of the other side’s production.

The IAA recognises that the merged entity market share threshold is inconsistent with the recommendation of the International Competition Network (“ICN”) that merger notification requirements should be based on “objectively quantifiable criteria.”<sup>58</sup> The ICN interprets this to mean that a market share test is “not appropriate for use in making the initial determination as to whether a transaction is notifiable.”<sup>59</sup> The OECD Council Recommendation concerning Merger Review similarly states that merger notification criteria should be “clear and objective,”<sup>60</sup> although it does not define “objective.” Market share thresholds are not generally considered to be objective because they oblige applicants to develop potentially subjective definitions of relevant markets.

The IAA’s position is that the RTPL’s merger notification system is justified in the particular circumstances facing Israel. Referring to the prevalence in Israel of markets that are highly concentrated but relatively small in size, the IAA asserts that use of the merged entity’s market share in conjunction with turnover indicia has proven to be better suited for detecting problematic mergers than would a system that relied on turnover alone.

An analysis by the IAA of merger notifications filed in the period from January 1, 2005 to August 31, 2008 showed that the agency conditioned one merger that had been notified only because it met the merged entity market share threshold. This represents approximately 0.5% of the 184 mergers that were blocked or conditioned during that time.<sup>61</sup> In addition, the IAA is presently seeking a divestiture order from the Tribunal against a non-notified merger that was a reportable transaction only because it met the merged entity share screen.<sup>62</sup> Eliminating the market share screen would require lowering the turnover thresholds if Israel wished to catch such mergers,<sup>63</sup> but a turnover reduction would sweep into the notification system many more innocuous transactions than are reported under the current scheme. With respect to the burden imposed by the market share screen, the IAA estimates that, of the 782 merger notifications examined in the 44 month period, 10 involved non-problematic transactions that were notified solely because they met the merged entity market share threshold.

The IAA notes that it finds no merit in the argument that the existing notification system unjustly exposes firms to criminal prosecution for failure to file if they wrongly calculate market shares. While it is true that consummation of a reportable transaction without notification is a criminal offence, the IAA does not routinely prosecute parties who reasonably assess the relevant market in a manner differing from that of the IAA, particularly where a party's market definition is based on comprehensive legal and economic analysis by professional counsel. The IAA also emphasises that the market share threshold is set at 50%, which means that it catches only mergers to monopoly. In the IAA's view, it is reasonable to assume that parties who undertake a transaction yielding such a high market share are well aware of the share size involved when they decide to merge. To provide guidance to merging parties, the IAA has posted on its website a compendium of over 100 market definitions established by the IAA in analyzing merger applications, issuing monopoly determinations, and conducting various enforcement proceedings. The IAA characterizes this compilation as a source of information that helps merging firms predict the IAA's market definition. The IAA also offers merging parties an advisory opinion procedure that can be employed to resolve market definition issues.

The notification requirement applicable where one of the parties is a monopolist also has an implicit market share element. The IAA's 44-month study showed that the agency blocked one merger and conditioned four others that were notified solely because they involved a monopoly party.<sup>64</sup> This represents 2.7 per cent of the 184 mergers that were blocked or conditioned during the period. As to this threshold, the IAA observes that merging parties face no uncertainty if the Director has already declared one of them to be a monopolist under Section 26(a). Even if no such declaration has been made, firms near or above the 50% monopoly threshold under any market definition will likely be well aware of the possibility that they meet the notification test, because they will have already considered their exposure to the RTPL's monopoly prohibitions. With respect to the burden imposed by the monopoly screen, the IAA estimates that, of the 782 merger notifications examined in the 44 month period, 32 involved non-problematic transactions that were notified solely because they met the monopoly entity market share threshold.

With respect to the turnover notification thresholds (requiring aggregate sales turnover of ILS 150 million and ILS 10 million in sales turnover for the acquired company), the IAA states that it regularly considers whether to adjust those thresholds by examining the portion of transactions involving significant competitive issues that were caught solely by the turnover screens. The IAA's analysis also includes other factors, such as changes in the size of Israel's economy, judicial treatment of the IAA's merger disapproval decisions, and

data relating to merger notification systems in other antitrust regimes. The IAA's 44-month survey analysed the effects of increasing either or both of the turnover thresholds in various combinations. The results are shown below. The IAA notes the important point that the turnover figures employed in its analysis were limited to those of the merging entities, and excluded turnover attributable to affiliated companies. Since aggregation of control group turnover is required under the IAA's merger filing regulations, this approach overstates the degree to which the volume of merger filings would be reduced by making the changes at issue.

**Table 8. Effects of Increasing Merger Notification Sales Turnover Thresholds**

Scenario Number	Aggregate and acquired firm thresholds (ILS million)	Reduction in number of notifications (%)
[Existing thresholds are 150/10]		
1	300/25	23
2	300/10	15
3	250/20	18
4	250/10	12
5	200/15	10
6	200/10	7
7	150/30	16
8	150/25	13
9	150/20	8
10	150/15	4

The IAA conducted a closer analysis of scenarios 1, 3, 4 and 9 to determine how many blocked or conditioned mergers that were freed from notification by the higher turnover thresholds would nonetheless have been notified under the market share or monopoly party screens. In scenario 1, all but 2 of the 70 problematic mergers would have been caught by the other screens.<sup>65</sup> In scenario 2 likewise, all but 2 of the problematic transactions would have been caught, and the IAA advises that the competitive issues in those matters could have been dealt with by other means. In scenario 4, all but one of the problematic mergers, and in scenario 9, 2 of the 4 problematic mergers would

have been caught by the other screens. The IAA has concluded that the current turnover thresholds do not warrant alteration until a new evaluation can be made when full data from 2008 are available.

The IAA offers both a short form and a long form for filing merger notifications. The short form may be employed if the aggregate share of the parties in the relevant market does not exceed 30%, no party is a monopoly in an adjacent market, and no party is involved in a contract with a competitor in the relevant market.<sup>66</sup> Once a complete notification is filed, the Director has thirty days to determine whether to approve, reject, or impose conditions on the proposed transaction.<sup>67</sup> The guidelines note that, although a notification is not deemed complete unless it contains the merger agreement with all of its appendices, this condition is waived in such situations as a tender offer. Further, the parties to a conventional acquisition may file a notification and begin the review process based only on a memorandum of understanding or other evidence of a concrete intention to undertake the transaction. In such a case, however, the 30 day review period does not commence until the notification package is completed with the submission of the full merger agreement package.<sup>68</sup>

Upon receipt, IAA staff classifies merger notifications into three colour-coded categories reflecting the relative competitive concerns that each transaction presents (green, indicating no significant issue; yellow, indicating potential issues warranting review; red, indicating a likelihood of adverse competitive effects warranting rejection).<sup>69</sup> In problematic cases, the IAA invites the parties to discuss the transaction in meetings with agency staff and senior officials, and may also hear presentations from interested third parties. The IAA may formally request additional information from the parties (Sec. 20(a)), although such a request does not automatically suspend the statutory waiting period.<sup>70</sup> The agency can also employ its investigative powers to obtain information from third parties (Sec. 46(b)). Before reaching a final conclusion on the merits, the Director is required to consult with the Exemptions and Mergers Advisory Committee (Sec. 24). Failure by the Director to issue a decision within the 30 day period constitutes approval of the transaction (Sec. 20(b)).<sup>71</sup>

The standard for evaluating mergers is set by Section 21(a), which provides that the Director shall object to a merger, or stipulate remedial conditions, “if there is a reasonable likelihood” that competition in the relevant sector “will be significantly harmed or that the public would be injured in one of the following regards.” The list that follows refers to (1) price, (2) quality, and (3) the quantity supplied, “or the constancy and conditions of such supply.” The Supreme Court has held that a “reasonable likelihood” of harm under Section

21(a) may be established by a preponderance of the evidence, thus requiring a probability that exceeds 50%. With respect to the statute's reference to public harm, the Tribunal interprets that language to comprehend only such harm as is associated with the public interest in preventing harm to competition.<sup>72</sup> The IAA frames the central question in conventional terms: will the transaction create, enhance, or facilitate the exercise of market power?

The methodology employed by the IAA to analyse mergers has seven stages, beginning with definition of the relevant product and geographic markets, a task for which the IAA focuses on demand substitution and employs the SSNIP test with a hypothetical price increase in the range of 5 to 10 percent. Supply substitution is considered at stage 2 of the process, during which the competitors operating in the relevant market are identified and assigned market shares.<sup>73</sup> Market concentration pre- and post-merger is then calculated at stage 3. Although there are no particular HHI thresholds at which mergers are presumed to be acceptable or anticompetitive, special attention is directed to cases in which post-merger concentration is high or in which the increase in concentration is significant.

Evaluation of competitive effects occurs at stage 4. Horizontal mergers are assessed for both unilateral and coordinated effects, while vertical mergers are examined primarily (but not exclusively) for unilateral effects associated with creating market power in adjacent markets along the distribution chain. Conglomerate mergers in which at least one party has market power are checked to determine if the parties (1) supply complementary products in circumstances that raise the possibility of vertical foreclosure, or (2) operate in multiple markets and propose to merge in a peripheral market, posing the risk that they may thereafter be disinclined to enter one another's core markets in response to a SSNIP. In stage 5, the prospects for new entry or expansion by market incumbents are considered,<sup>74</sup> while stage 6 focuses on efficiencies. To be recognised as an offset to anticompetitive effects, efficiencies must be merger specific, substantial, timely, and of a kind that will be passed on to consumers in the form of lower prices or new or improved products. To date, no proposed merger has been salvaged by a demonstration of cognisable efficiencies sufficient to outweigh the transaction's adverse competitive effects. At stage 7, the IAA considers application of the failing firm defence. The IAA will not block an otherwise anticompetitive acquisition of a failing firm if (1) by so doing, the productive assets of the firm would be forced to exit the market, (2) there is no less anticompetitive transaction that would keep the firm in the market, and (3) the competitive impact of the firm's exit would be at least as adverse as that of the proposed acquisition. In practice, the failing firm defence is invoked rarely and even more rarely accepted.

The IAA's guidelines are procedural, focusing on merger notification requirements, and do not contain an explication of the method by which the Director evaluates proposed mergers. The IAA staff has largely completed draft analytic guidelines, and the IAA is now considering options for issuing the final product.

The Director's decision in a merger notification case may involve denial, approval, or approval subject to conditions. The IAA's preference is to impose conditions on a merger that will permit it to proceed, rather than to prohibit the transaction outright. The following table summarises the IAA's merger review activity over the past five years. The data for structural conditions refer to decisions requiring some form of divestiture, while the data for conduct conditions refer to orders restricting the post-merger behaviour of the merged entity.

**Table 9. Merger Notifications**

Year	Notifications received	Notifications resolved	Approved without conditions	Approved with conditions		Rejected
				Structure	Conduct	
<b>2007</b>	243	237	215	8	13	1
<b>2006</b>	225	218	190	17	8	3
<b>2005</b>	188	184	157	9	17	1
<b>2004</b>	145	126	114	3	9	0
<b>2003</b>	130	104	82	8	11	3
<b>Total</b>	931	869	758	45	58	8

As shown in the table, the IAA resolved 869 merger notifications from 2003 to 2007 and approved 758 (87%) without conditions. Structural conditions were imposed in 45 cases (5 %) and conduct conditions in 58 (7 %).<sup>75</sup> Proposed mergers were rejected in eight cases (slightly under 1%).

Among the transactions barred outright by the IAA was a merger to monopoly involving manufactures of reinforced polyester products (2006), an acquisition eliminating a maverick from the highly concentrated corrugated cardboard manufacturing market (which had high barriers both to imports and to the entry of new domestic producers) (2003), a combination involving two of the four major gasoline station chains (2005), and another involving two of the three national burger chains (in a market defined to cover only burgers and not

all fast food outlets)(2003). Also in 2003, the IAA prohibited a major steel manufacturer from purchasing melting equipment from a competing firm in liquidation, where permitting the transaction would have left the purchaser as the dominant incumbent engaged in purchasing iron scrap and manufacturing steel bars.

Two recently rejected mergers involved Bezeq and entailed both horizontal and vertical anticompetitive effects. In one of the cases, Bezeq planned to increase its holding in Israel's only satellite TV company from a minority to a majority share. The IAA found that the expected development of Internet television technology meant that Bezeq was a strong potential competitor in the horizontal market for multi-channel TV origination. Vertical concerns arose because Bezeq also had land line infrastructure that could be used to distribute multi-channel TV programming originated by satellite. In the second case, a Bezeq subsidiary that sells, installs, and maintains telephone switchboard equipment for businesses sought to acquire the equipment's manufacturer. The horizontal issues related to the fact that both parties made equipment sales to certain classes of customers, while the vertical feature arose because the acquirer's parent, Bezeq, is a declared monopoly in the provision of land line telephone services.

Several significant cases involved approval of transactions subject to structural conditions. A 2006 merger of two telecommunications companies engaged in the international telephone call and ISP markets posed no direct competitive problems, but the companies' parents were horizontal competitors as owners, respectively, of Israel's sole satellite TV company and cable multi-channel TV company. Prior to consummation of the merger, the owner of the cable company was required to divest his shares in the subsidiary to be acquired, thus eliminating any link between the parent firms. In an earlier 2002 case involving the merger of cable television companies, the merged entity was required to improve its cable infrastructure in order to carry telephone services, thus leading to the entry of Hot Communications as a competitor against Bezeq in the landline telephony market.

The failing firm defence was successfully invoked most recently in another structural condition case. In 2005, the General Director approved the acquisition of one supermarket chain, Club Market, by another, Supersol. The Director concluded that Club Market was insolvent and unable to reorganise, that no acquisition offer was available other than Supersol's, and that allowing Club Market to dissolve would harm competition more than would its acquisition by Supersol under a conditional IAA approval. The transaction was approved with the requirement that Supersol divest 17 specified stores to a party that would continue to operate them as grocery outlets.

Notable cases in which approvals were conditioned with conduct requirements included a 2008 transaction in which Israel's only two manufacturers of PVC compounds were permitted to merge on the condition that the acquired company make available to its existing customers (through a trustee) the chemical formulae underlying its compounds; the 2007 privatisation of petroleum distillates distributor Pi Gliloth to Delek, one of the major gasoline station chains, in which Delek was required to supply gasoline equally to all customers, and refrain from refusing to deal with its competitors; and another 2007 case in which a merger between two major suppliers of military equipment was conditioned on the requirement that the merged entity provide impartially to its competitors certain software critical to next-generation military communications systems.

The IAA focuses intense effort on processing merger notifications quickly and efficiently, and seeks to minimise the number of cases that require extension of the statutory 30-day deadline. The colour-coded category system was introduced in 2004 as part of a program to streamline the merger review process and has proven successful in reducing average merger processing times.<sup>76</sup> In some cases, processing is delayed because the IAA expends time to explore whether a problematic transaction can be saved from outright rejection by imposing remedial conditions. The following table displays the processing record for the past two years.

**Table 10. Merger Notification Processing Time**

Classification category	Year			
	2006		2007	
	Notifications resolved	Average processing time (days)	Notifications resolved	Average processing time (days)
Green	170 (78%)	20	205 (87%)	20
Yellow	41 (19%)	41	31 (13%)	43
Red	7 (3%)	58	1	137
Total	218	25	237	23

The IAA can seek criminal penalties in merger cases under Section 47(a)(3) and (4), which impose fines and imprisonment for consummating a non-notified merger or violating a condition imposed in a merger approval. If the Director concludes that an unlawful merger causes sufficiently grave competitive harm, she can apply to the Tribunal for a divestiture order, which the Tribunal is authorised by Section 25 to grant if it concludes that the competitive harm standard for rejecting a proposed merger is met.<sup>77</sup> The Director may also petition the Tribunal President either for injunctive relief

against a non-notified merger under Section 50A, or for interim relief under Section 36 pending resolution of the underlying Tribunal case. The IAA can and does enforce the notification requirement by seeking penalties from merging parties who fail to submit a required notification, even if the underlying transaction is competitively innocuous. There is no separate prohibition of anticompetitive mergers, and a transaction that does not meet the notification thresholds is therefore immune from attack under the RTPL's merger provisions regardless of its actual competitive effect. Although it is an unsettled question whether an anticompetitive merger of that kind could be prosecuted as an unlawful restrictive arrangement, the IAA considers such a prosecution to be an available option. In September 2008, the IAA directed the parties to a non-notifiable acquisition to treat the agreement as a restrictive arrangement and seek a specific exemption under Section 14, so that the IAA could assess competitive concerns about the transaction. The parties decided to abandon the deal.

Since 2003, the IAA has prosecuted three cases in which the parties unlawfully engaged in a non-notified merger. In 2004, the parties to a merger of newspaper publishing companies accepted a Tribunal consent decree that required them to pay a fine of ILS 600,000 (USD 166,800) for failing to file. A similar case in 2006 against companies in the mobile coffee shops market resulted in a Tribunal consent decree under which the parties paid a fine of ILS 300,000 (USD 83,400). No structural relief was ordered in either case because the IAA did not consider the transactions to entail significant competitive harm.<sup>78</sup>

The third case, commenced in April 2007 and presently pending before the Tribunal, is the only IAA merger proceeding in the past five years to seek injunctive relief under Section 50A and a divestiture order under Section 25. The case involves a non-notified merger between Prinir and Milos, two of the three leading companies that market processed tomato products in Israel. The IAA's original complaint sought appointment of an independent manager for the merged company, an order directing Prinir and Milos to sever all ties between themselves, and an order divesting the merged company under Section 25. The Tribunal concluded that a procedural agreement devised by the merger parties made appointment of an independent manager unnecessary. It did, however, issue an interim order requiring Prinir and Milos to sever all ties between themselves and prohibiting the directors of either company from making any business decisions affecting the other during the pendency of the trial. The Tribunal is presently deliberating whether a Section 25 divestiture order should be issued.<sup>79</sup>

One final tool available to the IAA in dealing with mergers is Section 43(a)(3), which empowers the Director to issue a determination finding that certain conduct constitutes a notifiable merger under Section 17(a). Such a determination has the usual *prima facie* effect in any legal proceeding. The IAA has employed this authority on four occasions over the years, but not since 1998. After the consent decree authority in Section 50B was adopted in 2000, the IAA began employing that mechanism as the common method for dealing with failure to file cases.

The OECD Council's Recommendation on Merger Review urges Members to (1) avoid imposing unnecessary costs on merging parties, (2) assure transparency and procedural fairness, (3) coordinate merger review processes effectively with other competition authorities, (4) provide competition authorities with sufficient powers and resources, and (5) periodically review merger laws and practices. Israel's Initial Memorandum states that it accepts the recommendation, and the Explanatory Comment notes in particular that Israel complies fully with the recommendations concerning the parties' rights, coordination and cooperation between the IAA and other enforcement agencies, and the sufficiency of the IAA's authority and resources.

## **2.4      *Unfair competition***

The RTPL addresses harm to market competition rather than harm to competitors, and contains no provisions directed to business disputes among private firms. Court rulings have held that the competition law does not cover business conduct injuring an individual company unless it also harms competition or consumers. Companies alleging unfair competition may seek relief only by asserting claims under applicable business tort statutes, such as the Commercial Wrongs Law or the Torts Ordinance, or under common law tort and unjust enrichment principles. Statutory or common law causes of action exist for such forms of unfair competition as misappropriation of trade secrets, passing off, false advertising, and "unfair interference" with relationships between a competitor and its customers, employees, or dealers. The Commercial Wrongs Law does not include a cause of action for pricing below cost although, as originally drafted, it did include a generic "unfair competition" tort. The IAA succeeded in deleting that provision on grounds that competition is sometimes "unfair" from the victim's standpoint and that creating such a tort could ultimately harm competition. The IAA's ongoing role with respect to unfair competition is primarily to interdict efforts by businesses to implement some form of cooperative private regulation against perceived "unfair" or "ruinous" competition.

## 2.5 *Consumer protection*

At present, consumer protection in Israel is primarily the responsibility of the Ministry of Industry, Trade, and Labour. The Ministry's Office of Consumer Protection ("OCP"), headed by a Director, is responsible for civil enforcement of the Consumer Protection Law of 1981 and for the consumer protection provisions in other laws as well, such as those relating to adhesion contracts and real estate agents. The 1981 Law prohibits deceiving or defrauding consumers, exploiting consumers in distress, and disseminating false advertising. It also mandates certain information disclosures, and regulates such matters as credit sales, advertising directed at children, product labelling, door-to-door sales, sales of vacation apartments, and indirect sales involving no personal contact between the seller and the buyer.<sup>80</sup> The Law provides for both criminal and civil penalties and also authorises private suits for damages. Criminal cases are prosecuted by the Ministry's Legal Department, while the OCP Director handles civil penalty actions. Civil damage suits (including many class actions) are litigated primarily by consumer organisations.

A 2006 amendment to the Consumer Protection Law created the Consumer Protection and Fair Trade Authority ("CPFTA"), an independent (non-ministerial) agency. The CPFTA is expected to supersede the OCP Director as enforcer of the Consumer Protection Law within the next few months and will be able to use an expanded set of enforcement tools made available by the 2006 legislation. In addition, a pending<sup>81</sup> amendment would further strengthen the CPFTA by broadening its administrative, civil, and criminal authority, including its investigative and search and seizure powers. The government resolution transmitting the proposed legislation contemplates that authority to address market-wide consumer protection issues (as opposed to individual consumer complaints) will also be vested in the CPFTA at some future point.

The consumer protection regime in Israel also includes the Israel Consumer Council, created in 1970. Its board of directors, appointed jointly by the Prime Minister and the Minister of Industry, Trade and Labour, is composed of representatives from both the government and the public. The Council, which receives government funding, is charged with responsibility to prevent consumer fraud, inspect the quality of goods and services, respond to individual consumer complaints, advocate consumers' interests before the executive and legislative branches, and participate in international consumer organisations. It also has a consumer education function, which it implements by disseminating information, organising conferences, offering a consumer awareness program in schools, and encouraging consumers to assert their legal rights. In addition to the Council, there are several non-governmental consumer organisations in

Israel devoted to assisting consumers and promoting consumer protection policies.<sup>82</sup>

The IAA considers that consumer protection policy and competition policy are interdependent, as both are aimed at achieving the common objective of enhancing consumer welfare. The IAA states that it supports a proactive consumer protection policy and promotes cooperation between itself and the OCP. The IAA and the OCP exchange information on cases that involve possible violations under the other agency's jurisdiction, and both the IAA staff and the Antitrust Tribunal often consult the OCP Director concerning consumer protection issues raised in IAA proceedings. Also, the present director of the OCP sits on the IAA's Exemptions and Merger Advisory Committee, providing an additional point of contact.

The IAA interacts frequently with consumer organisations, which file complaints with the IAA, and may also draw the IAA's attention to potentially harmful commercial practices or provide pertinent information on consumer preferences and prevailing market arrangements. Further, the RTPL formally assigns an important role to consumer organisations by vesting them with standing to (1) oppose an application to the Tribunal for approval of a restrictive arrangement, (2) request the General Director to petition the Tribunal for revocation or modification of a restrictive arrangement previously approved by the Tribunal, and (3) appeal to the Tribunal against IAA decisions exempting a restrictive arrangement, approving a merger (with or without conditions), or issuing instructions to a monopoly.<sup>83</sup>

### **3. Institutional issues: enforcement structures and practices**

This section of the report describes the institutions engaged in competition law enforcement and the processes employed to investigate and prosecute violations; private enforcement mechanisms; and international aspects of the competition law regime.

The Israel Antitrust Authority, the principal enforcer, is a strongly independent agency, well respected by practitioners, academics, business associations and even the Supreme Court, which has praised the "exceedingly high calibre" of its expertise. The IAA and its staff have a reputation for responsiveness and sensitivity to confidentiality, and for valuing predictability, transparency, efficiency, and expedition. The Antitrust Tribunal, which hears appeals from IAA decisions, is also well regarded and, its decisions are generally accepted by the contending parties.

### 3.1 *Competition policy institutions*

The Israel Antitrust Authority<sup>84</sup> is an independent, non-ministerial agency funded through a separate budgetary line item (Sec. 41A(c)). It is headed by a General Director, who is a civil servant appointed by the Cabinet of Ministers upon recommendation of the Minister of Industry, Trade, and Labour. In accordance with a government resolution, the Minister is required to select a nominee from a list prepared by a formal search committee in a process designed to insulate General Director appointments from political pressure. There is no term limit to an appointment, and the Director is considered to hold a career position that remains unaffected by changes in the government's political composition.

The IAA's offices are in Jerusalem and its staff is organised into four departments: (1) Legal, which handles civil and criminal litigation, prepares legal opinions, and advises the IAA staff on legal issues; (2) Economics, which evaluates merger notifications, advises the IAA and other government agencies on economic issues, provides expert witnesses in IAA proceedings, and conducts market surveys and economic research; (3) Investigations, which conducts investigations of possible criminal violations of the RTPL, and (4) Administration.

The IAA recognises the institutional value of transparency in its activities, and employs a variety of methods for communicating with the public generally, and with the antitrust community in particular. These include the issuance of annual reports (one in Hebrew, as required under Israel's Freedom of Information Law, and one in English submitted to the OECD), publication of notices in newspapers and in Israel's Official Gazette, distribution of press releases (in both Hebrew and English), presentation of an annual IAA conference,<sup>85</sup> and appearances of agency representatives (approximately 20 times per year) before various legal, academic, business, and consumer groups. Further, the IAA complies with various requirements in the RTPL for publishing agency and court decisions, and voluntarily publishes additional material as well, all of which is posted on the agency's website.<sup>86</sup> The site includes a wide assortment of material, including IAA opinions issued with respect to applications for specific exemptions and merger approvals, determinations under Section 43, instructions to monopolists under Section 30, most Tribunal and other court decisions and decrees entered in IAA cases, a set of "relevant market" definitions developed by the IAA in the course of its proceedings, press releases, significant portions of the various public registries that the IAA is required to maintain,<sup>87</sup> statutes and block exemptions, and numerous miscellaneous documents such as guidelines, policy papers, speeches, and articles.

There are several circumstances in which the RTPL requires that a notice soliciting public comment be published in advance of a contemplated action. Such a notice is required with respect to General Director proposals to issue a block exemption (Sec. 15A(b)) or to submit a proposed consent decree for court approval (Sec. 50B(d)(1)). The Director is also required to publish a notice and request public comments whenever an application is submitted to the Tribunal for approval of a restrictive arrangement (Sec. 7(b)). Finally, Section 30(d) provides that the Director must publish advance notice of her intention to issue instructions to a monopolist, although the statute does not expressly refer to the submission of public comments in such a case. The IAA has also voluntarily released drafts of guidelines and other position papers for public comment prior to publishing the final version. Two such examples from recent years, both of which are described elsewhere in this report, include the procedural merger guidelines and the IAA position paper regarding relationships between food suppliers and retail grocery chains.

With respect to confidentiality, the IAA considers the protection of confidential commercial data and trade secrets to be a critical agency function, and states that it has implemented “technological and legal means to carefully protect confidential material located in its databases and at its premises and to ensure that none of its employees breaches this confidentiality, inadvertently or deliberately.” The IAA attempts to minimise discussion of confidential material in its written case decisions, and redacts any confidential data before placing decisions on the public record. The Tribunal likewise redacts sensitive material from its decisions, and has emphasised the importance of assuring that business entities are not deterred from making pro-competitive arrangements by apprehension about public disclosure of sensitive data in IAA or Tribunal proceedings. The RTPL itself contains only one provision referring specifically to confidentiality concerns, and it deals solely with excluding sensitive items from the public registries maintained by the General Director.<sup>88</sup> The IAA believes that an express confidentiality provision would be a useful addition to the RTPL.

The IAA notes that, when its decisions are appealed to the Tribunal, it does not routinely release confidential material in the case file to the parties participating in the appeal. Rather, the IAA applies its discretion, based on the circumstances, in determining what disclosure is appropriate. Where the IAA refuses disclosure, the requesting party may bring the question before the Tribunal, which will decide the case in accordance with the balancing procedures specified in Israel’s Administrative Tribunals Law.<sup>89</sup> The Tribunal occasionally accommodates the concern for procedural fairness to the interest in avoiding improper disclosure by permitting access only to counsel for the parties, subject to a prohibition against any further disclosure by them.

The IAA wins acclaim from practitioners, academics, jurists (including the Supreme Court), and business associations for the quality of its work and the responsiveness and professionalism of its staff. Several observers characterised the IAA as quite likely the best government agency in Israel. There is also praise in the antitrust community for the IAA's care in avoiding overbroad intervention in market operations, and consensus that the IAA's legal and economic analyses usually arrive at the correct result.

Israel's large businesses are fully cognisant of the IAA and the competition law, and generally support a strong competition policy (perhaps in part because they operate in highly competitive international markets). The degree to which the small business community is aware of the competition law and the IAA is less clear, and recognition of the IAA among consumers is also a matter of debate. The IAA considers that it is well-known among consumers, but some observers disagree, and recommend that the IAA expend more effort to educate consumers about the benefits of competition and publicise more aggressively the agency's role in prosecuting cartels that affect the price of common consumer goods.<sup>90</sup>

The Antitrust Tribunal is a specialised administrative court operating as part of Israel's judicial system. The Tribunal's President and Deputy must both be district court judges and are appointed by the Minister of Justice in consultation with the President of the Supreme Court (Sec. 32).<sup>91</sup> The Minister of Justice, upon recommendation of the Minister of Industry, Trade and Labour, also appoints up to fifteen public members, among whom must be at least three representatives of consumers' organisations and three representatives of economic organisations.<sup>92</sup> The number of civil servants (not counting the members who are judges) may not exceed one third of all members. Tribunal members serve for a term of three years and may be reappointed, although no member other than the President and Deputy may serve for more than three consecutive terms. Public members are not salaried, but receive a small *per diem* payment for expenses associated with service.

Tribunal adjudications are ordinarily rendered by a panel of three judges, comprised of the Tribunal's President or Deputy and two public members (typically law or economics professors), although preliminary hearings may be conducted by the President or Deputy sitting alone (Sec. 33). Panel decisions are determined by majority vote. The rules of evidence do not apply, except for those relating to witness immunity and confidential testimony (Sec. 37(a)). Tribunal orders are treated as district court civil orders for purposes of enforcement (including contempt of court), and the Tribunal President is vested with the same authority as a district court judge with respect to summoning witnesses and taking evidence (Sec. 37(b)).

The Exemptions and Mergers Advisory Committee has 13 members appointed by the Minister of Industry, Trade and Labour. Five of the members are required to be civil servants with expertise in the fields of economics, law, accounting, or business administration. The remaining eight are public representatives, four of whom are required to be “highly reputed” academicians in one of the four specified fields of expertise. The other four are to be citizens possessing academic degrees and at least seven years of experience in one of the fields. The Committee’s chairman is appointed by the Minister from among its public members. Members serve for a three year term, and may be reappointed subject to a limit of three consecutive terms. As in the case of the Tribunal, the Committee’s public members are not salaried, but receive a small *per diem* payment for expenses.

The RTPL specifies five circumstances in which the Committee has a mandatory role, two of which entail ratification and the other three of which entail consultation. The Committee’s “ratification” is required before the Director may either (1) issue a new block exemption or (2) amend or renew an existing block exemption (Sec. 15A(a) and (f)). “Consultation” with the Committee is required before the Director may approve, condition, revoke, or amend a specific exemption (Sec. 14(a) and (b)), and before approving a merger, with or without conditions (Sec. 24). When considering ratification of block exemptions, the Committee must convene in a panel of at least seven members, four of whom must be public representatives. (Sec. 23(d)(1)). In practice, the Committee meets as a plenum to consider block exemptions. When considering specific exemptions and mergers, the Committee must convene in a panel of at least three members, two of whom must be public representatives (Sec. 23(d)(2)). Panel decisions are by majority vote, with the chairman empowered to break ties (Sec. 23B(b)). The General Director must be invited to all Committee sessions (Sec. 23B(d)). The Director and the Committee have never found themselves unable to reach consensus in a particular matter, and the IAA considers that the Committee provides as a beneficial quality control mechanism for agency work product.

### **3.2 *Enforcement processes and powers***

The IAA has a large set of tools it can apply in enforcing the RTPL, ranging from advisory opinions to criminal indictment. Intermediate options include initiation of an agency proceeding to issue a Section 43 determination (such as a declaration that a monopoly exists or that a restrictive arrangement is unlawful); or commencement of a civil action in court to seek injunctive relief, divestiture of a monopoly or a consummated merger, or issuance of a consent decree. The IAA’s investigative authority is equally comprehensive, and includes compulsory document requests and oral interviews, unannounced

search and seizure, and arrest powers. The Law's maximum fines and prison terms are sufficient to deter hard core cartels if they were actually imposed, but the courts have been reluctant to order significant sanctions. The absence of direct authority for the imposition of civil remedies is a gap in the IAA's powers, and the agency's leniency program has generated few case investigations. The agency relies frequently on its authority to negotiate consent decrees, including consents that entail payment of a civil penalty. In contrast, its authority to seek injunctions against ongoing anticompetitive conduct has gone largely unemployed.

The IAA can forestall some violations by offering advice to business entities concerning proposed conduct that may raise competition issues. The General Director is authorised by Section 43A, added in 2000, to issue "pre-rulings," at her discretion, in response to applications by interested parties.<sup>93</sup> Such rulings may examine whether conduct about to be undertaken would violate the RTPL, or address whether the Director would approve a merger or a restrictive arrangement.<sup>94</sup> Although a pre-ruling is not a binding determination, the parties are entitled to rely upon it in a subsequent approval application proceeding. Further, if the Director opines that certain conduct would not violate the law, the parties will not be prosecuted for undertaking it. Over the past five years, the IAA has issued approximately 100 pre-rulings. Although the procedure is available to examine possible competition issues in a prospective merger, the IAA's experience is that such rulings are not usually sought in merger cases.

IAA law enforcement investigations of criminal conduct arise from complaints submitted by competitors and the general public, and from the IAA's own initiative. The IAA's Investigations Department will commence an inquiry if there is reason to believe that the Law has been violated. The IAA's investigative authority extends not only to substantive antitrust violations, but also to violations of certain Penal Law prohibitions against obstructing investigations.<sup>95</sup> As a general matter, exemption and merger notification proceedings do not involve the Investigations Department because no violation has been committed and the Economics and Legal Departments are able to obtain necessary information from the parties voluntarily.

The IAA has broad investigative powers comparable to those of the police.<sup>96</sup> IAA investigators can (1) interrogate any person involved in a violation of the Law, or any person who may have information regarding such violation; (2) order any such person to report, or accompany an investigator, to the IAA's offices for questioning; and (3) request any document or information relevant to an investigation (Section 46(a)).<sup>97</sup> Section 46(d) expressly authorises IAA investigators to arrest<sup>98</sup> and detain persons suspected of having violated the

Law.<sup>99</sup> Investigators are also empowered to enter any business premises, conduct unannounced searches ("dawn raids"), and seize any article if there is reason to believe that it constitutes evidence (Sec. 45). Searching a personal residence, however, requires the IAA to obtain a judicial warrant. The IAA may receive investigative information from other government authorities as provided by law<sup>100</sup> and may request the police to seek wiretap orders from a district court. The General Director may require any person to provide the IAA with such information or documents that the Director believes will facilitate implementation of the Law (Sec. 46(b)). This provision effectively imposes a statutory duty on all persons to cooperate with IAA investigations, and violations of that duty constitute a criminal offence (Sec. 47(b)). The IAA can therefore investigate and prosecute any person who declines to appear for questioning or who provides false information. It can also apply to a court for an order enforcing documentary and interrogative demands.

When the Investigations Department completes its work and presents its findings to the Legal Department, the IAA may decide to file a criminal indictment; initiate an agency proceeding to issue a Section 43 determination; commence a civil action to seek injunctive relief or a consent decree; or close the case. In considering a criminal indictment, the Department evaluates whether there is a reasonable probability of obtaining a conviction and whether the public interest would be served by pursuing the violation. The public interest assessment may entail evaluating, among other factors, the egregiousness of the offence, the amount of harm that could have been inflicted, the length of time since the offence occurred, and the size of the relevant market.

The IAA ordinarily grants a hearing to the prospective defendant before an indictment is filed.<sup>101</sup> If the offence was committed under aggravating circumstances that make the offence a felony, the Penal Law requires an IAA hearing. Historically, most criminal cases have been against hard core cartels, with only a few cases involving other restrictive arrangements, monopolies, or non-notified mergers. The IAA's policy in cartel cases is to consider issuing indictments against all participants, including the corporations and their executive officers.

Criminal prosecution is the exclusive province of the Attorney General, but IAA attorneys have been delegated power to file criminal charges, which by rule the IAA prosecutes solely in the Jerusalem District Court. Criminal cases end with a conviction or acquittal after trial, or with a plea agreement. A plea agreement between the IAA and a criminal defendant must be approved by the District Attorney before submission to the court, and judicial acceptance depends upon the court's conclusion that the agreement serves the public

interest under the circumstances of the case. An agreement can be reached at any stage of the proceeding, but IAA policy is to prefer agreements reached early in the process, so that the settling party can testify or provide other evidence against the remaining defendants.

Section 47(a) of the Law establishes the base penalty for the most serious offences under the RTPL, while Section 47A, added in 2000, deals with serious offences that have been committed under aggravating circumstances, and Section 47(b) addresses lesser offences. The base penalty for serious offences is a maximum of three years imprisonment and a fine of up to ILS 2,020,000 (USD 561,560) for an individual, and a maximum fine of double that amount (ILS 4,040,000, USD 1.12 million) for a corporation. An “additional fine” of up to ILS 1,300 (USD 360) may be assessed for each day that an individual persists in an offence; double that amount for a corporation.

A separate provision in the Penal Law provides that, for an RTPL violation, the courts may elect to impose a maximum fine of four times the amount of the damage caused by, or the benefit achieved through, the commission of the offence, provided that the defendant intended to inflict monetary harm on another person or to obtain a benefit for himself or another person. This provision is not often invoked by the IAA, because of the difficulties in proving the necessary amounts beyond a reasonable doubt.

An individual committing a serious offence under aggravating circumstances is liable to a maximum prison sentence of five years and a fine of up to ILS 2,600 (USD 720) for each day that the offence persists (Sec. 47A). “Aggravating circumstances” are conditions under which a violation is likely to result in substantial harm to competition arising from among four specified factors: (1) the share and position of the defendant in the market affected by the offence, (2) the duration of the offence, (3) the damage caused or expected to be caused to the public as a result of the offence, and (4) the benefits obtained by the defendant.

The offences to which this range of penalties applies are: (1) participating in a restrictive arrangement or a merger without the necessary exemption or approval; (2) failing to comply with a condition stipulated in an IAA specific exemption or a merger approval, or in a Tribunal restrictive arrangement approval or temporary permit; (3) abuse by a monopoly of its position, provided that the monopoly intended to harm competition or to injure the public; (4) violating a General Director instruction to a monopoly, or a Tribunal order divesting a merged company or a monopoly; and (5) violating a Tribunal order issued under Section 35 (auxiliary powers to implement Tribunal decisions) or Section 36 (interim rulings in pending Tribunal proceedings).

All other violations of the RTPL are addressed in Section 47(b), which sets maximum imprisonment at one year and the maximum fine for an individual at ILS 673,000 (USD 187,100); double that amount for a corporation (ILS 1,346,000, USD 374,200). An “additional fine” of up to ILS 1,300 (USD 360) may be assessed for each day that an individual persists in the offence; double that amount for a corporation. These penalties are applicable to such lesser offences as failing to comply with an IAA request for information under Section 46(b), or violating a General Director order under Section 27 requiring a monopoly to confirm its conduct to certain other laws.<sup>102</sup>

The IAA considers that the prison terms and fine maximums set in the RTPL, if applied, would be sufficient to deter violations. Israel’s Initial Memorandum accepts the Council’s Recommendation concerning Effective Action Against Hard Core Cartels, which urges Members, among other things, to assure that their competition laws provide adequate authority to detect and investigate hard core cartels, and sanctions effective to remedy and deter such conduct.<sup>103</sup> The problem confronted by the IAA is that the courts have failed to impose consistently high fines on hard core cartel defendants, instead assessing fines that the IAA believes fall well short of either the actual harm inflicted by the defendants or the level necessary for optimal deterrence. Although the Supreme Court emphasised in a 2002 decision that a “severe fine” is appropriate in a cartel case, fines imposed in cartel prosecutions over the past five years have averaged only approximately ILS 157,000 (USD 43,650) for individuals and approximately ILS 874,000 (USD 243,000) for corporations.<sup>104</sup>

The IAA considers that the courts’ record in imposing substantial prison sentences against hard core cartel participants could also be improved. In the early 1990s, defendants argued with some success that harsh sentences were unjust because the law had been so rarely enforced in the past. For the balance of that decade, sentences languished in the three to six month range, and defendants frequently avoided incarceration completely under a Penal Law provision specifying that, at the sentencing court’s discretion, prison sentences of six months or less could be discharged by assignment to “public work.”<sup>105</sup> The first sentence mandating actual jail time was not imposed until 2000. Prison sentences of six to nine months were imposed in the 2002 tiles cartel case, in conjunction with a pair of 2002 Supreme Court opinions stating that appropriate punishment for an individual participant in a hard core cartel was “actual imprisonment” even if the defendant had no previous criminal record. The Court followed those opinions with another in 2003, forcefully emphasising that “actual imprisonment” meant confinement and not public work. Still, no prison sentences were handed down from 2003 to 2005, and since then only three have been imposed: a 30 day term in the 2006 frozen vegetables case, a 100 day term in a 2007 LPG case, and a four month term in a 2008 LPG case.<sup>106</sup> As with

respect to fines, the IAA believes that such sentences fall too far below the maximums to reflect the true gravity of the offences or to deter future violations effectively.

During the past five years, the Supreme Court resolved three appeals from district court criminal antitrust decisions in which the government sought harsher punishment than the trial court had imposed. The results are shown below. (In the table, “DC” denotes the Jerusalem District Court and “SC” denotes the Supreme Court.)

**Table 11. Appeals to Supreme Court for Harsher Penalties in Criminal Antitrust Cases**

Case	Defendant	Court	Fine (ILS)	Imprisonment
Frozen vegetables (2007)	1 individual	DC	None	6 months, to be served as public work.
		SC	180,000	No change, denying IAA request for actual imprisonment.
Traffic lights (2007)	1 company	DC	100,000	N/A
		SC	1 million	N/A
	2 individuals	DC	40,000; 20,000	None
		SC	100,000; 50,000	None, denying IAA request for actual imprisonment.
Insurance (2005)	3 individuals	DC	600,000; 300,000; 150,000	6 months, 6 months, and 3 months, all to be served as public work.
		SC	Doubled to 1.2 million; 600,000; 300,000	No change. IAA did not seek an increase or actual imprisonment.

In none of the three cases did the Court impose prison sentences. In both the frozen vegetables and insurance cases, the Court stated that the increased fines it had ordered were moderated by deference to the trial judge. The Court added

that it would have imposed harsher penalties on the defendants had it been the trial court.<sup>107</sup>

A different problem is presented by the fact that the RTPL provides only for criminal fines and imprisonment. The absence of civil penalties impairs the IAA's capacity to deal with cases in which criminal proceedings are inappropriate, either because the gravity of the violation does not warrant criminal sanctions, or because the nature of the case does not justify the expenditure of sufficient law enforcement resources to prove a violation beyond a reasonable doubt. The IAA believes that adding civil penalty authority to its enforcement arsenal would considerably improve antitrust enforcement in Israel by enabling it to bring more cases, effectively deter and efficiently interdict a wider range of anticompetitive conduct, reduce enforcement costs, and provide a basis for settlement agreements under which defendants would disgorge illicit profits to the benefit of victimised consumers.<sup>108</sup>

Section 48 provides that active directors and senior administrative officers employed by a corporation that is found guilty of violating the RTPL "shall be indicted" along with the corporation "unless s/he can show that the offence was committed without his or her knowledge and that s/he took all reasonable measures to ensure compliance with this Law."<sup>109</sup> In 1998, the General Director issued a notice inviting Israeli corporations to adopt internal compliance programs designed to forestall violations of the RTPL. The Director pointed out that implementation of such a program would provide a basis for invoking Section 48, while the absence of a program would undercut an assertion that "all reasonable measures" had been taken. The Director offered a model program for consideration, which included the following elements: (1) appointment of an internal compliance officer, (2) active participation and support by management, (3) development of an internal compliance procedure and its implementation within the corporation, (4) training and indoctrination of the corporation's management and personnel, (5) establishment of auditing, supervision and reporting control systems, (6) initiation of disciplinary action against employees who violate the RTPL, (7) documentation of the program's implementation, and (8) submission to the IAA of a notice reporting establishment of the program. To provide further encouragement, the IAA stated that it would give priority to answering interpretive questions from corporations that had established such a program. In the past decade, about 80 corporations have registered their internal compliance programs with the IAA. Based on public statements of intention, another 40 or so companies have apparently adopted programs without filing registration notices

Under a "business inquiry" procedure announced in 1999, the IAA pledged every effort to provide staff advice within fifteen days in response to questions

from corporations with compliance programs. The IAA's notice cautioned that the program was limited to questions seeking clarification of the RTPL's applicability to a given set of facts, and was not a method for obtaining an advance opinion with respect to particular mergers or restrictive arrangements or other matters requiring extensive factual clarification. The most recent business inquiry was received in 2005, a fact which the IAA suggests may reflect the greater popularity of the pre-ruling procedure adopted in 2000.

One issue that has arisen in the interpretation of Section 48 is the liability of corporate officers and of the corporation itself when an attorney opines in advance that the conduct at issue in a criminal case is legal under the RTPL. Several recent Supreme Court decisions have restricted the availability of Section 48 in such circumstances, concluding that the existence of a legal opinion may not be sufficient to show that all reasonable measures have been taken when the parties could have obtained a pre-ruling opinion directly from the IAA under Section 43A. The Court added that, in any event, a legal opinion provides no defence if the party does not advise his attorney of all the relevant facts or if the conduct at issue involves a hard core cartel that an experienced businessman should recognise as problematic.

The IAA has a leniency program, launched in May 2005 under the authority of a protocol issued by the Attorney General.<sup>110</sup> The program accords immunity to the first cartel participant who makes full disclosure of involvement to the IAA, provided that (1) an IAA investigation of the cartel has not commenced; (2) the applicant terminates all involvement in the cartel, is not the cartel's apparent leader, and has neither been previously convicted of (nor granted immunity for) a cartel offence; and (3) in cases where restitution is possible, the applicant agrees to make such restitution. If the applicant is a corporation, then any cooperating director or employee of such corporation, as well as the corporation itself, will be granted full immunity from criminal prosecution with respect to both the cartel offence and certain related offences (such as destruction of evidence or tampering with legal proceedings).<sup>111</sup> If a party who applies unsuccessfully for immunity in one case subsequently applies successfully in a different case, his cooperation will be treated as a mitigating circumstance in the first case. Information provided in an unsuccessful application will not be employed by the IAA against the applicant.

Although the IAA considers that the leniency program can be an efficient enforcement tool, it has been employed only three times to date. It has certain features that may limit its utility, such as the condition that no IAA investigation of the cartel has been commenced at the time of the application. Further, it offers no protection against prosecution for other possible crimes (such as conspiracy) and does not insulate the party from damages in private

suits. This latter point has force because Israeli law provides for joint and severable liability among conspirators, and leniency program participants are therefore exposed to damage awards in excess of their allocable share.

An important litigation tool available to the IAA for dealing with law violations appears in Section 50A, which authorises the General Director to petition the President of the Tribunal (or, in his absence, any judge of the Jerusalem District Court) for an injunction to prohibit any action violating the RTPL or to require any action necessary to prevent such a violation. Since Section 50A was enacted in 1996, the IAA has obtained injunctions on five occasions, and presently has one petition pending<sup>112</sup> before the Tribunal in the processed tomatoes merger case, described previously. The agency observes that the utility of Section 50A is not fully reflected in the number of times that it has been employed, since the threat of an injunction can trigger acceptance by the party of a consent decree.

The IAA's consent decree authority, added to the Law in 2000 under Section 50B, empowers the Tribunal (or any court of competent jurisdiction) to accord the force of a court order to a consent agreement between the General Director and another party in both civil and criminal proceedings.<sup>113</sup> The General Director commences the process for court approval of a consent decree by publishing a notice of her intention in two newspapers at least thirty days prior to submitting the agreement to the court. The Director's court petition must state the grounds for the approval request, detail the alternative relief that the Director considered, and address any objections filed by third parties in response to the public notice. The Tribunal has held that it will ordinarily approve a consent decree if the General Director can demonstrate that it serves a desirable purpose consistent with the Law's objectives, promotes competition in the relevant market, and better advances the public interest than would any other available option.<sup>114</sup> Once a decree is issued, the court may amend it either in response to a party's application persuasively demonstrating that a substantial change in circumstances has occurred, or in response to a consensual request by all parties. Consent decrees may be (and usually are) issued without an admission of liability by the party, and may include commitments to pay a penalty to the State Treasury and to comply with specific conduct restrictions or requirements.

Consent decrees have been issued by the Tribunal on fourteen occasions since 2000, eleven of them during the past five years (2003-2007). One advantage of a consent decree is that a case can be resolved in a month or two, much more quickly than the usual Tribunal proceeding. Another is that it provides an indirect means of obtaining a civil penalty payment for antitrust violations that are otherwise subject only to criminal penalties. On the other

hand, the utility of the procedure for obtaining penalty payments is limited to dealing with criminal offences that, although not serious enough to warrant a regular indictment seeking imprisonment, nonetheless pose a sufficiently serious risk of monetary penalties to interest the defendant in settlement. Even in such cases, the procedure does not save the IAA from expending resources to develop a case sufficiently strong to confront the defendant with a credible threat of criminal liability.<sup>115</sup>

The system of judicial review in Israel owes much of its structure, practice, and philosophy to British traditions dating from the time of the Mandate (1920-1948). Courts freely advert to common law principles developed in British (and American) jurisprudence. Most significant decisions issued by the IAA may be appealed by right to the Antitrust Tribunal, and the Tribunal's decisions may, in turn, be appealed by right to the Israeli Supreme Court. District Court decisions in criminal cases brought by the IAA may likewise be appealed to the Supreme Court. Certain IAA decisions that are not appealable to the Tribunal are still subject to review in the Supreme Court sitting in its capacity as the High Court of Justice (another institution founded in British practice).<sup>116</sup>

The RTPL specifies which decisions of the General Director may be appealed to the Tribunal, within 30 days, by the party or parties with respect to whom the decision is rendered. These are decisions (1) rejecting a proposed merger or approving it subject to conditions, (2) issuing instructions to a monopoly under Section 30, (3) requiring a monopoly under section 27 to confirm its conduct to certain other laws, and, (4) making any determination under Section 43(a) (specifically, determinations that a monopoly exists, that certain conduct by parties or a course of action by an association constitutes a restrictive arrangement, that a notifiable merger has occurred, that a concentration group constitutes a monopoly, that a monopoly has abused its position, or that a block exemption will not apply to a particular restrictive arrangement). There are also some General Director decisions that may be appealed to the Tribunal by certain third parties. Specifically, industry associations, consumer associations, and persons claiming injury due to the Director's decision may appeal within thirty days from decisions (1) issuing, or refusing to revoke, an exemption for a restrictive arrangement, (2) approving a merger, with or without conditions, or (3) issuing instructions to a monopoly under Section 30.

The standard of review applied by the Tribunal is not specified in the Law<sup>117</sup> and has recently been modified to accord more deference to the IAA's findings. Previously, the Tribunal engaged in *de novo* review, but a 2006 decision by the Supreme Court, detailed in the box below, emphasised that the

IAA is the professional government agency specifically charged with handling antitrust matters and that the Tribunal must therefore consider IAA decisions to be the “basis and starting point for applying judicial consideration.” A subsequent 2007 decision by the Tribunal construed the Supreme Court’s holding to mean that the Director’s decision may be reversed “only if the Court finds that it is erroneous.” This formulation suggests that the Tribunal must find a mistake in the Director’s reasoning in order to overturn her decision, and that the Tribunal may not simply substitute its own reasoning for that of the Director. The Tribunal’s opinion also concluded that the party contesting the Director’s decision “must shoulder the burden of refuting the presumption of its soundness.” Applying these principles in a particular case may be complicated, however, by the fact that the Tribunal is not confined to the record that was before the Director, and may conduct a trial to receive new evidence.

### **Box 2. IAA v. DOR-ALON Israel Energy**

In its 2006 opinion in Dor-Alon case, the Supreme Court considered an Antitrust Tribunal decision overturning the General Director’s rejection of a merger between two of the four major competitors in the retail sale of benzene and diesel oil. The Court reversed and re-instituted the Director’s determination, holding that the IAA was entitled to more deference by a reviewing court than the Tribunal had accorded. In reaching this conclusion, the Court assessed the IAA’s capacities as follows:

The decision of the competent official that is reviewed by the Court in the appeal should be examined under the assumption that the decision reflects the finest professional discretion and is presumed to be sound. This is especially so in the case of the General Director of the IAA, an emphatically professional official who is appointed by the Government and may call on a staff of professionals of exceedingly high caliber in various relevant fields, including economics and law. This competent authority possesses extensive and thoroughly grounded theoretical knowledge in the complicated domain of antitrust, as well as experience that it accumulated in its years of diverse regulatory activity in the field. The General Director’s powers are exceedingly broad and the knowledge and expertise available to him in his purview carry special weight.

During the period from 2003 to 2007, the IAA issued 1266 decisions subject to review by the Tribunal, of which about twelve (1%) were appealed.<sup>118</sup> Most appeals were by parties seeking merger approval, although a few were by third parties opposed to mergers that the IAA had approved, and one involved an IAA determination that a company constituted a monopoly. During the same period, the Tribunal resolved nine appeals, affirming the IAA in five cases, and reversing in whole or in part in four others. Important cases in which the Tribunal affirmed the IAA’s decision were a decision by the IAA to block a merger (*Yehuda Steel*), a decision to approve a merger (cable TV companies), and one determination that a corporation constituted a monopoly (Bezeq, as a

monopoly in the market for broad band access services for end-users and ISPs). Three of the four reversals involved merger cases: *Dor-Alon*, in which the Tribunal permitted a merger that the IAA had rejected; *Aminah-Night Sleep Centre*, in which the Tribunal reversed the IAA's rejection of a merger between two mattress chains and approved the transaction subject to conditions<sup>119</sup>; and *Club Market- Supersol*, in which the Tribunal added one grocery store to the list of stores that Supersol was required to divest. The fourth reversal was the Tribunal's rejection, on market definition grounds, of the IAA's determination that Elite Industries constituted a monopoly in the roasted coffee market.

The principal concern raised by practitioners with respect to the functions of the Tribunal is that it does not render decisions quickly, a problem that is most acute when the Tribunal is reviewing the Director's denial of a proposed merger and time is of the essence to the parties. During the period from 2002 to the present, five IAA merger decisions were appealed to the Tribunal, three in 2002, one in 2005 and one in 2007. The three 2002 appeals were pending before the Tribunal for an average of 43 months (3.6 years). The 2005 case, *Dor-Alon*, marked a dramatic change in approach. Recognising the time sensitivity of the merging parties' position, the Tribunal expedited the review process, rendering a decision approving the merger five months after the IAA had rejected it. When the IAA appealed the Tribunal's decision, the Supreme Court likewise acted more quickly than usual, issuing its decision eight months after the Tribunal had ruled. Whether the next time-sensitive case will receive the *Dor-Alon* treatment remains to be seen. The 2007 case, in which the IAA approved the merger, was issued 21 months ago and is presently still pending before the Tribunal. It does not, however, serve as a revealing indicator about expedition in time sensitive situations because the underlying merger has been consummated and the appeal from the IAA's decision is being prosecuted by a third-party.

Decisions of the Director that are not appealable to the Tribunal include, most prominently, the denial of an exemption for a restrictive arrangement (or the revocation of such an exemption). The logic of this exclusion is that the applicants in such cases may seek approval from the Tribunal, while third parties will not be prejudiced by the rejection of an exemption. For similar reasons, third parties may not appeal a decision rejecting a proposed merger.<sup>120</sup> Non-appealable decisions can be reviewed only by petition to the Supreme Court sitting as the High Court of Justice. In that capacity, the Supreme Court acts not as an appellate court, but as a court with original jurisdiction to issue writs in cases falling outside the jurisdiction of any other court. Intervention by the High Court in a case involving a government agency requires a showing by the petitioner that the agency's action was *ultra vires*, based on an improper purpose, biased by a conflict of interest, arbitrary, discriminatory, or grossly

unreasonable. A few petitions for review of IAA decisions have been filed with the High Court over the years, most prominently in 1999. In that case, which involved an IAA decision to reject a restrictive arrangement exemption, the petition was ultimately withdrawn from the Court's docket.<sup>121</sup>

Tribunal decisions, both those issued under its original jurisdiction and those rendered on appeal from General Director decisions, may be appealed to the Supreme Court. The Tribunal's original jurisdiction includes authority to (1) approve, temporarily permit, or revoke approval of a restrictive arrangement; (2) order divestiture of a merged company or a monopoly; or (3) issue a restrictive injunction, a consent decree, an order under Section 35 (auxiliary powers to implement Tribunal decisions), or an order under Section 36 (interim rulings in pending Tribunal proceedings). "Any litigant" in the underlying case who claims injury arising from an appealable decision of the Tribunal may appeal to the Supreme Court within 45 days (Sec. 30). Qualifying litigants include the General Director, the affected party or parties, and any third parties who participated in the Tribunal proceeding. In considering such appeals, the Supreme Court ordinarily sits in a panel of three judges<sup>122</sup> and applies a *de novo* standard of review, as it does for all other lower court decisions.<sup>123</sup>

Over the past five years (2003-2007), the Tribunal issued 30 decisions under its original jurisdiction that were subject to review by the Supreme Court, most of which were either approvals of restrictive arrangements under Section 9 or consent decrees issued under Section 50B. None of those cases was appealed. During the same period, the Tribunal resolved nine appeals from IAA decisions, of which one, reversing of the Director's denial of a proposed merger in the *Dor-Alon* case, was appealed to the Supreme Court. The Supreme Court resolved that appeal by reversing the Tribunal and reinstating the Director's denial.

Decisions by the Jerusalem District Court in criminal cases brought by the IAA may be appealed to the Supreme Court by either the defendant or the IAA.<sup>124</sup> During the past five years, the Supreme Court resolved ten such cases, all involving hard core cartel prosecutions. In six instances, the Court sustained government appeals seeking to overturn trial court acquittals or to require harsher punishment than the trial court had imposed. In the other four cases, the Court rejected appeals by defendants seeking to overturn their convictions. The government thus successfully obtained all the reversals it sought and successfully resisted reversal of all the lower court decisions it supported.<sup>125</sup>

### 3.3 *Other enforcement*

Only the IAA prosecutes antitrust violations. A private party can submit a complaint to the IAA, which has broad discretion to determine what action to take, if any.<sup>126</sup> A private party may also seek damages or injunctive relief by filing a civil action in court. Any violation of the RTPL constitutes a tort (Sec. 50). Private claims may be filed in any court with proper venue and, unlike IAA cases, are not restricted to Jerusalem District Court.

To recover damages in tort, a plaintiff must prove a violation of the RTPL, a causal link between the violation and the injury suffered, and the amount of the damages incurred. The rules of standing for antitrust claims are evolving. It is still unclear, for example, whether a shareholder of a corporation may sue for injury inflicted on the company. Likewise, the courts have not yet determined whether indirect purchasers can assert damage claims. A plaintiff seeking an injunction must demonstrate imminent antitrust injury and meet any other legal requirements (such as posting a surety bond) applicable to the petition submitted.

From a private party's standpoint, the advantages of filing a complaint with the IAA are that the costs of doing so are very low and the IAA is better equipped to investigate the activities alleged to be unlawful. On the other hand, the prime mission of the IAA is to interdict anticompetitive conduct rather than remedy the injuries of victims and, under current practice, it does not offer a complainant any monetary redress.<sup>127</sup> Therefore, a court action will typically be more suitable if the complainant is seeking monetary damages or injunctive relief tailored to his particular circumstances. In fact, there have been only a few cases in which plaintiffs have successfully obtained antitrust damages, although the number of cases filed shows an upward trend.<sup>128</sup> The low volume of claims may be due partly to insufficient incentives (since Israeli law does not award multiple damages to antitrust plaintiffs), partly to the difficulties associated with proving damages, and partly to a cultural reliance on the government to procure remedies. As to suits for injunctive relief, there are even fewer instances of successful petitions than there are of damage awards. Several courts have said that claims alleging antitrust violations are too complicated to serve as the basis for preliminary relief, and should await the plenary case to be adjudicated. Contract litigation is the one area of private law in which antitrust claims are frequently successful, as parties charged with breach are able to convince the courts that their agreements are void as violations of the RTPL.

A notable feature of Israel's tort litigation system is its legislative hospitality to class action suits. Class action procedures were added to the RTPL in 1996 and remained until 2006, when they were deleted in favour of a

generic Class Actions Law that applies expressly to antitrust damage claims, among others. The 2006 legislation specifies the requirements that a class action plaintiff must satisfy in order to qualify for class certification. The requirements, similar to those found in the other jurisdictions with significant class action litigation, entail a *prima facie* showing that the plaintiff has incurred the alleged injury and a demonstration that the action raises substantial legal or factual questions common to the class. The plaintiff must further persuade the trial court to find a reasonable likelihood that the class will prevail on the merits of the underlying claim. Settlements in a class action case must be approved by the presiding judge, even if reached before class certification occurs.

The legislative enthusiasm for class actions has not been fully embraced by the courts. Although at least four class actions have successfully been certified since 1999, 90 others have been denied, and there is still no final case decision awarding class action damages. Nonetheless, some recent court opinions have offered encouragement and advice to prospective class action plaintiffs, and this may help explain why most class actions are settled by defendants before litigation gets underway.

IAA regularly monitors private antitrust proceedings, including class actions. If the General Director concludes that the IAA should intervene in a matter, the agency approaches the Attorney General, who holds the authority to present the government's position in court on any issue. The Attorney General may also be invited by a court to offer the government's position.<sup>129</sup> In either circumstance, the Attorney General may enter as a party or file a brief as *amicus curiae*. Ordinarily, when the Attorney General intervenes in a case with antitrust implications, IAA staff participates closely in developing the Attorney General's position, and its attorneys occasionally appear in district court cases in coordination with the Attorney General. In Supreme Court proceedings, the Attorney General is represented by the State Attorney, and the IAA will coordinate with that Office. Over the past five years, the IAA has appeared as co-counsel with the Attorney General's Office in five private district court cases, and with the State Attorney's Office in two private Supreme Court cases. The most prominent Supreme Court proceeding in which the IAA participated in recent years was a 2001 rehearing in a private contract case. The principal issue before the Court was whether a participant in a horizontal market allocation agreement was estopped from asserting that the arrangement was unlawful under the RTPL and hence void. The IAA, in conjunction with the State Attorney's Office, participated as *amicus curiae* both by brief and at the Court's hearing, arguing successfully that no estoppel attached in such circumstances.

### 3.4 *International aspects*

- *Trans-national enforcement issues*

In assessing conduct that involves an international aspect, the IAA applies the same standards used for evaluating domestic commerce, and does not consider such extra-competitive concerns as protecting domestic producers from imports or improving the national trade balance.<sup>130</sup> Foreign and domestic firms are treated equally in IAA proceedings. With respect to jurisdictional issues, Israel employs a conventional “effects test” with respect to restrictive arrangements. Thus, anti-competitive conduct occurring overseas may be pursued under the RTPL if the effects are felt domestically, provided that the IAA can obtain personal jurisdiction over the perpetrators. If personal jurisdiction is not available, the IAA may be able to invoke the assistance of a foreign antitrust agency.

For monopolies and mergers, the definitions in the RTPL limit the reach of the IAA’s international jurisdiction. The monopoly provisions apply to a firm that has the requisite share of a relevant market in Israel, and thus have no application to firms that are monopolists only in markets elsewhere.<sup>131</sup> Similarly, a merger is defined as a transaction involving firms that are registered or conduct business in Israel. Consequently, a foreign firm with no past or present Israeli presence is not required to notify the IAA when making its first acquisition in Israel. For subsequent acquisitions, only the foreign firm’s Israeli sales revenues are recognised in calculating market share and turnover for purposes of applying the notification thresholds. The IAA considers that this framework establishes an appropriate jurisdictional scope for enforcement of the RTPL. Presently, the IAA does not attempt to interdict competitive harm that occurs wholly overseas, whether or not the conduct causing the injury occurs in Israel.

Foreign commerce is fully integrated into the IAA’s examination of competitive effects, and the sophistication of the agency’s analysis has increased over time. In analyzing competitive constraints, for example, expected supply responses from foreign firms subsequent to a SSNIP are always considered, but with careful evaluation of any pertinent import barriers. Imports often serve to keep otherwise oligopolistic markets in Israel competitive, and in recent years the IAA has assiduously prosecuted conduct restraining foreign imports. One example is a 2006 IAA decision determining that Israel’s leading salt manufacturer had engaged in a restrictive arrangement by contracting to make a potential foreign importer one of its distributors.

With respect to international trade regulation, the Foreign Trade Administration (FTA) in the Ministry of Industry, Trade and Labour is responsible for Israel's participation in the WTO system. The FTA investigates dumping cases and proposes countervailing measures for the joint approval of the Minister and the Minister of Finance. Over the past five years, duties have been imposed only rarely, i.e. about once per year. The antidumping law requires a finding that there is no public interest against imposition of a duty, and defines public interest to include the promotion of competition. Despite this reference, the IAA has no official role in trade regulation proceedings.

The Council's Recommendation for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies, urges Members to evaluate carefully the impact on domestic and international competition and on consumer welfare of "trade and trade-related measures" (defined to include export limitation agreements but to exclude "laws relating to unfair trade practices"), and to ensure that competition policy considerations are taken into account in the formulation and implementation of unfair trade practice laws. Also, when considering action to approve or otherwise exempt export cartels, export limitation arrangements, or import cartels from the application of their competition laws, Members are encouraged to consider the impact of such practices on competition in domestic and foreign markets and, in general, to avoid encouraging the anticompetitive exercise of market power through the creation of such arrangements. Israel's Initial Memorandum accepts this recommendation, with the caveat that the IAA is authorised to apply enforcement measures only if the practice in question has a competitive effect in Israel. The Explanatory Comment notes that the Antitrust Tribunal can restrict approval of export cartels by applying the "public interest" standard under Section 10 of the RTPL. The IAA observes that one district court has held that the RTPL can be applied directly to export cartels based in Israel, even absent an effect on competition in Israel.<sup>132</sup> The IAA's enforcement experience is that even if anticompetitive behaviour by export cartels is directed at markets overseas, the cartels frequently also have harmful spill-over effects in Israel that constitute violations of the RTPL.

- *International cooperation*

The IAA states that, as a matter of general policy, it is willing to share confidential information and cooperate in investigations with foreign authorities in accordance with certain conditions. Information sharing is subject to two caveats. First, any disclosure of confidential information to a foreign authority must comply fully with applicable Israeli laws and regulations (including the International Legal Assistance Law), and will therefore entail conditions requiring that the recipient strictly protect the information provided and employ

it only in criminal proceedings. Second, as provided in Section IIA3 of the Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, the IAA reserves full discretion to provide or not provide requested information in a particular case. With respect to cooperation with foreign authorities in conducting investigations, the IAA notes the caveat that the RTPL cannot be enforced in situations in which only overseas competition is affected (except in certain circumstances involving export cartels where the RTPL has been construed to apply). Noting the same caveats, Israel states in its Initial Memorandum that it accepts the information sharing and investigative cooperation provisions in the OECD Recommendations concerning Effective Action Against Hard Core Cartels,<sup>133</sup> Co-Operation Between Member Countries on Anticompetitive Practices Affecting International Trade,<sup>134</sup> and Action against Restrictive Business Practices affecting International Trade including those involving Multinational Enterprises .

The IAA's capacity to cooperate with foreign agencies is controlled by Israel's International Legal Assistance Law.<sup>135</sup> The Law, which implements Israel's responsibilities as a signatory to the European Convention on Mutual Assistance in Criminal Matters, specifies the procedures for requesting assistance from (or providing it to) foreign authorities, and includes provisions dealing with collection of evidence, search and seizure, investigative activities, transfer of information, confiscation of property, and other topics. It is administered by the Minister of Justice, who is authorised to initiate and respond to international legal assistance applications. Although the IAA has never formally asked the Minister to approve requests to foreign agencies for assistance, it expects that the authority will be useful should circumstances arise where the necessary aid cannot be obtained by another means. With respect to information sharing, the Legal Assistance Law provides that Israeli agencies, including the IAA, may disclose confidential information to a foreign counterpart agency only for use in a criminal proceeding and may condition such disclosure on a commitment to preserve confidentiality under the recipient's laws.<sup>136</sup> The IAA has never invoked the Law to share confidential information with foreign agencies.

Israel has entered into a number of agreements that include provisions for cooperation in competition law matters. Israel and the United States have adopted an Antitrust Cooperation Agreement (signed and effective in 1999), that controls the relationship between the IAA and both of the US antitrust enforcement agencies. The Agreement calls for notification regarding actions that are anticipated to affect the other party, cooperation with respect to matters that both agencies are investigating, and coordination when they are investigating related matters. There are also provisions dealing with

confidentiality, avoidance of conflicts, and consultations between the parties. Notably, the Agreement includes a “positive comity” provision, under which one party may request the other party to prosecute violations of the latter’s competition laws that adversely affect the requesting party’s interests. As a practical matter, most of the activity under the US agreement involves notifications from the United States to Israel, and occasional requests for information running in both directions. For example, the IAA recently sought information from the US Justice Department concerning a certain Department investigation, requesting details about its status and the Department’s analysis of the offence and available remedies. The cooperative investigation and positive comity provisions in the agreement have never been employed.

Israel also has an Agreement with the European Union (the "Euro-Mediterranean Association Agreement," signed in 1995 and effective in 2000) that deals with a variety of political and economic topics, including competition policy. Article 36(1) of the Agreement identifies certain forms of commercial conduct that, to the extent they affect trade between the EU and Israel, are declared incompatible with the Agreement. The banned activities include the same anticompetitive agreements and abuse of dominance conduct prohibited in Articles 101 and 102 TFEU. In addition, Article 36(1) mirrors Article 107 of the Treaty by prohibiting any public aid “which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.” The parties are required to ensure transparency with respect to state aid by reporting annually to each other on the total amount and the distribution of any aid provided (Sec. 36(3)). The Agreement charges the Association Council with responsibility to adopt, within three years of the Agreement’s formation, all rules necessary for the implementation of Section 36(1) (Sec. 36(2)).

Two other competition provisions in the Agreement constrain the parties’ treatment of specially privileged firms. The first (Sec. 38) repeats the requirement in Article 106 of the TFEU that, with respect to public undertakings and undertakings to which special or exclusive rights have been granted, no party may enact or maintain any measure distorting trade between the two sides (with the caveat that the prohibition is not intended to obstruct the performance of the particular tasks assigned to such undertakings). The second (Sec. 37) prohibits the parties from permitting any discrimination between Israeli and EU firms respecting sales to or purchases from government commercial monopolies.

The implementing rules, which would also include provisions dealing with cooperation in antitrust investigations, have not been adopted because Israel and the EU have failed to reach agreement on how the rules should treat state aid issues. Israel takes the position that the implementing regulations on aid should

require no more than the WTO's subsidy reporting rules, with which Israel already complies. Although the formal agreement is not yet implemented, the IAA can and does maintain contact with the EU's Competition Directorate. One case in which the IAA sought assistance from the EU (and from the US as well) involved a 1999 international merger that was being investigated by EU and US agencies. The IAA's inquiry was of a general nature, focusing on the foreign agencies' analysis of the merger's potential anticompetitive effects.

Two of Israel's free trade agreements, with Mexico (effective in 2000) and Canada (effective in 1997), include provisions dealing with cooperation in competition matters. In the agreement with Mexico, for example, the parties "declare their willingness to cooperate on issues of competition law enforcement, including notification, consultation and exchange of information related to the enforcement of competition laws on matters that may affect their bilateral trade." Similar language appears in the agreement with Canada. IAA staff often contacts foreign antitrust agencies, either formally under cooperation agreements or informally based on goodwill, for consultations about legal questions, cases, parties, and industries, and the IAA expects that the frequency of such contacts will increase in the future.

The IAA participates vigorously in international competition organisations. It has been an observer at the OECD's Competition Committee since 2001. It is also a founding member of the International Competition Network and has served as part of the ICN's steering group since its inception in 2001. The IAA serves as co-chair (with Switzerland) of the ICN's special project on competition in small economies, and IAA staff is involved in the ICN's working groups on mergers, cartels, unilateral conduct, and advocacy.

The IAA has recently co-sponsored with the EU a TAIEX (Technical Assistance and Information Exchange) program, in the form of an April 2008 Jerusalem conference on abuse of dominance. The IAA is planning further TAIEX programs that would deal with cartel investigations and with competition issues in the telecommunications sector. The IAA is also a member of Israel's delegation to the EU-sponsored Euro-Mediterranean Partnership, and serves on a competition policy working group that is part of the Partnership's "Barcelona Process." The Process is intended to result eventually in the establishment of a free trade area among the partnership's members, which include the 27 member states of the EU and 12 nations of the eastern and southern Mediterranean.<sup>137</sup>

The IAA's objectives for the future in the international field include, among others, arranging for IAA staff to participate in US Justice Department and Federal Trade Commission training programs<sup>138</sup> and exchanging staff for

short term assignments with other competition agencies. The IAA is also interested in identifying opportunities for Israeli judges to participate in international conferences, including particularly programs at the OECD's Budapest regional centre.

### 3.5 Agency resources and priorities

- *Resources*

The IAA is funded solely from the state budget, according to a special line item appropriation by the Knesset. Fines and other monetary penalties collected in IAA cases are paid to the State Treasury. The IAA's budget requests are reviewed by the Budget Department of the Ministry of Finance, and in past years have generated no controversy either in that Office or in the Knesset.

Recent budget expenditures and staffing levels are shown in the following table.<sup>139</sup>

**Table 12. Trends in Competition Policy Resources**

Year	Budget expenditures		Person-years authorised
	ILS (million)	USD (million)	
2007	19.3	5.37	73
2006	20.7	5.75	67
2005	20.3	5.64	68
2004	18.7	5.20	70
2003	21.3	5.92	68

The allocation of authorised positions among the IAA's departments is Legal: 28, Economics: 13, Investigations: 17, and Administration: 12. The General Director's office has two employees: the General Director and her Senior Assistant. In addition, a registries officer reports directly to the General Director. Of the agency's current 69 employees, 58 hold professional positions, of which 33 are lawyers (most of whom are assigned to the Legal or Investigations Departments). Thirteen are economists (most assigned to the Economics Department), and fifteen fall into such other categories as accounting and business administration. Of the economists, two have doctoral degrees. The agency recently designated one economist to assess the economic effects of previous IAA cases and to conduct market performance surveys for the purpose of identifying malfunctioning markets and detecting law violations.

The Investigations Department is staffed primarily by lawyers, although some members have backgrounds in economics, accounting, business management, and other fields. The Department has recently undergone a reorganisation that involved moving its offices from Tel Aviv to the main IAA offices in Jerusalem and replacing most of its staff.<sup>140</sup> Current challenges facing the Department entail allocating a relatively small staff across the number of pending investigations (usually about twenty), acquiring the necessary technological equipment (such as video surveillance cameras) needed for efficient investigation, and providing effective training to staff in sophisticated investigative skills that are not taught in conventional educational institutions. By law (Sec. 45A), an IAA investigator may not exercise search and seizure powers under the RTPL until after being cleared by the police and receiving such training as is jointly determined necessary by the General Director and the police authorities.

The only OECD competition policy recommendation that deals with agency resources is section IC of the OECD Recommendation concerning Merger Review, which notes that competition agencies should be provided with adequate resources to fulfil their merger review functions. Israel's Initial Memorandum states that it accepts that recommendation. The most serious administrative issue facing the IAA overall is retention of professional staff. Average tenure is presently about four years, which is insufficient either to sustain the agency's institutional memory or to recover the costs of training new employees. Staffing losses are principally to the private sector, where the salary for an employee with three years experience exceeds the government salary level by about 200-300%. In addition, the IAA expects to increase cartel prosecutions, which are particularly resource-intensive since they require specially trained staff and sophisticated technological capacities and equipment. Resource demands will escalate even more if new powers about oligopoly are added to the Law.

- *Priorities*

The IAA estimates that, at present, its resources are allocated to mission functions as follows: horizontal cases 35%;<sup>141</sup> vertical cases 5%; monopoly cases 15%; mergers 30%; and competition advocacy (government and public) 15%. Over the past ten years, these percentages have seen a gradual reduction in the resources devoted to monopoly cases, and a commensurate increase in those devoted to advocacy.

Agency output reflected in case prosecutions over the five years from 2003 to 2007 is shown in the following table. For purposes of the table, the "No contest" column includes cases which were resolved wholly by consent decrees

or plea agreements, while the “Violation” column includes all other cases other than those resolved wholly by acquittal. An “injunction” includes injunctions issued by a court under Section 50A or a divestiture order issued by the Tribunal.<sup>142</sup> A “fine” is a criminal fine entered in accordance with a conviction or plea agreement, while a “penalty” is a civil monetary payment made in conjunction with a Section 50B consent decree. “Imprisonment” means confinement and excludes suspended sentences.

**Table 13. Results of Competition Law Enforcement Actions**

Year	Cases opened	Cases resolved							Cases pending (year end)
		No violation	No contest	Violation	Sanctions				
					Injunction/ Consent decree (number entered)	Fine/ Penalty (ILS million)	Imprisonment/ Public work service (months)		
2007	1	0	3	3	0/2	18.5/7.0	3.5/58.5	1	
2006	5	0	4	3	0/4	3.7/2.3	1.0/28.7	6	
2005	5	0	3	1	0/2	1.2/0.5	0/5.0	8	
2004	6	0	4	1	0/3	1.5/8.9	0/7.5	7	
2003	4	0	2	2	0/3	0.2/0	0/0	6	
Total	21	0	16	10	0/14	25.2/18.7	4.5/99.7	N/A	

The table focuses on cases resolved in court proceedings and therefore excludes cases resolved in IAA administrative proceedings. During the five year period, the General Director issued five determinations that an unlawful restrictive arrangement existed (four involving horizontal restraints and one involving vertical restraints), ten determinations that a monopoly existed, and one determination that an abuse of position had occurred. There were no instructions issued to a monopolist during the period and no determinations that an unlawful merger had occurred.

The allocation of case prosecutions among types of violations is shown below. The universe of cases is the same as for the previous table.

**Table 14. Trends in Competition Law Enforcement Actions**

Year	Horizontal Agreements		Vertical Agreements		Abuse of Dominance		Consummated Mergers	
	Opened	Closed	Opened	Closed	Opened	Closed	Opened	Closed
2007	1	5	0	0	0	1	0	0
2006	2	5	1	1	1	0	1	1
2005	4	3	0	0	1	1	0	0
2004	5	4	0	0	0	0	1	1
2003	3	3	1	1	0	0	0	0
<b>Total</b>	15	20	2	2	2	2	2	2

Horizontal cases constituted 77% of all case closed, with each of the other three categories representing about 8% of the total. The horizontal cases arose in diverse sectors, including hard core cartel cases relating to LPG, ready mix concrete, lighting products, paper envelopes, and frozen vegetables, and other horizontal cases involving TV broadcasting, salt, and gasoline stations. The vertical cases involved grocery chain food suppliers and gasoline station leases; the dominance cases involved chocolate candy and carbonated cola beverages; and the merger cases involved mobile coffee shops and newspaper publishing. Prospectively, the IAA expects to continue concentrating its attention on horizontal cases, particularly hard core cartels.

#### 4. Sectoral regimes and exclusions

This section of the report discusses categories of conduct, markets, or entities that are excluded or exempted from the coverage of the RTPL, as well as competition issues presented by regulatory regimes in particular sectors.

##### 4.1 *General principles of exclusion or special treatment*

Most commercial activity is subject to the Law. Other laws or regulatory regimes override the application of the RTPL only in cases of irreconcilable conflict. Government companies and agencies operating in a commercial capacity are fully covered. Statutory exemptions from the RTPL's restrictive arrangement provisions are construed narrowly.

The existence of a regulatory regime applicable to a firm's conduct is not itself a basis to displace application of the competition law. There is no explicit

statutory exclusion from the RTPL for firms in regulated markets, and the courts are reluctant to recognise immunity by implication. The rule is that where conduct is subject to two regulatory regimes, both will be permitted to operate unless there is an unavoidable incompatibility. Firms in regulated sectors are, for example, fully subject to the RTPL's merger provisions, although they may also be required to obtain approval for a merger from the relevant regulator. In such circumstances, denial of approval by either the IAA or the regulator will prohibit the transaction. Few attempts have been made to assert immunity on the basis of a conflicting regulatory regime, and none have been successful.

The RTPL has no application to private commercial conduct that is lawfully mandated by statute or by order of a government agency. Mere inducement or encouragement is, however, insufficient. The Antitrust Tribunal has held that the competition law applies to private conduct unless there is "no latitude for individual choice" with respect to implementation of a governmental directive. The same principle as it applies to restrictive arrangements is reflected in Section 3(1) of the RTPL, which excludes restraints "established by law." Restraints "established by law" for this purpose include those created under legislation or government regulation, but not those arising from policy or administrative decisions (such as a determination to grant a license or permit). The exclusion is strictly construed to cover only arrangements with respect to which application of the RTPL would create an irresolvable conflict with another government directive.<sup>143</sup>

Government entities are exempt from the RTPL to the extent they are engaged in governmental functions, in accordance with sovereign immunity doctrine. The RTPL is fully applicable to the commercial activities of government agencies and entities. Israeli law contemplates several types of government-related entities that, in addition to government agencies themselves, may engage in commercial activities. A "statutory corporation" is created by special legislation as a separate legal entity, supervised and at least partially funded by the Government. It may be empowered to regulate a sector (the Israeli Securities Authority), issue licenses (the Israel Bar), or collect certain taxes (the Broadcasting Authority), in addition to undertaking commercial activities. A "government company" is a company in which the government has a controlling interest greater than 50% (such as the Israel Electric Corporation, the monopoly electricity producer), while a "mixed company" is a company in which the government's share is 50% or less (such as the Israel Local Authorities Data Processing Centre, LADPC, which provides computer networking system services and in which the government holds a 40% stake). The commercial activities of all such entities are treated in the same manner as the commercial activities of private firms, and are subject to the competition law whether or not the entity is established as a non-profit institution.

Various exemptions commonly found in other competition law regimes appear in the RTPL as well, styled as exclusions from the Law's restrictive arrangement provisions. All are construed narrowly, and apply only where each restraint in the arrangement is closely confined to the exemption's scope. These exemptions cover:

- arrangements between a company and its subsidiaries (Sec. 3(5)). As construed, this exemption does not protect commercial transactions between a company and its subsidiary that are negotiated at arm's length, nor does it apply to agreements between sister subsidiaries or to entities connected by holdings of a 50% share or less.
- arrangements that prohibit the seller of a business from subsequently engaging in the same type of business (Sec. 3(8)). By its terms, this exemption applies only where the prohibition "does not contradict reasonable and acceptable practices." It does not protect non-compete commitments by other companies in which the seller has an ownership interest, unless such companies effectively constitute one business unit.
- arrangements requiring that the purchaser buy exclusively from the seller, and that the seller sell exclusively to the purchaser (Sec. 3(6)). Under this exemption, mutual vertical exclusivity arrangements are essentially *per se* legal. The exclusion does not apply in cases where both the purchaser and the seller are engaged in the production of the same asset or service.
- arrangements that involve a trade union as a party and entail restraints relating solely to the employment of workers and working conditions (Sec. 3(9)). The exemption covers only agreements reached through *bona fide* trade union collective bargaining and does not protect anticompetitive agreements among employer's structured as bargaining agreements with employees. For example, a 1997 Tribunal decision denied the exemption to an agreement among all major banks to close their branches on Friday. The Tribunal characterised as a pretext the banks' assertion that the arrangement was intended to benefit their employees.
- arrangements involving typical lease provisions under which a real property owner such as a shopping mall proprietor prohibits

mall tenants from operating businesses that compete with other mall stores. The exemption does not cover provisions that restrict the rights of the property *owner*, such as clauses prohibiting a shopping mall owner from leasing store space to a competitor of an existing store lessee.

Another exemption, in Section 3(2), protects any agreement “involving restraints all of which relate to the right to use” patents, copyrights, and other intellectual property,<sup>144</sup> provided that the agreement’s parties are the owner of the property and the party receiving the right to use it, and that the property right is properly registered to the extent required by law. The courts have applied the exemption to cover only such restraints as are consistent with the exemption’s purpose of promoting innovation and facilitating the legitimate exploitation of inventions. The IAA implements the judicial approach by treating as exempt only those restrictions relating to the right of use that exert an exclusionary effect within the scope of the intellectual property right. Thus, the exemption does not apply to horizontal agreements among owners of competing property rights or to provisions prohibiting a licensee from distributing a competing product or tying the purchase of additional items to the purchase of the intellectual property. License provisions that constitute patent misuse are also unprotected. On the other hand, where all the conditions of Section 3(2) are otherwise met, the exemption will cover provisions that impose territorial restrictions or field of use requirements.

Since the exemption operates only with respect to Section 2, it has no application to cases involving abuse of monopoly power. Conceivably, anticompetitive licensing practices by a licensor that held the requisite 50% market share could be addressed under the RTPL’s monopoly provisions. The exemption also does not affect application of the RTPL’s merger provisions. Thus, notification is required for the acquisition of a patent, trademark, or other intellectual property right that has a determinative impact on the selling’s company’s competitive activity in a particular line of business.

The exemption for intellectual property agreements is relevant to two Council Recommendations. The first, concerning Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements, urges that Members should, insofar as their laws permit, take into account the conclusions of the Competition Committee’s 1989 Report on Competition Policy and Intellectual Property Rights when applying competition analysis to patent and know-how licensing agreements. That Report calls for recognition of the pro-competitive advantages of various licensing restrictions, and recommends that Members should not apply competition law to prevent licensors from capturing the surplus arising from their inventions. Rather, law enforcement proceedings

should be initiated only to interdict the extension of market power beyond that associated with the innovation. The second, concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences, urges Members to consider (1) eliminating restrictions on parallel imports, where the purpose of such restrictions is to maintain artificially high prices or is otherwise anticompetitive, and (2) prohibiting (or controlling by means of an abuse of dominance or rule of reason principle) certain types of contract provisions in trademark agreements among actual or potential competitors or between licensors and licensees. The Initial Memorandum accepts both Recommendations, commenting that Israeli law and practice “strike a balance between competition policy and intellectual property rights in accordance with the principles set forth in the recommendation[s], pursuant to Section 3(2) of the [RTPL].”

A separate section in the RTPL contains an exclusion that may be applied by the Minister of Industry, Trade and Labour to protect any type of anticompetitive conduct on grounds of foreign policy or national security. Section 52 empowers the Minister, after consultation with the Knesset's Economic Affairs Committee, to exempt a restrictive trade practice (defined to include a restrictive arrangement, a monopoly, or a merger) “from all or some of the provisions of this Law, if s/he believes that such action is necessary on grounds of foreign policy or national security.” This exclusion has never been invoked.

#### **4.2**      *Sectoral issues*

The government is engaged in an ongoing program of opening markets to competition and integrating competition considerations into restructuring, reform and privatisation efforts. Reforms in telecommunications, transportation, energy, and financial markets have been structured to encourage entry by facilitating network access or lowering barriers. The full reform tool-kit has been deployed, including structural separation of competitive from non-competitive activities. Competition law enforcement is generally well coordinated with regulatory regimes, and the only sector exclusions are for agriculture and international sea transport.

- *Financial markets*

Retail banking and financial services markets such as insurance and pension funds are concentrated. In the insurance business, groups tied to five financial services conglomerates account for 95% of life insurance premiums, for example, and despite high returns on equity (ranging from 22% to 31% over 2003-2007), only a few foreign firms have entered. Government policy in recent

years has largely focused on trying to trim the market power of the banks. The Finance Ministry's Capital Markets Commissioner and Insurance Commissioner, and the Bank of Israel's Supervisor of Banks, all have licensing authority and regulatory powers relating to the institutional services and financial stability of companies under their jurisdiction. The regulatory structure of the industry is in flux. An inter-ministerial committee (Bachar), created to propose reforms in the capital market, recommended in August 2004 that competition should be enhanced in certain market segments by requiring banks to divest their mutual and pension fund businesses, and by establishing non-bank finance companies in the consumer credit services market. Legislation adopting these recommendations was enacted in July 2005.<sup>145</sup> Some are proposing that banks should not be allowed to offer credit-card services, but this has met with resistance, notably from the Bank of Israel. The 2005 legislation also established a licensing program for financial counsellors who advise employees concerning pension asset investments. In accordance with an IAA recommendation implementing that provision, no pension counselling licenses will be issued to an advisor affiliated with either of Israel's two largest banks during a two to three year cooling off period. Fees for financial services have received particular attention. The Bank of Israel in July 2008 mandated standardised disclosure of bank fees. The competitive consequences of that action are as yet unclear. In the course of their accession reviews that are underway, the Committee on Financial Markets and the Insurance and Private Pensions Committee have noted low competition, small foreign presence and the possibility of *de facto* entry barriers in markets for retail banking and other financial services including insurance and private pensions. Israel has been asked for clarification about possible restrictions that may be producing these conditions and steps to address them.

Regulation of cross-clearing fees for credit card transactions has been largely the work of the IAA. An IAA investigation of the fee agreement employed by Visa card companies led to an August 2006 Tribunal approval of a new arrangement. Those companies are now required to use a cross-clearing fee calculation methodology developed by the Tribunal.<sup>146</sup> This action was followed two months later by the commencement of a Tribunal approval proceeding that involved all credit card companies and under which all present companies and future entrants will cross-clear both Visa and MasterCard transactions using the Tribunal's methodology. The IAA anticipates that multilateral clearing fees will ultimately be reduced to 0.875% (a level considerably lower than in most EU countries).

- *Telecommunications*

The Ministry of Communications sets rate caps for fixed line telephony services offered by the historic monopolist Bezeq. The Ministry expects that, at some future point, an independent regulatory agency will be established. Competition has been introduced into fixed line service largely as the result of the IAA's efforts. In 2002, the IAA approved a merger among major cable companies conditioned with a requirement that the merged entity must modify its cable infrastructure as needed to compete in the fixed line telephony market. This action led to the entry of Hot Communications, a new provider in the fixed telephony market. In a separate effort to promote competition, the Ministry acted in 2004 to eliminate universal service requirements for new entrants into fixed line service. Other market segments in this sector, including international long distance, mobile telephony, and ISP, are open to competition, with interconnection charges regulated by the Ministry using a cost-based methodology. Bezeq is required to maintain separate subsidiaries for services that are offered in competitive markets, and any ISP firm that provides both transmission facilities and content services must separate the two functions into separate subsidiaries. In 2007, the Ministry implemented a phone number portability requirement to facilitate customer switching among service providers.

The government created a public committee (Gronau) in February 2007 to advise on the appropriate policy and rules for pro-competitive regulation of the telecommunications sector. The committee's report, issued in March 2008, called for a variety of reforms, including local loop unbundling by Bezeq, access to mobile telephone infrastructure by mobile virtual network operators, and permission for Bezeq to offer television and Internet access bundled with telephone service. These recommendations are presently under review in the Ministry of Communications.<sup>147</sup>

- *Broadcasting and media*

A mix of government and private operators broadcast television and radio programming in Israel. The Broadcasting Authority in the Ministry of Communications is responsible for public radio (Kol Israel) and public television (ITV).<sup>148</sup> Kol Israel broadcasts over the air on multiple frequencies, each with different programming, while ITV broadcasts on two channels. The first, Channel One (an over-the-air station) is the prime government television channel. The second (Channel 33) is a cable TV channel primarily offering reruns and documentary programs. There are two other over-the-air television channels, both operated by private firms. Channel Two is licensed by the Second Television and Radio Authority to a set of two private operators,

selected by tender, who broadcast on alternate days. Channel ten is also licensed by the Second Authority to a private operator. The Second Authority has also established sixteen regional radio stations that are operated by private licensees. TV channels Two and ten, as well as the regional radio stations, are funded by advertising. In the mid-1990s, a government proposal to privatise government public radio and TV broadcasting operations was initiated, but ran aground on opposition to imposing profitability constraints on channels created to serve the public interest.

Multi-channel television service is completely private. When cable television was introduced in the late 1980s, the country was divided into license areas, each with one cable provider. The pioneer cable companies eventually consolidated into the Hot Communications cable system, which today competes with the broadcast channels and with D.B.S. TV Satellite Services (“Yes”), Israel’s only satellite multi-channel operator. The IAA merger decision that approved the creation of Hot required that Hot’s signal transmission and content origination functions be segregated into separate subsidiaries. Further, Hot was required to permit third party content providers to distribute their product over Hot’s system. Except for a small base of Hot Communications customers still using old-technology analogue services, there is no rate regulation of multi-channel TV systems. There is, however, a public body (the Council for Cable TV and Satellite Broadcasting) which represent the interests of cable and satellite TV subscribers and has authority to control additions to or deletions from a service’s channel line-up. The Council focuses particularly on increasing the supply and diversity of available channels, policing the propriety of program content, and encouraging production of original Israeli programs.

- *Energy*

Oil refining and distribution of distillates are now privatised, and that step was accompanied by measures to encourage competition. Israel’s monopoly oil refining company, which operated refineries in Haifa and Ashdod, was privatised in 2006-2007. In accordance with IAA recommendations, the smaller Ashdod refinery was divested to a separate subsidiary and thereafter sold to one of the major gasoline station companies. At the same time, controls on wholesale prices for petroleum distillates were eliminated. The IAA urged that the Haifa facility be sold to a firm other than one of the other major gasoline station chains, and Haifa was subsequently purchased in 2007 by a company that, although having no previous relationship to the market, possessed the potential to become a new gasoline station competitor.

The privatisation of Pi Glioth, the largest distributor of petroleum distillates, arose from an IAA law enforcement investigation. In 2004, the IAA

initiated a settlement proceeding to terminate the arrangement under which the major gasoline companies and the State of Israel jointly owned Pi Glikoth. In 2007, the enterprise was privatised and divested to Delek, one of the gasoline companies, under conditions designed to prevent foreclosure and maintain competition in that market. The Minister of National Infrastructures (in consultation with a statutory “Prices Committee”<sup>149</sup>) has authority to regulate retail sales prices of petroleum products and has established a price cap for gasoline (but not diesel). The IAA has no role in the price regulation process.

The electricity supply chain is almost wholly in the hands of the Israel Electricity Corporation, an integrated state-owned national monopoly that has no connections to trans-national power grids. The Public Utility Authority for Electricity, an independent authority created in 1996, sets electric utility rates according to a statutory standard that requires cost-based pricing and prohibits cross-subsidies. Independent producers are encouraged, but few exist in the absence of a dependable natural gas supply. That constraint is expected to be moderated by the imminent completion of a new gas pipeline for natural gas deliveries from Egypt. The Ministry of National Infrastructures has adopted plans calling for 30% of electricity supply to be generated from independent sources within ten years. A pending restructuring proposal, under which an independent service operator would be created to handle transmission and distribution and 50% of generation capacity would be privatised, faces uncertain political prospects. Consultants retained by the Ministry have recommended privatising the entire system, but the government is unwilling to pursue that option because of concerns about energy security, given Israel’s small size and isolation.<sup>150</sup>

The private sector plays a somewhat larger role in the natural gas sector. A state-owned firm operates the wholesale gas distribution pipeline system, but retail and commercial end-user services are provided by private local distributors. The system is under the supervision of the Natural Gas Authority (NGA), an independent authority created in 2002 to issue licenses and sets tariffs for local pipelines. Liquefied petroleum gas (LPG) is privately supplied. Legislation recommended by the IAA and recently enacted by the Knesset (effective March 2008) seeks to encourage competition in the LPG market by prohibiting LPG companies from unreasonably refusing to sell gas and from interfering with consumers’ attempts to switch suppliers. The legislation provides, for example, that if the residents of a specific building select a new provider, the incumbent company must to sell its installed LPG equipment to the entrant and refrain from making new service offers to the residents for six months. The IAA was also successful in assuring that new entrants would not be required to meet universal service obligations or subjected to safety standards more demanding than those applied to incumbents.

- *Transportation*

Inter-city bus transportation is privately provided and highly concentrated. In conjunction with a government effort in the late 1990s to license additional bus companies, the IAA examined the contracts under which the dominant bus company had obtained exclusive access to the central bus terminals in numerous cities. In 1999, the IAA declared that the contracts were unlawful, with the result that new competitors have gradually entered the market.

Railroads in Israel are operated by a state-owned corporation, while sea and air transportation are privately provided. Certain arrangements relating to sea and air transport are excluded from the RTPL's restrictive arrangement prohibitions (Sec. 3(7)). Restraints relating to international sea or air transportation (or combined sea, air and ground transportation) are protected from attack provided that all parties to the arrangement are either (i) sea or air carriers, or (ii) sea or air carriers and an international association of sea or air carriers approved for this purpose by the Minister of Transportation. This exclusion was enacted in 1961 in emulation of similar exclusions in other antitrust regimes, to bolster the ability of Israeli carriers to compete in international transportation markets. A recent amendment to the RTPL, once effective, will significantly narrow the application of the exclusion to international air transportation. Under new Section 3A, the exclusion will not cover international air transportation arrangements in which either (i) one or more of the parties is an Israeli airline, or (ii) all of the parties are non-Israeli airlines, but at least one party operates or has a representative in Israel, and one of the principal subjects of the arrangement is air transportation to or from Israel. The IAA considers that the justification for the international sea transportation portion of exclusion is debatable, but does not expect to examine that question further until after the implementation of Section 3A.

Section 3A took effect on January 1, 2009, after the IAA's issuance of an air transport block exemption. The IAA's draft exemption, designed to exempt restrictive arrangements that are typically harmless to competition and that reduce uncertainty or encourage efficiency in the air transportation industry, will cover agreements relating to interline connections; flight capacity marketing; the charter, lease, and exchange of aircraft; frequent flyer systems; and certain technical arrangements. The exemption expressly excludes from coverage arrangements that (i) base the consideration due to a party upon the profit margin or income of any other party; (ii) prevent a party from entering into a similar arrangement with a different carrier, or (iii) entail such inherently anticompetitive practices as price fixing and market allocation.

The exclusion for international air carriage arrangements could be reinstated based on foreign policy concerns. The Minister of Transportation and the Minister of Foreign Affairs, after hearing the positions of the Minister of Finance and of the General Director, may protect from prosecution any arrangement involving a non-Israeli airline if they jointly conclude that such action is necessary to prevent harm to Israel's foreign relations (including foreign economic relations), or to guarantee continuity of flight service between Israel and other countries (Sec. 3A(b)). The IAA anticipates that this authority will be invoked very rarely, if ever.

- *Ports*

The Israel Airports Authority operates government-owned Ben Gurion airport and other airport and border entrance facilities. The privatisation of Israel's seaports was begun in 2005 by divesting the facilities to a separate government company (Israel Ports Development & Assets Company or "IPC"). IPC was required to create separate subsidiaries to operate the ports at Haifa, Ashdod, and Eilat under conditions intended to create competition among them. Ultimately, the plan is to sell each port individually to private owners. Competition has not in fact developed according to expectations, because of insufficient incentives and employee resistance (including a strike).

- *Water supply*

Mekorot (Israel National Water Co.), Israel's dominant water supply company, is controlled by the government. Rate regulation is by the Ministry for Infrastructures, in consultation with the Prices Committee. The applicable statute forbids cross-subsidisation among user groups.<sup>151</sup>

- *Postal services*

The Israel Postal Company is a government corporation. The government is currently considering possibilities for re-structuring its operations to segregate potentially competitive services, which could then be privatised.

- *Agricultural produce*

Special arrangements for agriculture aim to support producers. Statutory corporations have been established under the Vegetable Board (Production and Export) Law to operate as production boards for numerous specific products, such as tomatoes, corn, and olives. These corporations are authorized to promote increased output of the relevant product, guarantee a "fair price" for the growers, reduce production and marketing costs, assure a regular supply of

products at "appropriate prices" for the population, support research into improved marketing and packaging methods, and regulate the manufacture and marketing of the relevant product in both domestic and export markets. The IAA has no regular interaction with the marketing boards, which have no statutory obligation to consider competition policy issues in conducting operations.

The RTPL excludes from its restrictive arrangement provisions any restraints relating to the growing or marketing of certain domestic agricultural produce: fruits, vegetables, field crops, milk, eggs, honey, cattle, sheep, poultry and fish, provided that all of the arrangement's parties are growers or wholesale marketers (Sec. 3(4)).<sup>152</sup> This exclusion appeared in the original 1959 Law based on a legislative determination that unregulated market forces were an inappropriate mechanism for the distribution of perishable agricultural produce. Over the years, the scope of the original exclusion has been narrowed, so that it no longer covers imported agricultural produce, the retail marketing of such products, or products made from agricultural produce. The exclusion has been criticised by both courts and scholars and is strictly construed. The Supreme Court, for example, recently held that the exclusion does not apply to frozen vegetables, since processed foods do not involve exigent marketing. The Court noted in passing that the exclusion should be confined as much as possible, because the coverage it affords to horizontal agreements among marketers threatens harm to the farmers who are the intended beneficiaries of the provision. The IAA considers that no compelling interest justifies the current scope of the exclusion. During the period from 1999 to 2005, the IAA supported several legislative proposals that were introduced to limit section 3(4) in various ways, such as by omitting eggs from the produce list or by removing wholesale marketers who also engage in retail from its coverage. None of the proposals were enacted.

- *Food products*

Although the agricultural exclusion and the agricultural boards do not cover products made from agricultural produce or retail produce markets, retail price caps imposed by the government under its general price regulation authority apply to basic bread, milk, certain kinds of cheese and other dairy products, eggs, salt, baking yeast, and butter. The IAA has no involvement in the price regulation process for these products.

## **5. Competition issues in regulatory and legislative processes**

This section of the report addresses how the process of developing and applying regulations and laws considers and incorporates competition policy

principles, and describes the IAA's performance as a competition advocate. The IAA has been closely involved in virtually all of Israel's reform efforts. The Supreme Court has supported an IAA role in curbing anticompetitive agency action by rejecting agency decisions that the IAA has warned would lead to a violation of the RTPL. Successful IAA advocacy has facilitated pro-competitive reform in numerous markets, such as LPG and international air transport, and IAA enforcement efforts have supported reform in others, including financial services, bus transportation, and telecommunications. The IAA role in the formulation of regulatory policy is not formalised, although an increasing number of statutes require regulators to consider competition as a public policy objective. Although Israel has a wide-ranging program of opening markets to competition and integrating competition considerations into restructuring, reform and privatisation efforts, there is no general requirement for regulatory impact analysis of proposed laws and regulations, nor has there been a comprehensive review of existing laws and regulations to correct those that unnecessarily impair competition.

Several statutes require regulators to treat competition as a primary public interest. The Supervisor of Banks, the Insurance Commissioner and the Minister of Communications must consider competition in awarding licenses. The Minister of National Infrastructures must do likewise in issuing some regulations. Promotion of competition is an objective of the Capital Markets Law and the Natural Gas Markets Law, and the Government Companies Law provides that privatisation processes should be designed to promote competition. Although these laws obligate regulators to consider competition policy, they do not require consultation with the IAA in the process. Only one statute expressly requires the sector regulator to consult with the IAA: the Commissioner of Capital Markets must consult the IAA before issuing a pension advisor license to a person affiliated with a bank.

One common avenue for developing reform proposals in Israel is by appointment of a committee, such as an inter-ministerial body or a public committee with government representatives. In either case, the IAA typically has a seat. The committee conducts an analysis, deliberates, and issues a public report to the government or the Knesset. The IAA's then-General Director was a member of the inter-ministerial Bachar committee, which addressed issues in the financial sector; and the current General Director is a member of inter-ministerial Ariav committee, formed in November 2007 to improve the attractiveness of Israel's capital market to foreign investors. Also, the IAA's chief economist was a member of the Gronau Committee, which focussed on regulatory reform of the telecommunications sector. The General Director attends an ongoing inter-ministerial forum of financial market regulators to discuss proposed structural changes, reforms, and pending issues. The forum's

members are the Commissioner of Capital Markets, the Commissioner of Insurance, the Supervisor of Banks, and the Chairman of the Israel Securities Authority.

Another, less transparent reform approach is managed by the Finance Ministry's Budget Office. With its large staff of economists, the Budget Office has played a role as a co-ordinator and promoter of regulatory reforms. Its vehicle for reform implementation is the annual Economic Arrangements Law, which presents the government's budget and includes other items that affect the budget's implementation. These additional items may be prepared in consultation with other agencies, including the IAA, but sometimes they are not, and there may be little or no public consultation about them. The process can be used to implement potentially controversial proposals before effective political opposition can be organised, or to finesse intra-government disputes. The Arrangements Law has sometimes been employed to enact legislation that the affected ministry opposed or would not support publicly. Over its twenty years of use, the Arrangement Law has produced important reforms, such as liberalisation of international trade, restructuring telecommunications and cable TV, and creation of the IAA. But repetitious use, lack of transparency, and criticism by the Knesset have gradually reduced its utility.

The government's approach to privatisation and liberalisation over the past ten years is described in Israel's Initial Memorandum (pp. 19-21) as a commitment at the highest political levels to creating a regulatory environment that does "not cause unnecessary harm to competition, and, . . . , in fact, serve[s] to improve competition, e.g., in terms of access and ease of entry into the relevant industry." The Memorandum adds that "this is achieved, *inter alia*, by obtaining the IAA's position on how to design the regulatory scheme in the most pro-competitive manner."

The IAA has been closely involved in virtually all of Israel's reform efforts, although its involvement has been by invitation. The IAA generally has no mandated role in the regulatory process for formulating regulations or engineering regulatory reform. And there is no general program or requirement for regulatory impact analysis for proposed laws and regulations, nor has there been a systematic review of existing laws and regulations to correct those that impair competition more than necessary to achieve their objectives. Agencies generally lack the expertise to deal with competition issues. In an effort to address this problem, the IAA has prepared and distributed to all government agencies a "Competition Assessment Toolkit" in Hebrew, inspired by, and partially translated from, the OECD's toolkit. The IAA recently invoked the Toolkit in persuading the Ministry of Communications not to require building permits for the construction of mobile phone antenna towers.

A Supreme Court decision strongly supported the IAA's role in restricting agency decisions that threaten to violate the RTPL.

**Box 3. DAGESH Foreign Trade (Shipping), Ltd. V. Ports and Railways Authority**

The Port Authority, a statutory corporation that until recently administered Israel's ports, offered a franchise to operate government-owned grain silos at Haifa port. The tender terms originally prohibited any participation by firms involved in grain distribution, but this condition was later relaxed, subject to a 36% cap on their share of silo ownership.

The IAA General Director warned that franchising monopoly grain silos to a firm that was involved in grain distribution would create an anticompetitive vertical integration. A written IAA submission to the Authority urged that the tender terms be subjected to full IAA review before the franchise was awarded. The Authority rejected the IAA's suggestion and awarded the franchise to a bidder with grain distribution interests. A disappointed bidder appealed to the Supreme Court.

The Supreme Court revoked the award due to irregularities in the tender process, focusing particularly on the Authority's treatment of the IAA's recommendation. The Court concluded that it was unreasonable for the Authority to proceed with an expensive and complicated tender when it had been advised by a competent authority that the outcome might be void on antitrust grounds:

It was reasonable to expect that when the General Director of the IAA, representing the authorised government agency in this area, advises the bid committee to examine the legality of the proposed arrangement under antitrust law, . . . the committee would halt the tender's proceedings and seek the IAA's professional position, and refrain from advancing the tender as long as the concern that these proceedings are illegal has not been removed.

The IAA devotes approximately 15% of its staff resources to competition advocacy work, which has touched many sectors in the Israeli economy. The financial sector has received particular attention. The IAA testified at hearings before the Hamdani Committee, created in 2006 to examine the corporate governance rules applying to institutional investors, such as banks, with respect to their share holdings in public companies. The Committee has requested the IAA to shape governance rules to prevent harm to competition from collaboration among such institutional investors. In 2007, the General Director testified before a Knesset sub-committee concerning competition in local retail banking, calling for the minimisation of switching costs for bank customers, encouragement of new Israeli or foreign entry into the market, extension of the Israel Postal Company's banking license, promotion of Internet banking, improved transparency for bank service fees, divestiture of credit card

companies from the major banks, and establishment of a consumer credit reporting database. The IAA was not, however, consulted about the Bank of Israel's recently-issued rules on disclosure of bank fees.

The IAA has developed a strongly cooperative relationship with the Government Companies Authority, which since 2000 has broadened its focus from the operation of government companies to include an ongoing review of opportunities for pro-competitive privatisations. The IAA was closely involved in the recent major privatisation projects for oil refineries, ports, and petroleum products distribution, and expects to continue such involvement in all future major privatisations.

In other matters, the IAA has

- advised the Ministry of Communications on structural changes, involving such topics as the regulation and licensing of voice over broadband (VOB) services, a tender for licensing WiMAX frequencies, a request for proposals to operate terrestrial digital radio infrastructure, and the licensing of a cellular phone service firm that will provide its services as a mobile virtual network operator (MVNO);
- testified before the Knesset's Finance Committee concerning the importance of phone number portability to promote new entry into telephony markets;
- advocated before the Ministry of Environmental Protection for a regulation that would alleviate competitive concerns in the beverage container recycling market; and
- consulted with the Second Television and Radio Authority and the Council for Cable and Satellite Broadcasting on such topics as excessive service fees charged by media acquisition and advertising agencies.

As a key example of how its advocacy has improved competition, the IAA points to the structural changes in the LPG market designed to minimise switching barriers and facilitate new entry and increase market contestability. The IAA is also optimistic that competition will be enhanced in petroleum refining and distribution markets following refinery privatisation, and in international air transportation after reducing the scope of the air transport exclusion. On the other hand, the IAA has been disappointed thus far in the results arising from reform of Israel's ports because the privatization process

has not been completed. And it had no success in its efforts to limit the scope of the monopoly granted to the state water company Mekorot. The IAA consulted in 2007 with the Ministries of Finance and National Infrastructures concerning a proposal to expand Mekorot's monopoly. The IAA questioned the proposal because it did not open Mekorot to competition in contestable market segments involving (1) drawing, desalination, and treatment of raw water; (2) water transmission (national and regional); and (3) water supply to end users. The IAA was also particularly opposed to allowing Mekorot's participation in the market for re-use of treated wastewater. The Ministries, however, declined to accept the IAA's position.

The IAA enjoys excellent relations with the Economic Affairs Committee and the Finance Committee of the Knesset, and it is a frequent participant in their hearings and discussions. One notable product of this support from legislators was the 2007 legislation narrowing the air transport exclusion in Section 3(7) of the RTPL. The IAA was also involved with the Ministry of Justice in formulating the March 2006 class action legislation to assure that fair and balanced procedures were available for private antitrust plaintiffs. An effort is now underway to win legislative approval for the Goshen Committee recommendations on restrictive arrangements and oligopolies.

IAA law enforcement has supported reform in several sectors. In financial services, the IAA approved a 2007 merger between two small banks to promote more effective competition with the major banks. It also approved, with conditions, a joint venture between a credit card company and an insurance company as a means of encouraging new entry into retail consumer credit. The litigation involving cross-clearing fees for credit card transactions was similarly intended to advance competition policy objectives in the financial services market. In 2005, the IAA rejected a merger between the third and fourth largest gasoline station chains that threatened to increase the already high concentration in that market. IAA actions in earlier years include finding in 1999 that an unlawful exclusionary agreement between the dominant bus company and the monopoly bus terminal operator had constrained new entry into the bus transportation market, and determining in 1997 that Bezeq's attempt to restrain entry into the international telephone calls market was an abuse of its position.

Market-wide economic studies to support reform have not yet been part of IAA's work, although it may commence such efforts in the future.<sup>153</sup> The IAA's coercive investigative tools may not properly be used merely to satisfy curiosity about a market, but the IAA does not regard this condition as a significant constraint on its ability to research market operations.

With respect to OECD recommendations concerning regulatory reform and regulatory processes, Israel's Initial Memorandum states that it accepts the Recommendation of the Council concerning Structural Separation in Regulated Industries. That Recommendation addresses situations in which a regulated firm is operating simultaneously in a non-competitive activity and a potentially competitive complementary activity, and urges Members to balance carefully the benefits and costs of structural measures against the benefits and costs of behavioural measures. The Recommendation also notes that the competition agency should be involved in the balancing analysis. The Initial Memorandum comments that the IAA has been involved in practically all major structural changes in regulated industries in recent years, and that its views on balancing structural and behavioural measures have been considered in the decision-making process. The Memorandum adds that the IAA itself, in developing remedies in antitrust enforcement cases, balances the merits of structural and behavioural relief according to the circumstances of the case.

Israel also accepts the Council's Recommendation on Competition Policy and Exempted or Regulated Sectors,<sup>154</sup> which provides that Member governments should (1) in conjunction with the competition agency, review regulatory regimes and exclusions from the competition laws to determine whether the purpose of regulation is still valid and, if so, whether it could be achieved with less anticompetitive means; (2) ensure that competition laws and institutions are able to interdict anticompetitive conduct by regulated firms where such conduct is unrelated to the regulatory scheme's purpose; and (3) provide adequate means of consultation between regulatory authorities and competition authorities that will enable the latter to have a positive impact on the formulation and implementation of regulatory systems. The Explanatory Comment states that, with respect to element (2), the existence of a regulatory regime does not prevent application of the RTPL. As to element (3), the Comment states that, because the IAA regularly advises government agencies and the Knesset on competition and regulation issues and seeks to restrict exclusions from competition laws, "the recommended balance between the activity of the competition authority and the activity of the regulatory authorities exists, in practice, in Israel."

## **6. Conclusions and Recommendations**

This report has examined Israel's competition law and policy in light of the accession road map<sup>155</sup> to assist the Competition Committee in its assessment of Israel's willingness and ability to assume the obligations of membership in the OECD concerning Competition Policy. The concluding section summarises the current strengths and weaknesses of competition policy in Israel, with particular attention to the recommendations and best practices put forward in the

accession process. It assesses trends in competition policy and institutions and the likely strength and direction of change in the future.

### Current Competition policy and enforcement

The competition law now in force, the Restrictive Trade Practices Law (“RTPL” or “the Law”), was adopted in 1988. It replaced Israel’s first law, dating from 1959, which had represented an underlying philosophy that competition was to be controlled, not promoted. The RTPL reflected a new approach, of targeting enforcement more closely on protection of competition. Reinforcing the new approach, an independent body was established in 1994 to enforce the RTPL. The Israel Antitrust Authority (“IAA”) operates separately from government, with its own funding and personnel.

Additions and improvements to the Law since 1994 include provisions about abuse of dominance that parallel those in European competition law and stronger criminal penalties and investigative powers. The IAA has gained authority to seek injunctions and resolve matters with consent decrees, and to issue instructions to monopolists, advisory opinions and block exemptions from the Law’s prohibitions. In 2005, the government established a committee to make proposals for modernising the RTPL further. This group, the Goshen Committee, has issued recommendations dealing with restrictive agreements and oligopolies, and it continues work on additional topics.

Substantive provisions of the RTPL deal with restrictive arrangements, monopoly, and mergers. Hard core cartels are ordinarily prosecuted as *per se* violations, while other agreements are subject to rule of reason analysis. Block exemptions that excuse parties from obtaining specific exemptions for restrictive arrangements are based on EU models. Monopoly law similarly reflects the EU’s approach, overlaid on an earlier design keyed to market share. Mergers are reviewed using a contemporary, effects-based analysis. Competition law is applied with a pointed focus on harm to competition. An impressive body of fully elaborated decisions by the IAA and the specialised appellate Tribunal has applied the Law to a wide range of conduct, developing in the process a methodological sophistication informed by close attention to contemporary judicial and academic analysis both in Israel and worldwide. The IAA has powerful investigative tools and can invoke an array of enforcement procedures. It has successfully put competition issues and competition law compliance on the business community’s agenda.

## Trends: magnitude and direction of change

The trend toward modern-economics-based treatment of concerted actions continues. Proposed amendments developed by the Goshen Committee would support principled distinctions in treating different kinds of restrictive agreements. One would focus the prohibition on how a restrictive arrangement affects competition in the market, more than on how it affects competition between parties. This change will confirm the approach that the IAA and the courts have already adopted, of interpreting the Law to promote consumer welfare rather than protect market participants. Another pending amendment would apply only to horizontal agreements among competitors the presumption that agreements affecting price harm competition. For restraints in vertical agreements, between suppliers and customers enforcement would rely on case by case assessment of actual effects. This change in the treatment of vertical price restraints is consistent with developments in some Member countries.

The Goshen Committee has also proposed a measure to address the problem of oligopoly more effectively. The proposal would authorize the IAA to take action in markets where conditions lead to “slight” competition. The remedies would be prospective only. They could include eliminating or mitigating barriers to entry or to switching suppliers, prohibiting practices that might facilitate coordination and divesting cross-ownership interests. Intervention in these conditions requires careful case-by-case analysis, because the practices can both advance efficiency and encourage anti-competitive coordination. The “market inquiry” powers of the UK’s Competition Commission are an instructive parallel to this proposal. The UK Competition Commission may investigate problems of market structure or conduct that do not necessarily constitute a breach of the law and devise remedies to improve competitive conditions. The Competition Committee’s 2004 report on the United Kingdom found that this authority for open-ended study and flexible, prospective remedies for the problems identified constituted a “unique and valuable tool.”

The allocation of IAA resources among various types of violations reflects sound judgment about their relative importance. Claims about monopoly are getting less enforcement attention now, but there are more actions against attempts to exclude foreign imports from Israeli markets. In merger cases, the IAA increasingly tries to implement conditions to make a problematic transaction acceptable and thus avoid rejecting it outright. The IAA has reduced its use of the older formal tools, such as instructions to monopolists. It now relies more often on negotiating consent decrees, including ones that entail payment of a civil penalty. The IAA should, however, make more use of its power to seek injunctions, to terminate ongoing competitive harm or prevent actions that will make effective relief more difficult to fashion. To help

businesses comply with the law, the IAA is making more use of tools such as pre-rulings, guidelines, position statements, and a public compilation of market definitions. More guidance will soon be available as the IAA finalises analytical merger guidelines for public release.

Authorizing the IAA to impose civil penalties would provide an important additional tool to support a flexible, efficient enforcement program. The Law does not now provide a direct method for sanctioning conduct that is anti-competitive but not readily addressed through criminal prosecution. With this power, the IAA could bring more cases at lower cost and address a wider range of anticompetitive conduct. By underlining a distinction between hard core cartels and other forms of anticompetitive conduct, having civil penalties available for less serious violations could also encourage courts to treat criminal cases against hard-core cartels more seriously. Authority to impose civil penalties would also provide leverage for settlement agreements, perhaps including payment of compensation to injured customers and consumers.

The IAA has matured into a highly respected agency. It has a body of dedicated and well qualified professional employees who have helped earn the IAA its reputation as perhaps the best agency in the Israeli government. The agency and its staff are widely praised for responsiveness, keen sensitivity to confidentiality concerns and efficient conduct of agency business (particularly merger reviews), and for valuing predictability, transparency, efficiency and expedition. The agency's decisions are well regarded for the quality of their analysis and have won the IAA increasing deference from the Supreme Court.

Maintaining the IAA's stature, however, faces a resource challenge, notably in retaining staff who are drawn away by higher salaries in the private sector. This pattern of turnover makes it harder to maintain institutional memory and staff expertise. The authorised staff complement has been essentially constant for the last five years, but demands are changing and are likely to increase. Resources have already been reallocated from monopoly matters to competition advocacy. The IAA also expects to increase cartel prosecutions, which are particularly resource-intensive. Resource demands will escalate even more if new powers about oligopoly are added to the Law. The IAA's budget allocation should be increased, to strengthen law enforcement and advocacy and enable the agency to moderate staff turnover by raising compensation.

### Implementation of the six Roadmap principles

Israel has accepted all Council recommendations on competition policy as well as the 2005 Guiding Principles for Regulatory Quality and Performance and the 2005 Information Exchange Best Practices. In general competition law

and regulatory policy in Israel conform to the principles set out in the recommendations and the two 2005 instruments, although in several respects, noted below, further improvements of enforcement and regulation are recommended.

### 6.1. *Cartels and restrictive agreements*

The 1998 Recommendation of the Council concerning Effective Action against Hard Core Cartels focuses this important element of competition law enforcement. That recommendation deals with effective control, deterrence and remedy; enforcement processes and powers; sanctions against firms and individuals; exemptions and exclusions; and enforcement co-operation and comity. Israel has accepted this Recommendation.

The RTPL applies a strong, *per se* prohibition against hard core horizontal cartels and gives the IAA sufficient legal authority to investigate and prosecute them. The IAA recognises that this is an important priority, requiring that expert investigative staff be developed and equipped with the tools they need. IAA enforcement is becoming more aggressive, increasingly targeting for prosecution not only direct cartel participants, but also those who aid and abet or even just attempt collusion. The intensity of enforcement, as measured by the number of prosecutions, has varied. On average the IAA has brought two or three hard core cartel cases per year, but none in 2006 and only one in 2007. To improve enforcement, the IAA has recently overhauled its Investigations Department, relocating it from Tel Aviv to headquarters in Jerusalem and recruiting a new chief and many new staff.

Following the example of competition agencies that have been particularly successful in prosecuting cartels, the IAA has a leniency program, which accords immunity from prosecution to the first cartel participant who makes full disclosure of involvement to the IAA. Availability of immunity requires, among other things, that an IAA investigation of the cartel has not commenced. Although the IAA considers that the leniency program can be an efficient enforcement tool, it has been employed only three times to date. The leniency program should generate more cartel investigations as it becomes more familiar to Israel's antitrust bar, but revising some of its features might encourage more potential participants to come forward. Notably, the program could specify conditions for granting leniency even after an investigation has commenced. Although the IAA may already have some evidence of a conspiracy, encouraging a party to provide better evidence can expedite the investigation. Expanding the leniency applicant's protection against prosecution for other crimes (such as conspiracy) would also increase the reward for being first to implicate the cartel, as would reducing the applicant's exposure to civil damages.

The Law's sanctions would be adequate to deter cartel violations if they were actually imposed. The maximum penalties provided are three years imprisonment and a fine of up to ILS 2,020,000 (USD 561,560) for an individual, and a maximum fine of double that amount (ILS 4,040,000, USD 1.12 million) for a corporation<sup>156</sup>. The courts have been reluctant, however, to order sanctions as severe as the Law permits. Courts have recently tended to support higher fines – although not as high as the IAA recommends – but tough judicial statements about imprisonment have not been backed up with serious sentences. Courts should impose sanctions sufficient to deter effectively, such as real jail time for individuals and fines high enough to persuade firms to apply for leniency. Measures to bolster judicial sentencing practices could range from advisory statements issued by the Ministry of Justice, to legislative resolutions setting guidelines, to mandatory minimum sentences fixed by Law.

## 6.2. *Merger and monopoly issues*

Israel has committed to ensuring that review of mergers is effective, efficient and timely, following the standards of the 2005 OECD Council Recommendation concerning Merger Review. This recommendation provides best-practice guidance about merger control. It deals with effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and powers, and enforcement co-operation. Israel has committed to follow the standards of the Recommendation. The substantive principles and procedures for merger control are largely sound and efficient. Improvements in procedures for evaluating and processing applications have reduced the time expended to evaluate mergers, but appellate review of IAA merger decisions has sometimes been delayed. Three merger appeals filed in 2002 required an average of 3.6 years for the Tribunal to resolve. Yet in 2005, the Tribunal decided another appeal in only five months, showing that it is capable of dealing with a merger appeal quickly. The Council Recommendation calls for completing appeals within a reasonable time (Sec. A1(3)), a principle that deserves continued attention.

Using market share as a criterion for notification does not conform to best-practice recommendations that notification criteria be objective. The Law's merger notification thresholds include two provisions that are based on market share, one where the post-transaction entity will have a 50% share, the other where a pre-transaction party is a monopoly (which is defined by the Law as a firm with a market share over 50%). The Recommendation calls for clear and objective notification criteria, to avoid imposing unnecessary costs on merging parties (Section A1(2)). Market share is not generally considered to be an

objective criterion, because the definition of the relevant market is often difficult and contentious.

The IAA contends that the 50% combined market share criterion is justified because many markets in Israel are highly concentrated but relatively small. Without it, the IAA would not be notified of some problematic mergers of firms that are too small to meet the tests based on turnover. Experience shows that the test reaches few problematic transactions that would not otherwise have been controlled. The benefits of controlling those transactions should be weighed against the costs that the test imposes.

The monopoly-party criterion probably imposes fewer costs, but it has also yielded a slightly lower proportion of problematic transactions that would have been overlooked without it. The cost for firms to determine whether they meet the monopoly threshold may be low because the RTPL pays special attention in several ways to firms that are “monopolies” according to the Law’s definition. Firms with market shares near this 50% level therefore have a motivation other than merger filing to clarify their status. Some will not be doubtful at all because the IAA has already declared them to be monopolists.

Attention should be given to the justifications for the market share notification criteria, especially the combined entity 50% threshold. Even if the tests are not eliminated completely, raising the percentages could reduce costs without overlooking many anti-competitive transactions. The other notification criteria, based on turnover, may also need to be reviewed and adjusted, to ensure that notified transactions have a material nexus to Israel and to avoid imposing unnecessary filing costs. Analysis of the IAA’s merger matters since 2005 showed that several scenarios for adjusting turnover screens could have reduced the number of filings required with little reduction in the rate of detecting problematic transactions.

As the RTPL is presently structured, a merger that does not need to be notified is not subject to control under the RTPL’s merger provisions at all, even if it could harm competition. Whether a merger could be prosecuted as an unlawful restrictive arrangement is an unsettled question. Changing the Law to make consummation of an anticompetitive merger a violation would resolve this problem. It might also help reduce the need to rely on non-objective market share criteria for notification.

### 6.3. *Structural separation in regulated industries*

Israel has committed to consider carefully the costs and benefits of structural and behavioural measures in facing situations that combine non-

competitive and competitive activities in regulated industries, particularly when undertaking privatisation, liberalisation and regulatory reform, following the 2001 Council Recommendation Concerning Structural Separation in Regulated Industries. This Recommendation addresses cost-benefit assessment of behavioural and structural measures, including consideration of transition costs and public benefits of vertical integration. Such balancing should involve sector regulators and competition authorities. Israel accepts this Recommendation.

Israel's regulatory reform efforts have employed structural separation of contestable functions in such regulated sectors as natural gas. Vertical structural separation has been used to protect competition in internet service and multi-channel cable television, in each case by separating infrastructure from service or programming. Plans for reform in other sectors, such as electrical energy, contemplate structural separation as well.

#### 6.4. *Market regulation*

Israel has committed to supporting effective competition policy and ensuring that regulatory restrictions on competition are proportionate to the public interests they serve, in accordance with the 2005 OECD's Guiding Principles for Regulatory Quality and Performance. Particularly relevant here are the elimination of sectoral gaps in the coverage of competition law, co-ordination of regulatory oversight and competition law enforcement, proportionality in design of economic regulation, periodic review of cost-benefit balance, efficiency in reform to introduce competition, consumer choice, state ownership, universal service, consideration competition in regulatory impact analysis, competition agency authority to advocate reform and linkages to other objectives. Israel accepts the Guiding Principles.<sup>157</sup>

The government, supported by the Parliament, has pursued an aggressive program of opening markets to competition and integrating competition considerations into restructuring, reform and privatisation efforts. Coordination between competition law enforcement and regulatory regimes is effective. Few sectors are excluded from application of the competition law. Reforms in telecommunications, transportation, energy and financial markets have been structured to promote entry by facilitating network access or lowering barriers. The full reform tool-kit has been applied. Examples include structural separation of contestable functions in natural gas, price caps for regulating prices of fixed line telephony, reducing switching costs for LPG customers and limitation of universal service requirements for new entrants in telecommunications. Government efforts to deal with market power of banks have received support from IAA advocacy and enforcement actions; nonetheless, retail banking and financial services markets such as insurance and

pension funds remain concentrated. Israel has been asked by the Committee on Financial Markets and the Insurance and Private Pensions Committee, in the course of their reviews, for clarification about possible restrictions that may be producing these conditions and steps to address them.

No new exclusion from the RTPL has been enacted in the past four decades, and one exclusion, for international air transport agreements, has recently been repealed. The remaining sectoral exclusions that protect restrictive arrangements in agriculture and ocean shipping should be reviewed.

The IAA has been involved in the major structural changes in regulated industries. Its views on balancing structural and behavioural measures have been considered. In natural gas, its recommendation for structural separation was fully implemented. The Supreme Court has supported an IAA role in restricting anticompetitive agency action by rejecting agency decisions that the IAA warned would lead to a violation of the RTPL.

The IAA's advocacy and regulatory roles could be made more explicit. The IAA's extensive involvement in formulating new regulations, developing regulatory reforms and resolving competition issues in regulated sectors has been by invitation, not by requirement, even where the law specifies that regulator must consider the public interest in competition. The IAA's authority to advocate reform and advise regulatory authorities when decisions involving significant competition issues are at stake would be strengthened by regularising its participation or making it mandatory.

#### 6.5. *International co-operation*

Israel has committed to co-operating in investigations and proceedings applying competition laws, through notification and co-ordination pursuant to the 1995 Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade and through implementing the Competition Committee's Statement of Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (2005). The Council Recommendations on hard core cartels (1998) and mergers (2005) also address international co-operation. The topics of these instruments include notification, co-ordination, exchange of information, consultation-conciliation-comity, confidentiality and privilege protection, effects on leniency applicants and informants and notification to information providers. Israel accepts all three Council Recommendations and the Best Practices statement, with certain caveats, described below, and the Committee finds that Israel substantially complies with them.<sup>158</sup> The Committee does, however, call particular attention to the recommendation that the IAA's capacity to cooperate

with foreign competition agencies should be improved, especially by modifying the statute that limits exchange of confidential information to cases involving criminal conduct.

The IAA states that it is willing to share confidential information and cooperate in investigations with foreign authorities, but information sharing is subject to two caveats. First, any disclosure of confidential information must comply fully with applicable Israeli laws and regulations (including the International Legal Assistance Law), and it will therefore entail conditions requiring that the recipient strictly protect the information provided and employ it only in criminal proceedings. Second, the IAA reserves full discretion to provide or not provide requested information in a particular case, as provided in Information Exchange Best Practices Statement (Section IIA3). Cooperation with foreign authorities in conducting investigations is also subject to the caveat that the RTPL cannot be enforced where only overseas competition is affected (except in certain circumstances involving export cartels where the RTPL has been construed to apply). The statutory provision limiting exchange of confidential information to cases involving criminal conduct prevents information sharing with jurisdictions that do not subject cartels to criminal penalties. This restriction should be modified so that confidential information can be shared where hard core cartel activity is under investigation by the requesting authority.<sup>159</sup>

Israel's willingness to employ the Committee dispute conciliation procedure, described in the 1995 Recommendation is conditioned on agreement that the process entails mediation only and not a binding decision. This condition is consistent with the Guiding Principles appended to the Recommendation, which state that conclusions reached through the conciliation process are not binding (Section 12(d)).

Israel has active co-operation agreements with the competition enforcement authorities of Canada, Mexico and the United States, while implementation of a co-operation agreement with the EU awaits resolution of a separate issue. The IAA should consider developing additional agency-to-agency agreements, to help strengthen the framework for co-operation in dealing with hard core cartels.

The RTPL itself does not forbid disclosure of confidential information generated or held by the IAA. Other laws forbid and penalise unauthorised disclosure. Nonetheless, an express confidentiality protection provision should be added to the RTPL, to provide assurance to foreign authorities and to facilitate enforcement cooperation.

## 6.6. *Intellectual property rights*

Israel has committed to effective enforcement of intellectual property rights. To the extent this is affected by competition law and enforcement, the Committee finds that Israel's policy is consistent with this principle. Israel states that its law and practice strike a balance between competition policy and intellectual property rights, making reference to the principles and analysis set out in the Competition Committee's 1989 Report on Competition Policy and Intellectual Property Rights. That Report calls for recognition of the pro-competitive advantages of various licensing restrictions, and recommends that Members should not apply competition law to prevent licensors from capturing the surplus arising from their inventions.

The RTPL contains an exemption, so that it does not apply to restraints that relate exclusively to the right to use patents, copyrights, and other intellectual property. The IAA treats the statutory language as offering no protection to license restrictions that exceed the exclusionary scope of the underlying intellectual property right. The IAA's view is that this formulation of the exemption's limits is congruent with the statutory language and effectively bars anticompetitive restrictions. The boundaries of the exemption have not, however, been settled by litigation, and the application of antitrust law to intellectual property licenses is largely undeveloped in Israel. Accordingly, this exemption might be inadequately specified. The policy goals of supporting intellectual property rights while preventing anti-competitive abuse in licensing arrangements might be better addressed through a closely tailored block exemption (as in the EU), or detailed enforcement guidelines (as in the US).

The exemption for intellectual property agreements is relevant to two Council Recommendations that were adopted some time ago. The 1989 Recommendation concerning Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements recommends that Members take account of the conclusions of the Competition Committee's 1989 Report on Competition Policy and Intellectual Property Rights when applying competition analysis to patent and know-how licensing agreements. The second Recommendation from 1978, concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences addresses restrictions on parallel imports and certain contract provisions in trademark agreements among actual or potential competitors or between licensors and licensees. Israel accepts both Recommendations.

## Notes

- 1 Other prominent Histadrut businesses included the construction firm Solel Boneh, the Tnuva grocery cooperative, and the Egged and Dan bus cooperatives.
- 2 The Law refers to the “public interest” as a basis for approving restrictive agreements. The term’s definition retains references to social policy goals from the 1959 law, such as assuring supply, preventing damage to an important national industry, safeguarding employment, and improving balance of payments. These have been construed narrowly, to conform as closely as possible to principles of standard antitrust analysis.
- 3 If a person managing a business “is aware of the existence” of a restrictive arrangement, and “adapts his or her actions to such an arrangement, in whole or in part,” then such person is deemed to be a party to the arrangement (Sec. 6). This provision has evidently never been invoked.
- 4 Section 2(b) is construed to cover only arrangements that are typically anticompetitive. Thus, for example, although the Antitrust Tribunal held a conventional non-compete clause to be a restrictive arrangement under Section 2(a), it declined to treat the clause as a restraint constituting a “market allocation” under Section 2(b).
- 5 An “industry association” is defined in Section 1 of the RTPL as any trade or business group that seeks to promote the business interests of its members.
- 6 The Minister is required to sign block exemptions unless he “believes, on exceptional grounds, that they should not be ratified” (Sec. 15A(d)). In 2004, the Minister declined to approve an IAA proposed block exemption for lease exclusivity provisions that restricted the rights of property owners. The Minister’s reasons for rejecting the proposal were not publicly disclosed, but apparently arose from a concern that the limited scope of the proposed exemption could discourage entry into commercial real estate leasing. Court and IAA decisions since 2004 have largely resolved the problems that triggered the proposal, and the IAA has tabled the project.
- 7 The General Director commences the block exemption process by publishing a notice in two daily newspapers and on the IAA’s website 60 days before

submitting her proposal to the Exemptions and Mergers Advisory Committee. Any public comments received, along with the Director's response, are provided to the Committee for its deliberations. An existing exemption may be renewed or amended in accordance with the same procedures that applied to its initial adoption.

8 In such a case, the General Director may direct the parties to apply to the Antitrust Tribunal for approval of the arrangement under Section 9 of the Law. This authority has never been employed.

9 Antitrust Rules (General Instructions and Definitions), 2006, 6438 S.H. 786.

10 In calculating market shares for purposes of applying such limits, the parties must add the shares of any third parties in the same market with whom they have agreements that are "identical or similar" to the type of agreement at issue (Sec. 3). Although the omnibus rule does not address the calculation of market shares by parties who are members of a control group, the IAA requires that the shares of all firms in a control relationship be aggregated.

11 This exemption is modelled closely on the European Commission's Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 81(1), OJ C 368/13 (22.12.2001).

12 In civil litigation, courts have articulated a principle that arrangements with negligible competitive impact will not be treated as unlawfully restrictive under the RTPL. This doctrine has occasionally been applied in private litigation against parties charged with breach of contract who have tried to evade contractual obligations by contending that the contract at issue was anticompetitive and hence an illegal contract void under Section 30 of the Contracts Law (General Part), 1973, 694 S.H. 118.

13 The Director may extend the period for an additional 60 days for cause. The deadline is tolled during any period in which the parties are responding to a request for additional information. The IAA rarely extends the initial 90 day deadline. If an exemption application relates to an activity over which a Ministry has jurisdiction, the Ministry must be notified at least 15 days before the Director renders a decision. Although Section 14(e) provides that a fee, determined jointly by the Minister of Finance and the Minister of Industry, Trade and Labour, shall be imposed on an exemption application, the fee amount has never been established and hence is not presently charged.

14 Once an exemption has been issued, the Director may, after consultation with the Committee, amend or revoke it or impose conditions on its continued application.

- 15 An application for Tribunal approval is commenced by filing a petition with the Tribunal and serving a copy on the General Director. The Director publishes notification of the application in the Official Gazette and two daily newspapers. Interested third parties may file written objections with the Tribunal. Thereafter, the Tribunal convenes a hearing, at which the parties and the Director appear, and determines whether a trial to receive evidence should be conducted.
- 16 During the past five years, the Tribunal has amended the conditions of a previous approval in at least one case, creating a structural separation between the parent entities of a joint venture. The Tribunal's action responded to the General Director's concern that the joint venture's operating methods risked anticompetitive coordination.
- 17 Under Section 11, approval is for such period of time as the Tribunal stipulates. If no stipulation is made, approval runs for the lesser of three years or the agreement's duration.
- 18 After an approval application is submitted to the Tribunal, the President is empowered, upon request of the parties and with the concurrence of the General Director, to issue a temporary permit to act in accordance with the proposed restrictive arrangement during the Tribunal's review of the case (Sec. 13). Such a permit may be issued only if the President concludes that the arrangement is *prima facie* in the public interest under Section 10. Conditions may be imposed on the permit to satisfy that standard. A temporary permit remains in force for a specified time not to exceed one year. The President may revoke or amend the permit on application by either the Director or a third party who objected to the approval application.
- 19 Failure to comply with conditions imposed in an order approving a specific exemption or granting a Tribunal approval or temporary permit is also a criminal offence subject to prosecution by the IAA (Sec. 47(a)(2)).
- 20 The IAA observes that all of the cases resolved by consent decrees were settled before a court action was commenced and that it cannot be assumed what form of proceeding would have been commenced had consent negotiations failed. For example, the IAA might have initiated an administrative proceeding to issue a Section 43 determination that the parties had engaged in an unlawful restrictive arrangement.
- 21 If the joint venture operates in the same market in which the venture parties independently compete, or in an adjacent market, then the exemption applies only if (1) the parties' aggregate market share in the joint venture market or an adjacent market does not exceed 20%; (2) their aggregate market share in any other market in which they compete does not exceed 30%; (3) in any

market in which they compete, there are at least three additional competitors, each of which has either (i) a market share of at least 10%, or (ii) a market share that equals or exceeds the market share of the largest party in the venture; and (4) the venture does not entail any marketing activity respecting either a product market in which the parties compete, or an adjacent market, unless the venture combines all of the parties' importing or manufacturing operations. If there is no overlap between the venture market and the markets in which the parties compete, the exemption applies provided that, in markets where the parties compete, (1) their aggregate share does not exceed 20%, and (2) there are at least two additional competitors, neither of which is a party to the joint venture, and each of which has either (i) a market share of at least 10%, or (ii) a market share that equals or exceeds the share of the largest party in the venture. If the parties' aggregate market share exceeds 20% but not 30%, the exemption will still apply provided that venture activities generate less than 25% of the sales turnover, assets, or profits of either venture party in the market in which they compete.

- 22 For agreements relating to markets in which the parties independently compete, the same thresholds apply as for the joint venture exemption, except that there is no stated aggregate share limit applicable to the R&D markets in which they compete. Instead, the exemption provides that where the parties intend to use the products developed under the agreement as components in the manufacture of other products, the aggregate share of the venture parties in the other market may not exceed 20%. Likewise, for agreements relating to markets in which the parties do not separately compete, the same joint venture market share thresholds apply, except that the parties' aggregate share in any market in which they compete may not exceed 30%.
- 23 One more officer has been sentenced to four months imprisonment since the completion of this report.
- 24 Throughout this review, an exchange rate of 0.278 has been used to convert ILS to USD.
- 25 The case arose in conjunction with a joint project by the Ministries of Finance and Health to introduce a more competitive contracting method between hospitals and the government for delivering hospital services to geriatric patients. The IAA determined that the Israel Association of Private Hospitals for Chronic Patients had instructed its hospital members to boycott the government's bid process.
- 26 Yediot had previously been unsuccessful in attempting to introduce its own local news supplements.

- 27 Where the products purchased are used as inputs in production rather than re-sold, the total of all products sold by the supplier through exclusivity agreements may not exceed 10% of the turnover in that market.
- 28 If the distributor offers maintenance services for products covered by the agreement, the exemption requires that such services must be offered without regard to whether the products are purchased from the distributor or from another party.
- 29 Franchise contracts may not bar franchisees from (i) purchasing goods from outside sources without regard to whether such goods conform to the franchisor's quality requirements, (ii) using non-confidential know-how after the agreement terminates (iii) raising a legal challenge to the franchisor's intellectual property claims, (iv) making "passive sales" of goods to consumers located outside the franchise area, or (v) purchasing goods from other franchisees or authorised distributors. Franchisees are subject to the same non-discriminatory maintenance service obligation found in the exclusive distribution exemption.
- 30 The Exclusive Distribution exemption allows maximum RPM (Sec. 3(4)(e)), while the Franchise Agreement exemption permits RPM of any kind (Sec. 2(b)(14)).
- 31 Some criminal cases classified as horizontal also involved vertical aspects. For example, a 2002 case in the market for polyethylene conduit attacked a cartel in which the participating competitors had established a joint marketing company to facilitate collusion.
- 32 There were no Section 50A injunction cases in the past five years involving vertical arrangements.
- 33 Section 26(f) requires that share calculations be accomplished by aggregating the shares of all members of a control group, thus including the shares of any parent or subsidiary entities associated with the firm at issue.
- 34 The Tribunal has observed that the analysis entailed in determining the existence of a monopoly market share differs from merger analysis, because the former ignores supply responses, no matter how likely.
- 35 The Tribunal has observed that a monopoly declaration constitutes a strong indication that market power exists.
- 36 Israel's Initial Memorandum notes the IAA's policy on monopoly pricing in conjunction with Israel's acceptance of the Council's Recommendation concerning Action against Inflation . That Recommendation urges Members

to apply their competition laws vigorously against conduct that exacerbates inflation, including particularly hard core cartels, RPM, monopolistic and oligopolistic practices affecting prices, and restrictive patent licenses. Israel states that it accepts the recommendation, conditioned with the observation that “the policy of the IAA does not address price supervision.” The Explanatory Comment adds the assertion that Israel’s competition regime meets the Recommendation’s requirements because the IAA has broad authority to prosecute all forms of anticompetitive conduct.

- 37 If no minister has jurisdiction, the Minister of Trade, Industry and Labour does duty.
- 38 Section 29A offences are penalised under Section 47(a)(4a), which imposes more severe sanctions than those imposed on Section 29 violations by Section 47(b).
- 39 The IAA observes that both of these cases were resolved by consent decrees before a court action was commenced and that it cannot be assumed what form of proceeding would have been commenced had consent negotiations failed. The IAA might, for example, have initiated an administrative proceeding to issue instructions under Section 30 or a Section 43(a)(5) determination that an abuse of position had occurred.
- 40 The Director noted that deceptive advertising is ordinarily addressed under the consumer protection law, and that its relevance in the Bezeq case arose from the fact that the harm inflicted did not merely affect consumers, but also the competitive process in the relevant market.
- 41 Bezeq appealed the Director's decision before the Tribunal which later upheld the Directors decision. This development occurred since the completion of this report
- 42 Violations of Section 27 instructions are criminal offences but are less severely punished under Section 47 than are violations of section 30.
- 43 The Director is required to publish notice of her intent to issue instructions in two daily newspapers and on the IAA’s website at least fourteen days in advance, and must make the contemplated instructions available for public review (Sec. 30(d)).
- 44 Failure to comply with Section 30 instructions or with Section 31 orders constitutes a serious criminal offence (Sec. 47(a)(5)).

- 45 In an extreme case, exclusionary arrangements employed by a firm seeking to become a monopolist might be attacked under the restrictive arrangements provisions in Section 2.
- 46 The proposal has received governmental approval since the completion of this report and is pending legislating procedure in parliament.
- 47 A different kind of concentration issue is considered in a recent study focusing on business groups that hold controlling stakes in diversified portfolios of publicly-traded Israeli companies. Typically, such groups maintain control through pyramid structures. Although the firms controlled by business groups appear to be no more or less profitable than unaffiliated firms, shares in business group firms have lower market valuations than do shares in their unaffiliated peers. See Kosenko, Konstantin (2007), *Evolution of Business Groups in Israel: Their Impact at the Level of the Firm and the Economy*, *Israel Economic Review*, Vol. 5 No. 2, pp. 55–93; [http://www.bankisrael.gov.il/deptdata/mehkar/iser/10/iser\\_3.pdf](http://www.bankisrael.gov.il/deptdata/mehkar/iser/10/iser_3.pdf). It is unclear whether business groups present issues that can or should be addressed by competition policy.
- 48 Since the completion of this report the following development has occurred: In its deliberation whether a Section 25 divestiture order should be issued, the Tribunal decided to proceed in two phases - first make a finding as whether there exists potential for competitive harm and second, make a finding whether a merger did in fact exist. After hearing the parties, the Tribunal found there was in fact an anticompetitive potential and proceeded to decide the second phase. Shortly after the said finding, Prinir 'voluntarily' severed all ties with Milos.
- 49 A block exemption for restraints ancillary to a merger provides that no specific exemption is required for restraints in the merger agreement if they are necessary to maintain the economic value of the company sold and are limited to a reasonable duration. The block exemption applies special conditions to two types of restraints. First, for covenants not to compete imposed on a seller, the exemption applies only if the merger involves a transfer of know-how, the covenant is limited to four years in duration, and the sold business is not a monopoly in either the relevant product market or an adjacent market. Second, for covenants either obliging the seller to continue supplying inputs to the business or obliging the business to continue supplying inputs to the seller, the exemption applies only if the sold business is not a monopoly and the covenant neither exceeds three years in duration nor contains any exclusivity clauses.

- 50 The “profit rights” clause means that the RTPL covers acquisitions of non-voting shares and share acquisitions made only for purposes of investment. The 25% threshold applies with respect to each type of ownership right specified in Section 1 and is triggered by any acquisition that results in control of either a 25% share or a 50% share of the right involved. As a matter of policy, no further notification of an acquisition of a particular right is required once the IAA has approved a proposed increase in the existing share of that right beyond 50%. In June 2000, the IAA issued guidance concerning the application of notification requirements in situations where a firm purchases its own stock and consequently changes the relative share holdings of the stockholders in a manner that triggers application of the 25% share thresholds. The guidance details the circumstances in which such stock repurchases must be notified (Opinion 2/00: Duty to Submit Notice of Merger for Self-Purchase of Shares, 2000 Antitrust 5000574).
- 51 Guidelines for Reporting and Evaluating Mergers Pursuant to the Restrictive Trade Practices Law, 1988, 2008 Antitrust 5000763.
- 52 For example, notification is required for the acquisition of any trademark, brand name, or other intellectual property right that constitutes a critical component of the selling’s company’s competitive activity in a particular line of business. A qualifying “acquisition” need not entail full ownership, but may arise, for example, from a long term lease.
- 53 The guidelines describe an example in which the acquirer obtains less than a quarter of a category of rights, but nonetheless gains a significant foothold in the target company by becoming its largest shareholder.
- 54 Under Section 17(a)(1), the Minister of Industry, Trade and Labour may set the combined market share threshold for a particular market lower than 50%, in accordance with the Minister’s monopoly share specification authority in Section 26(c). This authority, like that in Section 26(c) itself, has never been exercised.
- 55 As enacted in 1988, Section 17(a)(2) specified a minimum combined sales turnover amount of ILS 50 million and contained no reference to a minimum turnover amount for individual firms. The Section provides, however, that the sales turnover threshold may be amended by the Minister of Industry, Trade and Labour with the approval of the Economic Affairs Committee of Israel’s parliament (the Knesset). The currently applicable sale thresholds appear in Section 9(2) of the Restrictive Trade Practices Regulations (Registration, Publication and Reporting of Transactions) 2004, 6330 K.T. 812, 2004 Antitrust 5000544.

- 56 Thus, a notification for the acquisition of an Israeli firm is not necessary if the acquirer has no operations in Israel at all. Over the past three years, the proportion of notifications involving firms that operate both inside and outside Israel has held steady at about 10%. In 2007, the IAA examined 26 mergers that had an international aspect, approving all of them after assessing their competitive effects in Israel.
- 57 With respect to financial institutions such as banks and insurance companies, the amount to be employed for purposes of calculating “sales turnover” is the entity’s total income from current operations.
- 58 International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup, Recommended Practices for Merger Notification Procedures (2005) [hereafter ICN Merger Notification Procedures], § IIB, available at: <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>.
- 59 ICN Merger Notification Procedures, § IIB, comment 1.
- 60 OECD, Recommendation of the Council Concerning Merger Review (March 23, 2005) §IA1.2(2), available at <http://www.oecd.org/competition>.
- 61 Two additional problematic mergers were notified because they met both the merged entity market share and the monopoly party thresholds (yet did not meet the turnover thresholds).
- 62 This case (Prinir - Milos) involves a consummated merger in the processed tomato products market.
- 63 The smallest problematic merger in the study group involved an aggregate turnover of ILS 26.4 million (USD 7.3 million) and an acquired entity turnover of ILS 11.3 (USD 3.1 million).
- 64 The one monopoly party merger that was blocked involved a 2006 acquisition in the avian serums market (Biovac – Shafit).
- 65 Of the two mergers, the first involved a 2006 horizontal merger between two leading flour milling companies (Shtibel and Dagan) that faced few competitors. Shtibel was required to divest its holdings in certain other flour milling facilities. The second involved two manufacturers of food spice mixes (Frutarum and Reihan) whose products were formulated using trade secret recipes. The IAA required Frutarum to release its employees from non-compete agreements and required Reihan to disclose to its customers the formulas for certain meat and fish spice products.

- 66 In recent years, about half of notifications have been filed using the short form.
- 67 A copy of the notification must be sent to any government ministry that has jurisdiction over activities in which the merging firms engage (Sec. 20(c)).
- 68 Although Section 20(d) contemplates that the Minister of Industry, Trade and Labour and the Minister of Finance will jointly establish a fee to be charged for filing a merger notification, no such determination has ever been made and, at present, no fee is assessed.
- 69 Of the 237 notifications received in 2007, 205 (86.5%) were classified green, 31 (13.1%) were classified yellow, and one (0.4%) was classified red.
- 70 The guidelines note, however, that a party's failure to provide information requested by the IAA can serve as an independent basis to deny approval for the transaction.
- 71 Although Section 38 provides that the 30-day deadline may be extended by the President of the Tribunal upon application by either the Director or the parties, that approach is virtually never employed. Rather, the IAA's usual practice is to obtain the consent of the parties for an extension.
- 72 This is the same approach that the Tribunal takes with respect to the public harm clause in Section 29A concerning abuse of dominance.
- 73 Firms that are able to expand rapidly into the relevant market without incurring sunk costs are not assigned a market share at this stage. Consideration of their relevance is reserved until the IAA assesses whether excess capacity will constrain the transaction's anticompetitive unilateral effects.
- 74 In a 2003 decision, the Tribunal considered the issues posed when a potential entrant that has yet to incur significant sunk costs is the acquired party in a merger. The Tribunal concluded that acquisition of such an "actual potential competitor" should be treated as anticompetitive if (1) the firm has "the ability, interest, and incentive as well as available feasible means" to enter the market, and (2) independent entry would have a significantly greater pro-competitive effect than would entry by merger.
- 75 Cases in which both structural and conduct conditions were imposed are classified as structural cases.

- 76 The introduction in January 2005 of a more sophisticated database system for tracking and recording the results of merger reviews has also served to expedite the review process.
- 77 This provision is a counterpart to the Tribunal's authority to order divestiture of a monopolist under Section 31.
- 78 The IAA observes that these three cases were resolved by consent decrees before a court action was commenced and that it cannot be assumed what form of proceeding would have been commenced had consent negotiations failed. The IAA might have initiated, for example, an administrative proceeding to issue a Section 43(a)(3) determination that a non-notified merger had occurred.
- 79 The IAA also conducted a criminal investigation in the case, the results of which are being examined by the Legal Department to determine if an indictment is warranted.
- 80 The Law applies to all sectors of the economy except banks and insurance, which are policed by sector regulators.
- 81 Since the completion of this report, legislation has been finalized and the CPFTA is in process of being established.
- 82 For example, the Histadrut operates a consumer assistance program that makes services available both to union members and to the general public.
- 83 To qualify as a "consumers' organisation" with standing under the RTPL, the entity must be approved for that purpose by the Minister of Justice. Four such organisations have been approved: the Israel Consumer Council; the Histadrut's consumer assistance office; the Israel Consumers' Association; and Shill, Citizen Information Services.
- 84 In Hebrew, "Rashut Hahegbelim H'iskiyim," or, translated literally, "Restrictive Trade Practices Authority."
- 85 The IAA's annual conferences are attended by antitrust practitioners, company executives, academics, and the public, and provide intensive analysis of recent developments and selected antitrust topics.
- 86 See [www.antitrust.gov.il](http://www.antitrust.gov.il) (in Hebrew) or [www.antitrust.gov.il/Antitrust/en-US](http://www.antitrust.gov.il/Antitrust/en-US) (in English). The IAA currently has underway a project to make significant improvements in the coverage of its English-language site.

- 87 Under Section 42(a) of the RTPL, the IAA maintains public registries for (1) pending applications for Tribunal and General Director approval of restrictive arrangements, (2) Tribunal approvals and temporary permits for restrictive arrangements, and (3) General Director merger approvals, restrictive arrangement exemptions, and declarations of monopolies.
- 88 Under Section 42(b), the Tribunal may direct that a particular matter be excluded from a registry if such redaction “is necessary in the interests of state security, foreign relations or some other vital interest, including the interest of a party in a trade secret.”
- 89 The Administrative Tribunals Law (Sec. 30) provides that a party appealing an agency decision to an Administrative Tribunal is entitled to review the agency files pertaining to the decision at issue, except for certain protected categories of information. Those categories include confidential commercial information, classified material relating to national security or foreign affairs, government deliberative process documents, private personal data, and information relating to employee hiring and performance. Where the agency has denied access to a party, the Tribunal may permit disclosure if it concludes that the interests of justice outweigh the interest in preserving confidentiality.
- 90 One suggestion was that the General Director should publish a blog on the internet..
- 91 District court judges are appointed to office by the President of Israel upon recommendation of a nominating committee comprised of three Supreme Court judges, two government ministers, two members of the Knesset, and two members of the Israel Bar Association.
- 92 “Consumers’ organisations” are organisations that have been approved for purposes of the RTPL by the Minister of Justice. “Economic organisations” include any business association. In practice, economic organisation representatives are typically members of one of the approximately 15 organisations that participate in the Histadrut's Coordinating Bureau of Economic Organisations (including, for example, the Manufacturers' Association of Israel, the Federation of Israeli Chambers of Commerce, and the Association of Banks in Israel). Once appointed, representatives of consumers’ and economic organisations have no legal obligation to the nominating organisations, do not lose their Tribunal seats if they resign organisation membership during their term of office and, in rendering decisions, are expected to reflect their independent views rather than the views of the nominating organisations.

- 93 The IAA has issued procedures applicable to pre-rulings. Rules for Pre-ruling by the General Director, IAA, Pre-Ruling Procedure, 2004 Antitrust 5001240. The Rules provide that the Director will advise the parties within 15 working days whether she intends to render an opinion on the application, and will issue the final opinion within 30 working days. The IAA states that it complies with these self-imposed deadlines.
- 94 A pre-ruling opinion is available to address market definition issues, but not to calculate a firm's market share or to address any other question that requires substantial investigation or a detailed factual examination.
- 95 Section 46(a) expressly authorises the IAA to pursue violations of Penal Law sections 242, 244, 245, 247 and 249, which deal with destruction of evidence, tampering with legal process, and threatening or harassing witnesses.
- 96 The police also have authority to investigate criminal antitrust violations, but defer to the IAA in recognition of its expertise. The IAA considers that its relationship with the police has always been good.
- 97 Suspects can invoke their right to remain silent and refuse to testify on grounds of possible self-incrimination. The IAA also honours the attorney-client privilege.
- 98 The IAA's arrest authority applies to suspected violators, but not to witnesses or persons suspected of planning a crime.
- 99 Persons detained for questioning at the IAA's offices may not be held there after 8:00 PM, but must be brought to a regular police station if the IAA wishes to keep the subject in custody (Sec. 46(e)).
- 100 For example, the IAA has statutory authority to request that the police provide investigative information obtained from the Israel Money Laundering and Terror Financing Prohibition Authority.
- 101 The Tribunal has also ruled that the IAA should provide a hearing to the affected parties before the Director issues a determination under Section 43. The scope of such hearings is relatively narrow, as the parties do not have the right to access the evidentiary file or examine witnesses until court proceedings commence. The IAA may grant access in such cases as an exercise of discretion.
- 102 Section 47 imposes no penalty on the violation of court orders issued under Section 50A (restrictive injunctions) or Section 50B (consent decrees). Such orders are enforced in contempt of court proceedings.

- 103 The Initial Memorandum adds the caveat that the RTPL does not reach conduct that solely impairs competition in other countries
- 104 Fines imposed during the period ranged from ILS 5,000 to 1,250,000 (USD 1390 to 347,500) for individuals and from ILS 50,000 to 4,040,000 (USD 13,900 to 1.12 million, the statutory maximum) for corporations. The Ministry of Justice's Centre for Collecting Fines, Fees and Expenses is responsible for monitoring the payment of criminal fines, including those imposed in IAA cases. The Centre has extensive legal powers to collect unpaid fines, and the IAA does not consider that non-payment of antitrust fines is an issue in Israel.
- 105 A sentence to public work is considered a form of imprisonment and leaves the defendant with a criminal record. Public work service entails working full time in a hospital, shelter, or similar facility.
- 106 The three 2002 sentences in the tiles case and the 2007 and 2008 sentences in the LPG cases are the five most severe prison sentences ever imposed for cartel violations in Israel.
- 107 The IAA presently has one cartel case on appeal before the Supreme Court in which it is seeking harsher penalties. In 2007, the trial court in a prosecution of a paper envelopes bid-rigging conspiracy against four companies and their officers imposed fines of up to ILS 90,000 (USD 25,000) and public work terms of up to six months on the officers and fines of up to ILS 250,000 (USD 69,500) on the four companies. The IAA is requesting that the individuals be sentenced to actual imprisonment and that the fines for both individuals and companies be increased.
- 108 Since the completion of this report, the IAA has circulated an amendment to the RTPL that will provide for civil penalties. The amendment has received approval from the Ministry of Justice, public comments and is pending governmental discussion.
- 109 Section 49 provides a defence to employees or agents who can show that they acted in compliance with the instructions of their employer or client and believed in good faith that their personal conduct did not constitute an offence.
- 110 The program is not based on any provision in the RTPL.
- 111 Leniency agreements (like plea bargains) are negotiated between the IAA and the applicant, but must also be approved by the District Attorney.

- 112 In its deliberation whether a Section 25 divestiture order should be issued, The Tribunal decided to proceed in two phases - first make a finding as whether there exists potential for competitive harm and second, make a finding whether a merger did in fact exist. After hearing the parties, the Tribunal found there was in fact an anticompetitive potential and proceeded to decide the second phase. Shortly after the said finding, Prinir 'voluntarily' severed all ties with Milos. This development has occurred since the completion of this report
- 113 Section 50B(a) provides that a consent decree is available in lieu of proceedings (1) seeking criminal penalties or a Section 50A injunction, or (2) leading to a General Director determination under Section 43.
- 114 If the court determines not to approve a decree, Section 50B(f) provides that any document submitted to the IAA by a party shall not be admissible as evidence in any other legal proceeding.
- 115 In evaluating the advisability of a consent decree, the IAA also considers whether defendants in similar cases could claim discrimination if they are not also offered a settlement, and whether the case should be litigated to resolve ambiguities in the law.
- 116 In comparison to the IAA, decisions of sector regulatory agencies are subject to review either by a district court sitting as an Administrative Matters Court or by the Supreme Court sitting as the High Court of Justice, unless a specialised tribunal has been created for purposes of hearing appeals. At present, there are a few tribunals responsible for reviewing certain decisions of particular government agencies, such as decisions setting regulated prices, granting assistance to manufacturers who engage in industrial research and development, determining National Security System payments, and resolving tax issues. The Antitrust Tribunal is, however, the only tribunal established as a unit within a district court to review the actions of a market regulation agency.
- 117 Section 22(c) merely provides that the Tribunal may “reaffirm, revoke, or amend” the General Director’s decision.
- 118 Of the 1266 decisions, 1250 (99%) were in merger or restrictive arrangement exemption cases. Most such cases result in approval of the parties’ application, with or without conditions, and incentives to appeal are therefore relatively limited. Moreover, in mergers (which constitute 67% of the cases), the parties usually have strong incentives to accept conditions and consummate the transaction, rather than incur the delay associated with an appeal.

- 119 Aminah was a vertically integrated distributor-retailer. The IAA opposed the merger on the grounds that Aminah's acquisition of retailer Night Sleep Centre would significantly reduce intra-brand competition among retailers of Aminah brand mattresses. The Tribunal agreed with the IAA's analysis, but concluded that intra-brand competition could be preserved by establishing conduct conditions that barred the merged entity from imposing on retailers RPM requirements or other contract provisions designed to restrict such competition.
- 120 One further limitation, established by a decision of the Tribunal, is that the parties to a merger cannot appeal a General Director decision rejecting their proposal to modify previously imposed merger approval conditions. In such cases, the parties may petition the Supreme Court.
- 121 In High Court cases, the IAA is represented by the State Attorney's office (a unit in the Department of Justice). Certain IAA decisions, such as a response to an application for information under the Freedom of Information Law, are subject to review by a District Court in its capacity as the Administrative Matters Court. The IAA is represented in those proceedings by the District Attorney.
- 122 Section 39 of the RTPL provides that any appeal against a Tribunal interim ruling or temporary permit, or against a Tribunal decision on appeal of a General Director order issuing a Section 43 determination, shall be heard by a single judge unless the President of the Supreme Court determines otherwise.
- 123 In cases before the Supreme Court involving appeals of Tribunal decisions, the IAA is represented by its own attorneys, in consultation with the State Attorney's Office or the District Attorney's Office. The IAA controls the decision whether to appeal, but consults with those offices about that question as well.
- 124 In cases before the Supreme Court involving appeals of District Court decisions, the IAA is represented by its own attorneys. The IAA controls the decision whether to appeal.
- 125 It should be noted, however, that although the Supreme Court granted every IAA request seeking increased fines, the amount of the increase did not always match the IAA's request. Further, in a few cases involving IAA requests for both increased fines and increased prison terms, the Court rejected the prison term portion of the request.
- 126 A complaining party dissatisfied by the IAA's refusal to initiate a criminal case can appeal to the District Attorney under a provision in the Criminal Procedure Law. The complainant may also petition for review by the

Supreme Court sitting in its capacity as the High Court of Justice, although the Court will act in such only in response to a demonstration that the IAA's decision was grossly unreasonable or tainted by serious legal or ethical impropriety.

- 127 A defendant may agree to pay a monetary penalty in accordance with a consent decree, but Section 50B(a) expressly provides that any such money must be deposited in the State Treasury. The clause in Section 50B(a) providing that a decree may entail a commitment by the defendant "to take a specific action" might be exploited to include a provision requiring payment of redress to victims. Ordinarily, however, the companies reaching agreement with the IAA under Section 50B do not admit liability or accept responsibility for any harm inflicted.
- 128 An IAA analysis of court rulings issued in 2007 on antitrust claims asserted by private plaintiffs found five civil damage cases, two injunctive relief cases, and two declaratory judgment cases. In one 2007 private case, airline companies won an award of approximately USD 3.5 million in antitrust damages incurred as a result of an industry-wide restrictive arrangement among wholesale suppliers of jet engine fuel.
- 129 The general preference of the IAA is to intervene in district court antitrust cases sparingly and only where a clear theoretical antitrust issue is presented. In lower courts, the antitrust questions tend to be less academic and more entwined with the interests of the parties involved. Intervention in such cases may, in certain circumstances, risk tainting the IAA's reputation as an impartial party. The IAA always responds to district court invitations, but only occasionally files an application to intercede. At the Supreme Court level, where core antitrust issues are more likely to be presented, the IAA is more willing to consider intervening on its own initiative.
- 130 The Antitrust Tribunal, in ruling on requests for approval of restrictive arrangements, may consider whether an arrangement will improve the balance of trade by reducing imports or increasing exports, as provided in Section 10(7). As discussed previously, however, the Tribunal applies its approval authority for the principal purpose of preventing competitive harm, and has never approved an otherwise anticompetitive arrangement on the grounds that it would advance Israel's international trade interests.
- 131 If a foreign firm with less than 50% of the relevant Israeli market was exercising market power abusively, the monopoly provisions of the RTPL could be made applicable if the Minister of Industry, Trade and Labour invoked Section 26(c), which permits him to set a lower threshold market share for a particular firm that has a "decisive impact" on the market.

- 132 The court was construing a provision in Israel's Penal Law under which persons in Israel committing any element of a crime under Israeli law may be prosecuted in Israel even if other critical elements of the offence occur overseas.
- 133 The Initial Memorandum states Israel's position on all ten Council Recommendations identified by the Legal Affairs Directorate as within the Competition Committee's jurisdiction. The Memorandum does not provide a statement with respect to items that do not appear in the Compendium of OECD Decisions, Recommendations, and Other Instruments, such as the Committee's Statement of Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (2005). The IAA states separately that it accepts that instrument subject to the same caveats applicable to the Council Recommendations on information sharing and investigative cooperation.
- 134 The Initial Memorandum notes that Israel's willingness to employ the dispute conciliation procedure set out in the Recommendation requires that the process entail only mediation and not a decision binding on the parties.
- 135 The RTPL itself has no provisions dealing with foreign assistance.
- 136 The Legal Assistance Law imposes an additional requirement where the IAA receives an information request from a foreign agency that is not responsible for competition law enforcement. In such a case, disclosure is permitted only if the requesting agency's Israeli counterpart would be authorized to access the information requested.
- 137 The Process also has a bilateral component, which includes the development of Euro-Mediterranean Association Agreements between the EU and each of the 12 non-EU members of the Partnership, such as the EU Association Agreement with Israel described above.
- 138 This initiative has already come to fruition at the US FTC, where two IAA staff members attended training in September 2008 and a third attended in October.
- 139 Budget amounts appropriated are not shown, because expenditures are closely aligned with appropriations.
- 140 The physical facilities provided for use of the Investigations Department are also being upgraded. It now has interview rooms in Tel Aviv and in Jerusalem, located in separate offices that minimise any encounters with other IAA staff. The Department now also has the capacity to record interviews on video tape and to conduct forensic analyses of computer data.

- 141 An estimated 25% of total resources are devoted to investigation and prosecution of horizontal cases, while 10% are allocated to other functions relating to horizontal arrangements, such as exemption applications, Tribunal approval cases, and pre-rulings.
- 142 One injunction case was commenced during the past five years, but was ultimately resolved by a consent decree. No divestiture orders were issued by the Tribunal during the period.
- 143 The Tribunal has observed with respect to Section 3(1) that the absence of such an exclusion applicable to the RTPL's monopoly provisions is logical, since legislation could not practicably "establish" the full range of a monopolist's business operations.
- 144 The statutory list includes patents, service marks, trademarks, copyrights, performers' rights, and developers' rights, but does not include know-how,
- 145 The effects of the legislation included a dramatic increase in the share of long-term savings and mutual funds held by insurance companies and investment houses, as well as a decrease in the banks' share of the business loan market.
- 146 The method for setting cross-clearing fees that had previously been employed by the credit card companies resulted in charges substantially in excess of the costs incurred by the card issuers in completing transactions. Under the method developed by the Tribunal, the fee charged by an issuer to the acquirer may be no higher than necessary to compensate the issuer for (1) the risk that the card holder will default in paying the amount charged, (2) the administrative cost of processing the transaction, and (3) the cost of the "float" between the time that the issuer pays the acquirer and the time that the card holder becomes liable either for payment of the charge or accumulation of interest.
- 147 Since the completion of this report, the Ministry of Communications has accepted the recommendations and they are currently in the process of implementation.
- 148 The Broadcasting Authority is funded primarily by an annual tax on television sets, but also receives about 20% of its budget from advertising.
- 149 The Prices Committee is comprised of two representatives of the Finance Ministry and two representatives of the ministry with jurisdiction over the product to be regulated.
- 150 There is also political resistance, as the Electricity Corporation has one of Israel's strongest unions.

- 151 Sewage treatment facilities are typically operated by municipal corporations, with supporting services from Mekorot.
- 152 The Minister of Industry, Trade and Labour, with the consent of the Minister of Agriculture and the ratification of the Knesset's Economic Affairs Committee, may add or delete types of agricultural produce from the statutory list.
- 153 The IAA observes that the economic analysis it undertakes in particular cases is typically based on confidential data that cannot be disclosed in a public report.
- 154 The Initial Memorandum states Israel's position on all ten Council Recommendations about competition in the Compendium of OECD Decisions, Recommendations, and Other Instruments. The Memorandum does not provide a statement with respect to items that do not appear there, such as the Committee's Statement of Guiding Principles for Regulatory Quality and Performance (2005). The IAA states separately that it generally accepts the Guiding Principles.
- 155 Available at  
*[http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=c\(2007\)102/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=c(2007)102/final&doclanguage=en)*.
- 156 An "additional fine" of up to ILS 1,300 (USD 360) may be assessed against an individual for each day that an offence persists; double that amount for a corporation. Also, an individual committing a serious offence under aggravating circumstances is liable to a maximum prison sentence of five years and a fine of up to ILS 2,600 (USD 720) for each day that the offence persists
- 157 Israel also accepts the Council's Recommendation on Competition Policy and Exempted or Regulated Sectors [C(79)155], which deals with review of regulatory regimes and exclusions from the competition laws, interdiction of anticompetitive conduct by regulated firms and consultation between regulatory agencies and competition authorities. The existence of a regulatory regime does not prevent application of the RTPL and that the IAA regularly advises government agencies and the Knesset on competition and regulation issues and seeks to restrict exclusions from competition laws.
- 158 Israel also accepts, subject to the same caveats, the Council Recommendation concerning Action against Restrictive Business Practices affecting International Trade including those involving Multinational Enterprises [C(78)133] (the predecessor to [C(95)130]).

The IAA's activities in the international sphere also implicate the Council's Recommendation concerning Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies [C(86)65]. That Recommendation addresses the impact on domestic and international competition and on consumer welfare of "trade and trade-related measures" relating to export and import cartels and export limitation arrangements. Israel accepts this recommendation, with the caveat that the IAA is authorised to apply enforcement measures only if the practice in question has a competitive effect in Israel. The IAA observes that one district court has held that the RTPL can be applied directly to export cartels based in Israel, even absent an effect on Israeli competition.



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## Competition Law and Policy Reviews

# Competition Law and Policy in Israel 2011

The *Review of Competition Law and Policy in Israel* was prepared as part of the process of Israel's accession to OECD membership. The report describes the policy foundations, substantive competition law and enforcement experience, institutional structure as well as treatment of competition issues in regulatory and legislative processes. The review then examines these findings under three assessment themes: the current situation of competition policy and enforcement; the magnitude and direction of change in competition policy over the last 5-10 years; the extent of conformity with the particular OECD competition recommendations.

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