

ISRAEL

Executive Summary

1. This report summarises major developments in Israel's competition law and policy and in the enforcement of the Antitrust Law (1988) (hereafter: Antitrust Law) in the year 2001.

2. The most significant development has been the enactment of seven block exemptions, exempting types of transactions from the requirement of authorisation from the Antitrust Tribunal or of specific exemption from the General Director of the Israel Antitrust Authority (IAA). This follows the recent amendment¹ to the Antitrust Law, empowering the General Director to exempt not only specific transactions from the requirement to be authorised, but also types of transactions which do not substantially harm competition and are not naked restraints.

3. The credit card industry has intensely occupied the IAA, particularly concerning interchange fees agreements and the determination of an interchange fee which does not substantially harm competition. The IAA also advocated competition in the legislation proceedings of the Credit Report Law, which is hoped to decrease competition barriers in the financial service field, including in the credit card industry.

4. Telecommunication and broadcast was another field of intense activity. The IAA was involved in the legislative proceedings of an amendment to the Communication Law (Telecommunications and Broadcast) designed to eliminate regulatory barriers to convergence and competition in this sector. Subsequently to the new legislation, the merger of the three cable television companies operating in Israel has been notified and reviewed during 2001 (although not yet decided). The IAA also examined mobile call termination fees and advised the Ministry of Communication on their effect on competition and consumers welfare. The IAA advised the Communication Ministry regarding the regulation of these fees.

5. In addition to these issues, the IAA pursued a range of civil and criminal cases. A series of criminal court decisions continued the ongoing tendency for increasing punishments for hard-core cartels. The record fines were 12 million NIS and 9.5 NIS for insurance companies and record imprisonment terms of up to nine months in jail for floor tile cartel members – two big cases that came to their conclusion this year.

6. The resources of the IAA have not significantly changed from previous years, with an annual budget of 20,689,000 NIS (approximately 4.5 million USD) and 78 employees.

¹ Amendment 6 to the Antitrust Law, 2000.

Changes to Competition Laws and Policies, Proposed or Adopted

Summary of new legal provisions of competition law and related legislation

Block exemptions

7. In 2001 the first block exemptions for restrictive arrangements, exempting types of transactions from the requirement of authorisation from the Antitrust Tribunal or of specific exemption from the General Director of the IAA, were enacted. Section 2 of the Antitrust Law defines a “restrictive arrangement” in a very expansive manner, as an arrangement made between two or more persons conducting business that limits at least one party to the arrangement in a manner that may prevent or reduce competition. A restrictive arrangement is subject to the requirement of being authorised by the Antitrust Tribunal or exempted by the General Director of the IAA. The block exemptions are intended to liberalise the authorisation and exemption system, and limit the requirement of applying to the authorities to transactions that entail genuine concern of significant impairment of competition.

8. The new block exemptions are: Block Exemption for Restrictive Arrangements Causing Immaterial Harm to Competition; Block Exemption for Joint Ventures; Block Exemption for Research and Development Agreements; Block Exemption for Exclusive Dealing; Block Exemption for Exclusive Distribution and Block Exemption for Franchise. The block exemption draw upon the E.U.’s block exemptions and the experience gained in their application.

9. The Block Exemption for Restrictive Arrangements of Immaterial Harm to Competition constitutes a reform in antitrust enforcement in Israel by raising the actual substantial standard for notifying an arrangement to the antitrust authorities from any possible reduction of competition to significant harm to competition. The exemption establishes that agreements of minor importance, which do not appreciably restrict competition, are exempt from obtaining authorisation or specific exemption. Immaterial restriction on competition is defined in the block exemption as “impairment whose probable effect and actual effect on business competition are slight, considering, *inter alia*, the position of the parties in the relevant product market, its intended duration and the existing degree of competition in the product market”. The exemption establishes non-conclusive evidentiary presumptions based mainly on market shares and number of competitors in the relevant market for arrangements to be considered as insignificantly harming competition.

10. The Block Exemption for Joint Ventures includes cooperation agreements between competitors. It distinguishes joint ventures between competitors in their field of competition from joint ventures that are not in the market in which they compete, establishing broader exemption for the latter sort of agreements. The substantial standards for its application are based mainly on market shares, the scope of the parties’ activity in the joint venture compared to their scope of activities in competition and the degree of competition in the product market in excess of competitors co-operating in the joint venture.

11. The Block Exemption for Research and Development Agreements addresses only co-operation agreements in research and development, and does not apply to agreements concerning the usage or marketing of research and development results (addressed by the Block Exemption for Joint Ventures). Here too, relevant parameters are aggregated market shares of the parties, the state of competition and the presence of other competitors in each product market in which the R&D parties are competing.

12. The three blocks exemptions relating to vertical agreements (exclusive dealing, exclusive distribution and franchise) are designed to exempt agreements that do not establish concern of foreclosure

in any level of the production chain. These block exemptions do not cover agreements dictating minimum price or profit rate of goods upon their sale to consumers.

Other relevant measures, including new guidelines

Draft guidelines for the definition of relevant markets

13. The IAA released draft guidelines for market definition (in the analysis of mergers, restrictive arrangements and monopolies) for public consultation and comment. These draft guidelines are designed to function as an analytical tool for the IAA's staff in reviewing transactions and practices under the Antitrust Law. It further furnishes the business and legal community with a clear understanding of how the IAA defines the relevant market in assessing the impact of a reviewed transaction or practice on competition. The guidelines are intended to contribute to the transparency of the criteria and indices by which decisions are made at the IAA. The approach outlined in these guidelines is based on the hypothetical monopoly concept in economic theory, on past decisions of the agency and the Israeli courts, and on the principles derived from other jurisdiction's similar guidelines, such as the U.S. Department of Justice and the Federal Trade Commission's Horizontal Merger Guidelines, 1992; The European Commission, Competition, Commission Notice of the Definition of the Relevant Market for the Purposes of Community Competition Law (97/C/372/03) 1997; and Canada Competition Bureau: the Merger Enforcement Guidelines.

Proposals to change Competition law and related legislation

Recommended change in the Merger Notification Form format

14. The IAA recommended to the Minister of Trade and Industry (who has the authority in this matter) to change the form of the merger notice submitted to the IAA, expanding upon the information submitted to the IAA at the initial notification of the transaction. The purpose of the proposed form is to include sufficient information in the initial submission for making a decision of whether the merger appears to substantially harm competition. The existing form has many deficiencies, and in very high percentage of the notified transactions it is necessary to ask the parties for further elementary data, just to assess whether an elaborated inquiry is needed. This unnecessarily delays the handling of applications. The IAA published its recommended change for public comment in August 2001, in order to confer and examine the implications of the anticipated change. Comments and suggestions have been reviewed, and the final draft of the proposed form is soon to be released.

International Co-operation

ICN

15. The IAA joined the newly formed International Competition Network (ICN) and is a member of its interim steering group. The IAA heads the Merger Investigation Techniques Subgroup, operating within the ICN Merger Working Group, which focuses on the development of best practices for investigating mergers. This includes methods for gathering reliable evidence; effective planning of a merger investigation; and the evaluation of economic evidence.

Enforcement of Competition Law and Policies

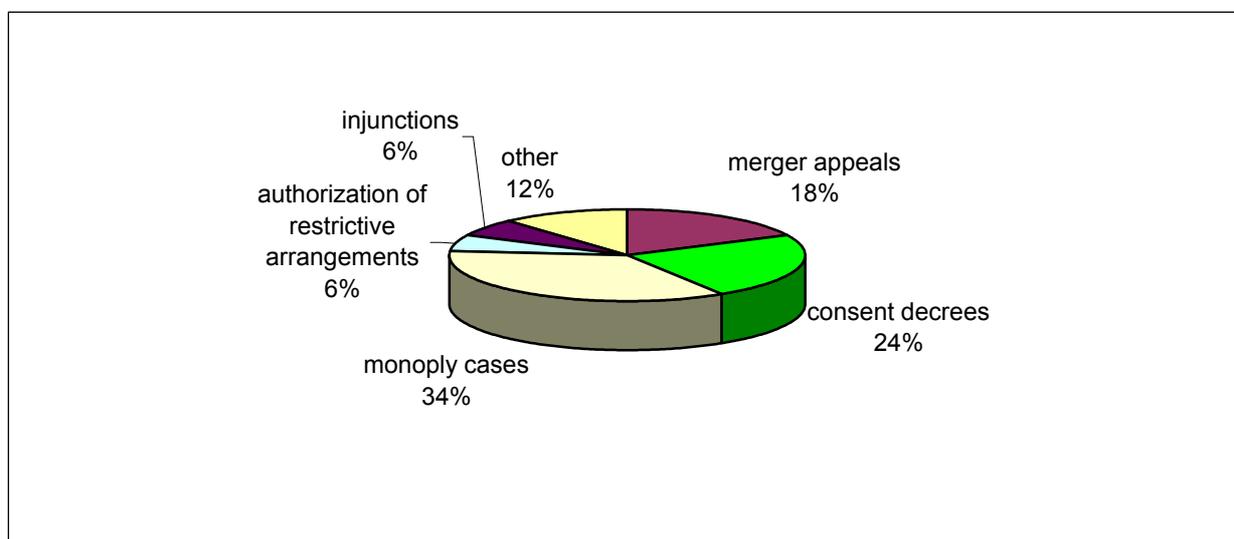
Action against anticompetitive practices, including agreements and abuses of dominant positions

Summary of activities of the IAA and the courts

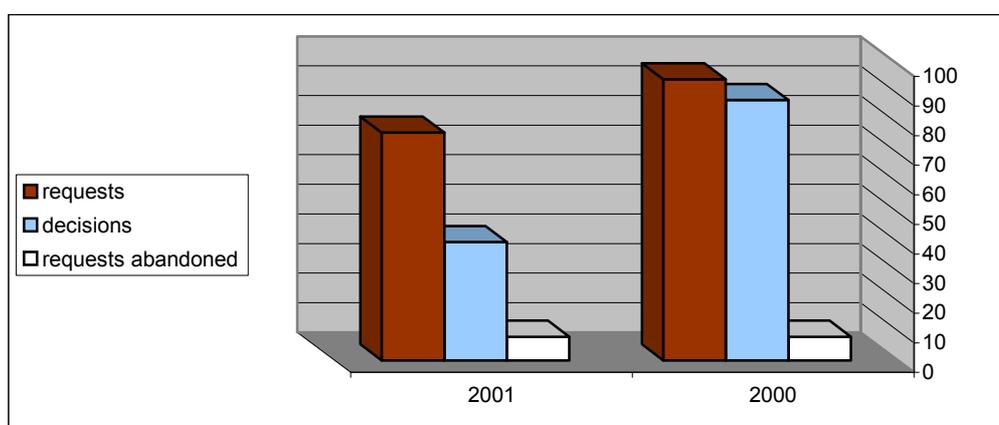
16. The Antitrust Law provides for varied remedies upon its infringement. Antitrust Law violations are a criminal offence; severe violations may be subject to criminal prosecution and may result in fines and prison terms. Liability is imposed upon the corporation and its executives. The IAA holds investigational and prosecutorial powers. In the period at hand it opened six criminal investigations, four investigations have been concluded and two indictments were filed in the Jerusalem District Court. There were convictions in five cases that were tried in recent years and acquittal in one case.

17. The civil and administrative remedies for infringements of the Antitrust Law include consent decrees, injunctions and court orders granted by the Antitrust Tribunal. The General Director has the power to declare activity as prima facie illegal and the power to issue rules of conduct to monopolies. In 2001 the IAA was involved in 19 civil litigation procedures before the Antitrust Tribunal.

Table: Civil litigation proceedings 2001



18. In addition, the IAA opened seventy administrative inquiries, following public complaints.

Table: Requests and Decisions regarding exemptions for restrictive arrangements*Description of significant cases*

19. The following examples of significant cases in the areas of restrictive agreements and monopolies demonstrate the range of issues addressed by the IAA involving both criminal and civil enforcement activities.

Restrictive agreements

20. A special expanded panel of the Israel Supreme Court issued a precedent decision in August 2001, regarding the validity of a non-competition clause in an agreement for dissolution of a partnership². The court held that such non-competition agreement is a restrictive arrangement, which is prohibited in the absence of an exemption from the IAA or approval from the Antitrust Tribunal. It was held that the courts would not enforce an unauthorised restrictive arrangement, the parties to which commit an offense by its very formation. The court emphasised that for claims for the enforcement of restrictive arrangements, the court must consider not only the balance of justice between the parties, but also the interest of consumers affected by the arrangement. This long and detailed ruling is one of the first Supreme Court rulings interpreting the restrictive agreements rules in the Antitrust Law of 1988, and it includes some first-time, precedent-making interpretations.

Interchange fee agreements among credit card issuers

21. The IAA found that interchange fee agreements among credit card issuers and acquirers are a restrictive arrangement under the Antitrust Law. Interchange fee can serve as a co-ordinating mechanism concerning merchant commissions: as interchange fees are a substantial component in establishing the merchant commission, they generate a minimal price threshold processors will not be willing to drop below. After previous exemptions granted to the interchange fee agreements between VISA companies in Israel expired, they applied to the Antitrust Tribunal for the authorisation of their interchange fee agreement; the court approved a temporary arrangement for the term of one year, which was supported by the IAA, setting up provisions for gradual reduction of merchant commissions, reduction of discriminating gaps in interchange fees in processing different categories of businesses, and a prohibition tying banking

² Re-Hearing 4465/98 Tivol (1993) Inc. V. Shef-Hayam (1994) Inc. and others.

ISRAEL

services with the clearance or issuance of the banks' credit cards. Some businesses, which use the VISA companies processing services, as well as VISA International applied to the Antitrust Tribunal with a request to join the proceedings and present their perspectives on the requested interchange arrangement.

22. At the same time, the IAA continues its efforts in opening the issuing and acquiring of MasterCard to competition. At present there is a sole acquirer of MasterCard in Israel.

23. It should be noted that IAA's statistics indicates that following its activities in this field over the last year, the average rate of the Visas' business commissions has decreased by 20%.

Proceedings for a consent decree in the field of automotive after-sale services

24. Following complaints to the IAA regarding vertical agreements and related restrictive practices employed by vehicle importers (primary distributors) and after sale services providers, which allegedly lead to a rise in the price level of services and spare parts in Israel, the IAA initiated an examination of the system of arrangements between vehicle importers and their authorised after sale services providers. It was found that some of the arrangements decrease competition and raise entry barriers in the field of automotive services and spare parts. The IAA reached an agreement for a consent decree with all motor vehicle importers constituting a reform in the field of after sale services. After the proposed consent decree was published for public consideration and comment, the parties jointly filed for approval from the Antitrust Tribunal in August 2001.

25. The main features of the requested consent decree are that vehicle importers will not be able to prohibit their authorised service providers from making use of spare parts and oils from any supplier, if they meet quality and vehicle compatibility requirements; the importer will not be able to dictate any restrictions concerning the pricing of vehicle servicing provided thereby (other than statutorily imposed restrictions); the importer will not be allowed to void vehicle warranty terms due to the vehicle owner having undertaken servicing by a service provider unauthorised by the importer; and other terms aimed at increasing the number of authorised service providers.

Criminal Enforcement

26. In the field of criminal enforcement, prominent cases heard at the District Court include the following:

27. Cartel in the field of international diamond dispatching between Brinx Israel Ltd. and Malka Amit Ltd., which according to allegations co-ordinated diamond dispatch prices for exporting from Israel for three years. One of the companies has already been convicted and sentenced under a plea bargain. Proceedings are pending concerning the other.

28. The acquittal of the companies "Tnuva" and "Meir Ezra" of unlawful restrictive arrangements charges, on the basis of the defense of "mistake in the legal state of affairs"³. According to this defense, a person shall not bear criminal liability if he acted on the mistaken assumption that his acts were legal, if his mistake was not reasonably avoidable. The court accepted the defendants' claim that they relied on incorrect legal advice according to which their conduct was legal; and that under the circumstances of the case their mistake in understanding the legal situation was not reasonably avoidable. The IAA has appealed the decision to the Supreme Court.

³ Criminal Law, 1997, Sec 34(18).

29. A floor tile cartel that acted in Israel for 14 years and encompassed virtually all manufacturers on the market. The court proceedings against the parties started in 1999; the trial continued during 2001, and the last companies and executives involved were convicted and sentenced in the beginning of 2002. The prison sentences in this case, up to 9 months terms of imprisonment, are the harshest prison sentences hitherto given. The court established in this verdict that in determining the sentence in hard-core cartels such as this, there is a definite assumption that the cartel caused harm to consumers and the public; hence the prosecution does not have to prove actual damages when pleading for the sentence.

30. Conviction of two insurance companies that took part in a cartel that included the leading insurance companies in Israel, co-ordinating rates, restricting and co-ordinating discounts, co-ordinating reduction of policy components and insurance liability and allocating markets in the automobile and housing insurance branches. The indictment was filed in 1997, concerning arrangements performed in 1991-1993. Six other companies and their directors were convicted within plea bargains in 1997. The two companies at hand tried the case, which culminated in convictions in December 2001 (in a verdict decision of an exceptional scope in excess of 800 pages). The sentence given at the beginning of 2002 established record fines of 12 million NIS and 9.5 million NIS for the companies, individual imprisonment (to be served as public work) and fines for the directors. The court noted that it refrained from handing down harsher punishment (i.e. actual prison terms for the directors involved) due to the fact that at the time the violations took place the Antitrust Law was not sufficiently enforced (the enforcement rate changed substantially after the IAA was established in 1994); this implies that if the violations would have taken place today, the punishments would have been even more severe.

Monopolies and abuse of dominant position

31. Intellectual property and competition law: in an appeal filed to the Antitrust Tribunal upon a declaration by the General Director that a manufacturer of security fences holds a monopoly position (monopolist is defined in the Israeli law, in general, as an entity having a market share in excess of 50%), the Antitrust Tribunal delivered judgement establishing a significant precedent whereby a patent owner is not immune from the Antitrust Law and the regulation of his actions as a monopoly in accordance with this law⁴. The tribunal established that the exemption from the restrictive arrangements rules for intellectual property owners from the restrictive arrangements rules with regard to licenses for use of intellectual property does not exempt a monopoly from the provisions of the law prohibiting the abuse of its position. However, the court sustained the appeal, on the basis of lack of sufficient evidence as to the market share of the declared entity.

32. Market definition in the telecommunication industry: The IAA denied an application from Bezeq Israel Telecommunication Company Ltd. to terminate its declaration as a monopolist in basic telephony services. Bezeq stated that the market definition had changed since it was declared in 1995, and currently comprises not only fixed telephone service (Bezeq is the incumbent telephony company and the only entity in Israel providing this service) but also mobile telephony service. After examining Bezeq's arguments and market data, the IAA found that it could not be established that mobile telephony services were an alternative for consumers to fixed telephone services to the extent that they could be assigned to the same market. Bezeq has appealed the IAA's decision.

33. Tying arrangements: The IAA has investigated complaints received against Coca-Cola's franchisee in Israel, whereby the company abused its dominant position in the market for carbonated cola beverages, by tying the supply of its monopoly product with the purchase of mineral water manufactured by its subsidiary. Coca-Cola's franchisee in Israel was declared a monopoly in 1998 for carbonated cola

⁴ Appeal 3/97 Magal v. The General director of the Antitrust Authority

beverages. The investigation concluded in 2001; its findings were passed to the IAA’s legal department for decision regarding enforcement measures.

Mergers and acquisitions

Statistics on number, size and type of mergers notified and controlled under the Antitrust Law

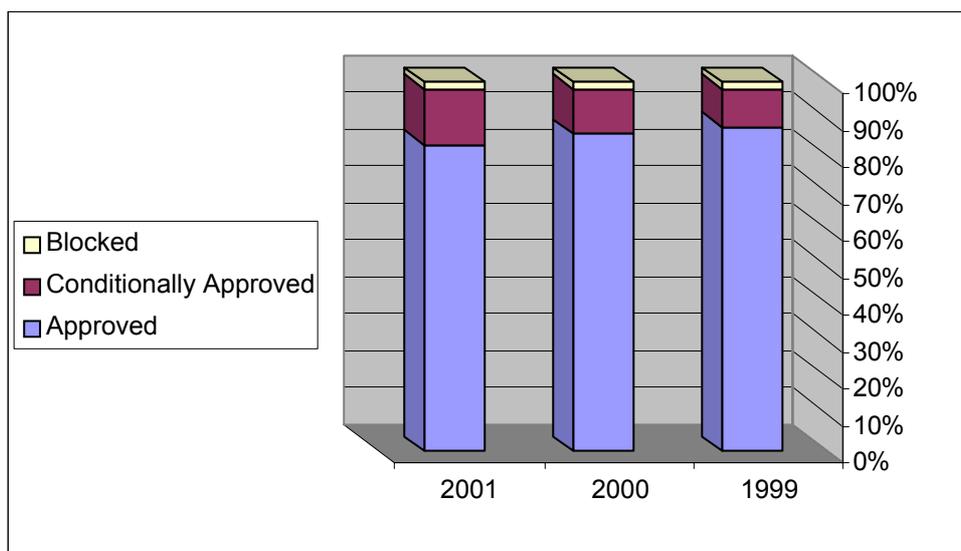
34. During the year 2001, the IAA examined a hundred and sixty merger notifications. To the best of knowledge, ten of these mergers were also reviewed by foreign competition agencies and had international implications. 2% of the notified mergers were blocked; 15% of the notified mergers were approved under imposed conditions. 65% of the merger reviews ended within the 30 days time period determined in the law; 35% of the mergers required extensions by court order or the parties’ consent.

Table: Decisions in merger applications by type of merger – 2001

Horizontal mergers	51%
Vertical mergers	25%
Conglomerate mergers	24%

Table:

	Notified Transactions	Approved	Approved with conditions	Blocked
1999	316	88%	10%	2%
2000	230	86%	12%	2%
2001	160	83%	15%	2%



Summary of significant cases

35. Food retail: In September 2001, the IAA blocked the merger of the second largest food retail chain, “Ribua Kahol”, and “Haviv”, one of the largest independent discount supermarkets in Israel. The IAA based its decision on the ground that the merger would have increased the market power of the large food chains; increase concentration in the food retail market and harm competition. Competition concerns related not only to the geographic market Haviv is active in, but also in food retail all over the country.

36. Independent competitors such as “Haviv” were found to generate competition in the geographic markets in which they operate as well as preventing or lessening the creation of a stable non-competitive equilibrium among the nation-wide competitors. The concern was that the acquisition of Haviv by Ribua Kahol will significantly increase the concern of co-ordinated market conduct and further reinforce the already dominant buying power of the large chains. Examination by IAA economists indicated that the buying power of large chains, leading to preferential purchasing terms, was not converted into cheaper consumer prices – a strong indication of the defective competition already present in the market.

37. Cement: The IAA conditionally approved with conditions a merger between the owner of Neshet Industrial Cement Works Inc., a declared monopoly in the manufacture of cement in Israel, and CRH PLC, an Irish corporation dealing with manufacture and marketing of building materials and cement throughout the world. The IAA’s review of the merger focused on its probable implications on the import of cement to Israel. Imported cement has begun to generate significant competition in the market in recent years. It was established that the merger would not foreclose sources for import. The conditions imposed relate to the obligations of the merged entity as monopolist in the market.

38. Marketing: The IAA approved with conditions a merger between two companies engaged in marketing through tender catalogs for bidding prices for a variety of products (electrical appliances, computers, tour and holiday packages, furniture, etc.). The merging companies are the major companies in Israel marketing through this method. However, it was found that marketing via tender catalogues did not define a separate product market, and that the merging companies competed with all marketing channels of the products they offered. The conditions imposed mainly demanded a change in the structure of ownership of the merged entity, so as not to create a substantial partnership between the two major publishers of newspapers in Israel. One of the companies was partly owned by a monopoly in the daily press field, and the other by a very significant competitor thereof, thus one of the newspaper owners was required to sell its holdings in the merged company.

39. Cable television: A major issue that occupied the IAA in 2001, although it did not conclude in that year, was the review of a requested merger between the three cable television companies in Israel. Currently, each company operates independently on cable television in different geographic regions, and competes with the satellite multi-channel television company, which commenced national broadcasting in 2001. In July 2001, the Communication Law (Telecommunications and Broadcast) (1982) was amended so as to abolish the exclusivity theretofore provided for cable television operation in each region, and to provide for the supply of other communication services via the cable network, such as telephony and broad-band Internet. IAA’s examination of the effect of the merger over competition is focusing on potential competition among the companies by means of overbuilding, on an open access regime whereby each could transmit over the other companies’ infrastructures, and on the aspect of the effects of the merger in foreclosing contents vis-à-vis the satellite company. Conversely, the expected efficiencies of the merger, including the ability to act on the national telephone and Internet infrastructure market, are being examined.

The role of the Antitrust Authority in the formulation and implementation of other policies

40. The IAA plays an active role in promoting a pro-competitive marketplace and competitive reforms. Because of its professionalism and expertise in competition issues, its input and advice are often sought by Parliament and by governmental agencies in formulating legislation and general policies.

Financial services

41. The IAA was involved in the legislative proceedings of the Credit Report Act, which is designed to provide for gathering of information on the credit history of private borrowers (as opposed to corporations, for which gathering was permitted before the new law) and the establishing of credit data agencies. The IAA believed that the provision of information and data of this type is essential for improving the competition for households over financial services. At present, the banking and credit market in Israel is very concentrated in the household segment, and one of the strong barriers for entry identified by the IAA is the inaccessibility of information on credit risks. IAA representatives presented their views before the government and parliamentary committees that prepared the law, whose legislative proceedings were finished in June 2001.

Communication

42. Interconnection charges between cellular networks – the IAA presented its position towards the Ministry of Communication, which has the authority to control interconnection charges, concerning call termination charges the mobile communication companies collect for incoming calls from other networks, regarding the need to establish a maximum rate (rather than a fixed price) lower than that currently charged. The IAA recommended a significant decrease in the regulated interconnection price, due to concern of mobile termination rates being substantially in excess of their cost.

43. Communication Law (Telecommunications and Broadcast) – the IAA has been involved in the legislation the 2001 amendment to the Communication Law (Telecommunications and Broadcast) (1982), and presented before parliamentary committees their positions on issues of opening communication networks for use of competitors (unbundling of the local loop and other access arrangements), revoking exclusive concessions, cross ownership limitations of infrastructure owners in content providers and licensing policy – from the aspect of competition in communication markets.

Natural gas

44. The IAA was involved in the legislative proceedings of the Natural Gas Law of 2001, which will regulate natural gas transmission, distribution and marketing activity in Israel. The transmission segment is considered to be a natural monopoly, but the IAA's position was that competition is possible, and should not be distorted, in the other segments of the production chain. The IAA's position on the need for full corporate separation between companies engaged in transmission and marketing, limitation of the ability of companies associated with the transmitting corporation to engage in marketing, and concerning restrictions on natural gas producers ownership of the transmitting pipe, has been accepted.

Resources of the Antitrust Authority

Annual budget

45. The annual Budget for the year 2001 was 20,689,000 NIS, which is approximately 4.5 million USD. A major portion of the budget, 60%, was allocated to salaries.

Number of employees

- Economic Department: 14 economists;
- Legal Department: 20 lawyers and 7 legal interns;
- Criminal Investigations department: 18 employees (lawyers, economists and other professionals);
- Support staff and administrative services: 17;
- The General Director's Office: 2 lawyers;
- All staff combined: 78 employees.

Application of Human Resources to IAA Activities (rough assessment)

- Enforcement against anti-competitive practices: 60 employees;
- Merger review and enforcement: 16 employees;
- Advocacy: 2 employees.