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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**COMMITMENT DECISIONS IN ANTITRUST CASES**

-- Note by Israel --

**15-17 June 2016**

*This document reproduces a written contribution from Israel submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.*

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[www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm](http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm)*

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## ISRAEL

### 1. Preview

1. This written contribution discusses the use of consent decrees by the Israeli Antitrust Authority (hereinafter – "the IAA") under the Restrictive Trade Practices Act, 5748-1988 (hereinafter – "Antitrust Law" or "the Law") in lieu of other enforcement proceedings.

2. The paper will review the statutory framework for this procedure and the experience of the IAA over the years with regard to its utilization.

### 2. Background

3. In the year 2000, the Antitrust Law was amended to grant the Director General of the IAA the authority to agree with infringing parties on consent decrees, in lieu to other enforcement measures. The relevant section of the Law is:

#### *50B. Consent Decree*

*"(a) A court with competent jurisdiction over offenses under this Law, or the Tribunal (hereinafter in this Section, "the Court") may, upon motion by the General Director and in lieu of proceedings pursuant to Sections 26, 43, 47, 48, or 50A or under Chapter VIII, give an agreement reached between the General Director and another person (hereinafter, "consent decree") the force of a judgment; a consent decree may be reached without admission of liability with regard to the period prior to its issuance and may include, inter alia, an commitment by such person to pay a sum of money to the State Treasury, and a commitment by such person to take or to refrain from taking a specific action.*

*(b) The General Director's motion for the issuance of a consent decree shall be reasoned, and shall specify, inter alia, alternatives to the consent decree which were considered by the General Director.*

*(c) A consent decree issued by the Court shall, for all intents and purposes, have the force of a District Court judgment.*

*(d) A motion for the issuance of a consent decree shall be deliberated by the Court only when all of the following conditions are met:*

*(1) The General Director has published, at least thirty days prior to filing said motion, a notice in two daily newspapers of his intent to file a consent decree for Court approval; said notice shall include an invitation to any person liable to be harmed by the consent decree and any consumers' organization or industry association, to bring their objections to the decree before the General Director;*

*(2) The General Director has attached to the motion all objections brought before him pursuant to paragraph (1) and his response to such objections.*

*(e) The Court may, at any time, amend the provisions of the consent decree in any of the following instances:*

(1) *All parties to the consent decree file an agreed motion to amend the decree;*

(2) *The General Director or the person with whom the General Director enters into the consent decree files a motion for the amendment of the decree, and the Court is persuaded that a substantial change in circumstances has occurred since the consent decree was granted;*

*The provisions of subsection (d) shall apply to a motion for amendment of a consent decree filed pursuant to paragraph (1) or filed by the General Director pursuant to paragraph (2).*

*(f) If the Court decides not to grant the consent decree, such decree, anything said in the proceedings relating thereto, and any document prepared at the request of the General Director by the person with whom the General Director wished to enter into the consent decree for the purpose of such proceedings, shall not be admissible as evidence in any other legal proceedings; however, nothing in said failure to grant a consent decree shall be construed as preventing the General Director from instigating further proceedings under this Law."*

4. Before the law was amended, enforcement of Antitrust Law infringements was primarily based on criminal proceedings and declarations by the Director General that an activity was *prima facie* illegal (such declarations serve as *prima facie* evidence in any legal proceedings).

5. Given the wide variety of possible infringements, it was recognized that such enforcement measures have significant disadvantages. The criminal procedure has far-reaching implications for the offender due to the implied moral stigma and the severity of the penalties (fines and imprisonment). In addition, it is a lengthy procedure and requires significant resources from the IAA as well as the court. Therefore, a criminal procedure is most appropriate to enforce the most severe offenses. Publishing a declaration, on the other hand, is considered inadequate, given that it does not include a sufficiently deterring sanction, nor does it allow directing the violator as to the right course of action. Thus, the law was amended to allow for consent decrees, which, as will be detailed below, were considered to be a more efficient and flexible enforcement measure.

### **3. The Requirements of the Law**

6. Pursuant to § 50B of the Law, the Director General is authorized to apply to the Antitrust Tribunal, or a District Court (hereinafter we will refer to either such court as "the Antitrust Tribunal") for approval of an agreement between the Director General and an individual or a corporation alleged to be in violation of the Law, in lieu of other enforcement measures.

7. A consent decree may replace both administrative enforcement procedures and criminal proceedings under the Law. In this sense, the Director General can reach a consent decree with respect to all types of cases and violations, including cartels, abuse of dominant position, vertical arrangements and unlawful mergers.

8. A consent decree may be reached with or without admission of liability, and may include a payment to the state treasury. It may also include commitments by an alleged violator to take or to refrain from taking specific actions, or any other remedy agreed by the parties to the decree.

9. Before submitting an application to the Antitrust Tribunal for approval of the consent decree, the Director General must publicize her intention to file a consent decree for court approval in the printed media. The required publication includes an invitation to any person who might be harmed by the consent decree and any consumers' organization or industry association, to bring their objections to the decree before the Director General.

10. Following public comments, the Director General may change the decree's terms and commitments add terms or even withdraw from her consent.

11. An application to the Antitrust Tribunal for the approval of a consent decree needs to include the objections that were brought before the Director General and her response to these objections.

12. A consent decree approved by the Antitrust Tribunal has the force of a District Court judgment for all effects and purposes.

13. If the Antitrust Tribunal's decision denies the application for a consent decree, the Director General has the authority to enter other enforcement proceedings under the Law.

14. To conclude, the Director General has broad discretion as to when and how to use consent decrees, both in relation to the types of violations and in relation to the types of remedies and the conditions that can be included in the decree. However, the final approval of the consent decree is reserved to the Antitrust Tribunal, in a proceeding which is public, transparent and allows for standing of third parties, consumers' organization and industry association.

#### **4. The Use of Consent Decrees – an Overview**

15. Since the law was amended to allow for consent decrees in 2000, the IAA has reached 35 consent decrees. In this period, 76 other enforcement proceedings have been conducted by the IAA (including criminal proceedings, declarations that an activity was *prima facie* illegal, instructions to monopolies (not under a consent decree) and imposition of monetary penalties).

16. Thus, consent decrees constitute about 30% of the enforcement proceedings conducted by the IAA.

17. Consent decrees are adopted most frequently with regard to restrictive arrangements and unlawful mergers, and have been adopted most often in the food provision sector, followed by the energy and media sectors.

#### **5. Types of Remedies in Consent Decrees applied by the IAA**

18. Over the years there have been changes in the primary remedies applied by the IAA within the framework of consent decrees.

19. In the early 2000s, the vast majority of consent decrees included detailed behavioral commitments undertaken by the parties.

20. The appropriate behavioral commitments were determined based on the information obtained by the Director General regarding the relevant market and the alleged infringement, and their purpose was to ease the competition concerns that the Director General identified in the relevant market.

21. One such example is the consent decree *in re* Vehicle Importers, dated 2002.

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 authorized after sale services providers. It was found that some of the arrangements decreased competition and raised entry barriers in the field of automotive services and spare parts. The IAA reached a proposed 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. The application was approved by the Antitrust Tribunal and the consent decree was issued in December 2002.<sup>1</sup>

The main commitments under the consent decree are (1) Vehicle importers cannot prohibit their authorized service providers from making use of spare parts and oils from other suppliers, as long as they meet quality and vehicle compatibility requirements; (2) Vehicle importers cannot dictate any restrictions concerning the pricing of vehicle servicing (other than statutorily imposed restrictions); (3) Vehicle importers are prohibited from voiding vehicle warranty terms based on the vehicle's owner receiving service from a service provider which was not authorized by the Vehicle importer; (4) Additional terms aimed at increasing the number of authorized service providers.

22. In very few cases the consent decrees included structural commitments. One such example is the matter of Pi Gilloth, dated 2004.

Pi Gilloth Petroleum Terminals & Pipelines Ltd. was the major supplier of petroleum distillates in Israel, and had been owned by the major gasoline companies in conjunction with the State of Israel. Its joint ownership by competitors was perceived by the IAA as an unauthorized restrictive arrangement that inhibited competition in the gasoline station segment.

In 2004, the Director General initiated negotiations with Pi Gilloth, involving the Ministries of Energy, Finance and Justice, in order to reach an agreement which included a plan for the company's privatization and break-up. The IAA and Pi Gilloth ultimately reached an agreement that was later submitted for the Antitrust Tribunal's Approval as a consent decree under § 50B of the Law. The agreement, which was subsequently approved by the Antitrust Tribunal, incorporated a privatization agreement and a creditors' settlement.<sup>2</sup> In August 2007, the Pi Gilloth facilities were successfully divested, to Delek, the Israel Fuel Corporation. This transaction was examined as a merger, and approved by the Director General under strict conditions.<sup>3</sup>

23. From the IAA's experience, structural commitments are much preferable as a remedy for competition concerns arising from infringements of the Law. Such a commitment, which results in a change in the structure of the market, in appropriate cases, can solve the competitive problem detected. Behavioral commitments, which limit the parties' course of action and prevent harmful practices, can only minimize the practical expression of the competitive problem but not eliminate it. In addition a structural commitment is, by its nature, non-recurring, time-limited and relatively easy to monitor.

24. Despite the clear advantages of structural commitments, it is evident that in the majority of consent decrees behavioral commitments are prevalent. Given that commitments in a consent decree require the parties' consent, it is less likely that they will agree to a structural solution that will require them to divest assets, unless they anticipate that in the absence of such an agreement, the implications for them will be significantly worse. In addition it should be noted that structural commitments are not

<sup>1</sup> *Re: Case 28/01 Director General of the Antitrust Authority v. Carasso Vehicle DISTRIBUTORS Ltd and others (22 December 2002)*

<sup>2</sup> *Re: Delek the Israel Fuel Corp. Ltd. – Paz Oil Co. Ltd. – Sonol Israel Ltd. – Sonenco Straight Corp. Bank - Pi Gilloth Petroleum Terminals & Pipelines Ltd. (Consent Decree), 2005 Antitrust 5000094.*

<sup>3</sup> *Re: Delek the Israel Fuel Corp. - Pi Gilloth Petroleum Terminals & Pipelines Ltd. (Approval of Merger), 2007 Antitrust 5000620.*

always available for practical reasons (*e.g.* reasons concerning the structure of the involved companies).

25. Over the years, the inclusion of behavioral commitments within the framework of consent decrees has raised difficulties in monitoring and enforcement following infringements of such commitments, especially in cases with a wide array of detailed behavioral commitments. In addition, due to the dynamic structure of modern markets, commitments designed at a given point in time may become irrelevant as time passes.

26. Thus, in recent years there has been an increase in proportion of consent decrees where the main remedy is a payment to the state's treasury. Some of these decrees also include behavioral commitments, but in general these are relatively narrow in scope. The rationale for using consent decrees for monetary payments is not so much to create a direct forward looking change in the market, but to use this proceeding as a more efficient *ex-post* enforcement mechanism. Such agreed payments were a particularly useful enforcement measure until 2012, when the Director General had no authority to impose monetary penalties for infringements. Consent decrees requiring a payment were, to a certain extent, a substitute for such an authority. Nevertheless, given the need for the parties' consent, the amounts that were set in such decrees were relatively low.

27. In 2012, the law was amended to allow the Director General to impose monetary penalties. However, consent decrees still include monetary payment commitments. Following this expansion of available enforcement measures, companies seem to have a stronger incentive to reach a consent decree, commit to certain obligations and even pay substantial amounts, even before the Director General has completed the investigation in their matter. From the IAA's standpoint, consent decrees allow for a shorter and more efficient procedure, and are thus still an important enforcement measure in appropriate cases.

## **6. Monitoring compliance with commitments**

28. Over the years the IAA applied various methods for overseeing companies' compliance with commitments included in consent decrees.

29. In some cases, some of the decree's commitments were not aimed at easing a competitive concern but at ensuring compliance with the decree. For example, in order to address future ownership changes in companies that undertook consent decrees, it was stipulated that agreements that lead to a change of control must include a commitment by the new owners to comply with the consent decree.

30. Some consent decrees included an obligation to report to the General Director periodically on the actions undertaken to comply with the commitments under the decree.

31. Other consent decrees included a stipulation requiring a guarantee for compliance with the commitments under the decree. Thus, the parties agreed that should a court determine that a part of the decree had been infringed, they would pay a sum of money specified in the decree.

32. Furthermore, during a certain period the IAA operated a monitoring unit.

33. However, these oversight efforts were found to be costly and not very effective. Today, oversight is mainly through the complaints of third parties affected. In many cases, interested third parties that are knowledgeable about the behavior of the companies in the market and of the consent decrees, inform the IAA of alleged infringements of the commitments. Following information about infringements of commitments, the IAA may open criminal investigation. Alternatively, following a Law amendment in 2012, it is possible for the Director General to impose monetary penalties for breach of commitments in consent decrees. The Director General has not yet implemented this authority.

## 7. Judicial Review of Consent Decrees and Relationship with Private Enforcement

34. As discussed above, the Law requires that the proposed agreement between the Director General and the Parties will be approved by the Antitrust Tribunal. Such approval gives the agreement the force of a court judgment.

35. The Antitrust Tribunal has held that it will generally grant a request for a consent decree if the Director General can demonstrate that the requested decree (1) is for a desirable purpose which is consistent with the objectives of the Law; (2) promotes competition in the relevant market; and (3) better serves the public interest than other available solutions.<sup>4</sup> This judicial review guarantees the public interest in avoiding harm to competition and the appropriateness of the administrative process.

36. As for private enforcement, it seems that consent decrees are a weak basis for filing a damages claim.

37. The Director General's determination that the Law has been infringed is accepted as *prima facie* evidence in any legal proceedings, and as such its impact on private enforcement is potentially significant. In comparison, a consent decree has less, if any, probative value. In addition, the consent decree generally does not include a detailed description of the facts or a detailed analysis of the Director General's preliminary concerns regarding competitive harm. It is further worth noting that the Law does not require a consent decree to include any admission of liability by the companies. Where such admission is absent, a plaintiff in a private action may find it difficult to rely on a consent decree to file a damages claim.

## 8. Advantages and Disadvantages

38. A consent decree is one of the most flexible enforcement measures available to the IAA.

39. A consent decree can conclude and replace any enforcement proceeding. The Director General can agree to a consent decree without conducting a full investigation to establish the infringement, after conducting such an investigation or even after an indictment is filed. In addition, the Law does not limit the remedies included in a consent decree, and these can include various terms and commitments, monetary payment, an admission of liability or any other agreed remedy.

40. An important advantage is the procedure's short duration. Other enforcement measures are subject to wide and detailed judicial review in the framework of criminal proceedings or of an appeal on a decision by the Director General. In contrast, judicial approval of a consent decree is a significantly shorter and more efficient process.

41. The importance of this advantage is twofold: first, it allows the market to proceed to an enhanced state of competition relatively quickly; in addition, it leads to substantial savings in enforcement resources, allowing the limited enforcement resources to be diverted to other cases to ensure continued and enhanced law enforcement.

42. At the same time, given that a consent decree is by definition an outcome of negotiations and consent, it presumably entails a lesser enforcement measure than a full enforcement procedure would have yielded. In this sense, overly aggressive implementation of consent decrees and underutilization of other enforcement measures might diminish the IAA's deterrence, and subsequently diminish the Director General's ability to obtain desirable and valuable consent decrees. In the absence of enforcement and deterrence, parties are less likely to agree to the commitments that are appropriate given the competitive concerns, or to significant monetary payments.

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<sup>4</sup> *Re: Case 33005/11/14 Director General of the Antitrust Authority v. FMR Computers and Software Ltd (21 January 2015).*

43. Thus, the consent decrees' advantages can be maintained only if they co-exist with a continued and effective use of other enforcement measures, and taking the appropriate cases to full enforcement procedures.

## **9. Conclusion**

44. The IAA has been utilizing consent decrees for over 15 years.

45. The IAA believes that consent decrees serve as a very valuable and effective enforcement measure, for a number of reasons: First, using this measure reduces the average cost of enforcement proceedings, both for the IAA and the Antitrust Tribunal, by preventing prolonged litigation; second, it allows achieving positive competitive results in a considerably shorter time than would have been possible through other means, which include long litigation and appeals; third, and as a result, it allows the IAA to better allocate its enforcement resources, thus increasing deterrence against violations of the Law. Nevertheless, as noted above, this measure can serve these goals only if other enforcement measures continue to be vigorously pursued.