

The European, Middle Eastern and African Antitrust Review 2017



Published by Global Competition Review in association with

FBC – Fischer Behar Chen Well Orion & Co

GCR |
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

Israel: Overview

Tal Eyal-Boger, Ziv Schwartz and Shani Brown
FBC – Fischer Behar Chen Well Orion & Co

The Restrictive Trade Practices Law, 5748-1988 (the Law) is the primary law dealing with antitrust issues in Israel and its objective is to prevent harm to competition or the public. The Law defines and regulates the substantive rules that apply to the various restrictive trade practices (restrictive arrangements; mergers; monopolies; concerted groups).

In addition, the Law determines rules concerning the structure and the powers of the Israeli Antitrust Authority (IAA), the general director of the IAA (the General Director) and the Antitrust Tribunal (the Tribunal), as well as procedural rules that apply to cases brought before each of them.

Recent years have been characterised by a trend of strengthening the position of the IAA as well as increasing civil 'follow-on' class actions against international cartels.

Inter alia, this trend is reflected by the following:

- new proposed amendments to the Law which have been published in recent years and which empower the IAA's authorities under the Law;
- granting the General Director more formal powers to advise other authorities;
- a pilot for a fast track review and approval of 'ultra green' mergers;
- the IAA reconsideration of its policy on the prohibition on excessive pricing by a monopoly; and
- many motions to certify class actions have been submitted in Israel following allegations of several worldwide cartels.

Restrictive arrangements control regime

Definition

Section 2(a) of the Law defines a restrictive arrangement as an arrangement, between persons (including legal entities) conducting business, according to which at least one of the parties restricts itself in such manner that might prevent or reduce competition between the person and the other parties to the arrangement, or any of them, or between the person and a third party. Section 2(b) of the Law also provides conclusive presumptions that an arrangement involving a restraint will be deemed to be a restrictive arrangement if it relates to:

- the price to be demanded offered or paid;
- the profit to be obtained;
- market allocation; and
- the quantity, quality or type of assets or services in the business.

With regard to extraterritorial application of the restrictive arrangement control regime – the IAA applies the effect doctrine in order to acquire extraterritorial jurisdiction over restrictive arrangements, including cartels, performed outside of Israel which harm competition in Israel.

In general, a restrictive arrangement is prohibited unless it is permitted in accordance with the Law. Section 4 of the Law establishes that the parties to a restrictive arrangement can receive an approval from the Antitrust Tribunal in the case where the Tribunal finds that the arrangement is in the public interest; or it can be exempted

by the General Director upon the request of a party to a restrictive arrangement and following consultation of the General Director with the Exemptions and Mergers Committee. The General Director considers whether the restrictive arrangement considerably reduce competition or cause substantial harm to competition, whether the objective of the arrangement is to reduce or eliminate competition and whether the restraints in the arrangement are necessary to fulfil the objectives of the arrangement.

Statutory exemptions

A statutory exemption may also apply to certain arrangement, detailed within section 3 of the Law, inter alia:

- arrangements involving restraints, all of which are established by law;
- arrangements relating to specific business sectors (eg, agricultural, international air or sea transformation);
- arrangements involving restraints relating to intellectual property rights;
- arrangements entered into by a company and its subsidiary;
- certain arrangements relating to real property rights assignment;
- certain arrangements relating to transfer of property rights (non-compete following a purchase of a business); and
- arrangements involving trade unions or an employer's association involving restraints which relate to employment and labour conditions.

Recent trends

A recent development in the Restrictive Arrangement Control Regime is Amendment No. 16 of the Law, which entered into force in August 2015, and repealed the statutory exemption regarding reciprocal exclusivity arrangements between the purchaser of an asset or service and its supplier. Prior to the amendment, the Law stated that such arrangements, under certain circumstances, shall not be deemed restrictive arrangements. Pursuant to requests made by various entities, the IAA has agreed to postpone the date in which it will begin its enforcement with respect to particular reciprocal exclusive distribution arrangements.

Also, on 10 August 2015, the Israeli Supreme Court rendered a decision in an appeal with regard to Israel's largest food chains (Shufersal). The chain was convicted of breach of merger conditions and attempting to engage in a restrictive arrangement. The *Shufersal* ruling indicates a strict approach towards anticompetitive conduct and sets two important precedents: first, the imposition of stricter penalties for antitrust violations, as for the first time in Israel, jail sentences (of the CEO and VP for marketing) were ordered for violating merger conditions and for attempting to set a vertical restrictive arrangement; second, that, as a rule, vertical arrangements will not be presumed to constitute a restrictive arrangement. From now on, such arrangements will be examined primarily on the basis of their likelihood to harm competition, under the definition of a 'restrictive arrangement' in the Antitrust Law (a rule of reason analysis).

Block exemptions

Section 15a of the Law grants the General Director the power to set block exemptions that will be published as regulation, following a notification process which includes receipt of comments from the general public on the proposed said regulation.

When publishing block exemptions, the General Director basically exempts parties to a restrictive arrangement from seeking a specific exemption from the General Director or the approval of the Antitrust Tribunal, subject to the terms of the various block exemptions.

During the past years the IAA published various block exemptions, including the Block Exemption for Restrictive Arrangements Causing De Minimis Harm to Competition; Block Exemption for Joint Ventures, the Block Exemption for Research and Development Agreements, the Block Exemption for Exclusive Dealing, the Block Exemption for Exclusive Distribution and the Block Exemption for Franchise. In August 2013 the IAA published the Block Exemption for Non-horizontal Arrangements without Price Restrictions, which offered a significant reform of a self-assessment regime (ancillary restraints in vertical arrangements (except for minimum or fixed resale price maintenance) no longer require the prior approval of the Antitrust Tribunal or the General Director, provided that such arrangements do not significantly harm competition). In May 2015, a new block exemption was published by the IAA, which exempts joint ventures for the marketing and supply of security equipment in foreign countries.

Recent developments in the restrictive arrangements control regime

During 2011 the General Director expressed his intention to publish a decision (determination) according to which the purchase of a preliminary permit for natural gas exploration (which is known today as the 'Leviathan' reservoir – the biggest discovery of natural gas in Israel) by several entities operating in the natural gas sector constitutes a restrictive arrangement. Following negotiations, the IAA and the entities agreed on a draft consent decree. However, eventually the IAA withdrew its consent to the decree and returned to its original position.

With the aim of furthering the development of Israel's offshore natural gas resources, and despite the position of the IAA, in December 2015 the Israeli government adopted the Natural Gas Framework (the Framework) as a government decision. Inter alia, the Framework acknowledges that the investments required for the natural gas production are immense and therefore established a stability clause, which intends to create a stable regulatory environment for a period of 10 years following the signing. The Framework involves many disciplines, not only relating to antitrust issues, however, it is specifically interesting from an antitrust point of view as the Israeli government – in order to adopt the Framework – used for the first time section 52 of the Law, which allows the Minister of Economy to exempt a restrictive trade from the application of the Law if such measure is required for foreign policy or for reasons of national security.

Several petitions were submitted to the Supreme Court to annul the Framework. The Supreme Court held that the use of article 52 of the Law was reasonable and within authority of the Ministry of Economy under the circumstances of the matter. However, the Supreme Court, in a majority ruling, held that the stability clause was signed in lack of authority. The government was given one year to comply with the ruling, otherwise the Framework would be annulled. In May 2015, the Israeli government decided on

an updated framework that will enable the development of the 'Leviathan' reservoir in light of the Supreme Court's instructions regarding the stability clause.

In February 2015, the General Director announced his intention to amend the IAA's policy paper regarding collaborations among competitors in activity as regards government authorities. In the IAA's previous policy paper, which was published in 2000, the IAA recognised the legitimacy of cooperation between competitors when facing government agencies and undertook not to act against them, under certain circumstances. Within the framework of the amendment to the policy paper, the IAA considered to clarify that an activity which competitors undertake as regards government agencies – that is likely to harm competition – will no longer be protected under the policy paper's safe harbour. However, in July 2015, the General Director published a draft update for the IAA's guideline regarding the activities of trade associations which is intended to replace the above-mentioned policy paper. This draft update raised strong objections.

In recent years, the IAA's view has been that consortia agreements may be deemed restrictive arrangements and thus are subject to the Law. Accordingly, the IAA has published 'no-action' letters with regard to consortia agreements between financial entities which detail the terms of entering such consortia agreements. In November 2015, the IAA published a decision in which, for the first time, it applied its regime regarding consortia agreements to an international bank. In a later 'no-action' letter, on December 2015, the IAA established that its regime regarding consortia agreements applies also to foreign financing entities.

In December 2015, the IAA published an outline to facilitate requests for cooperation between small and medium-sized factories during times of emergency. The outline relates to factories located in conflict areas that cannot operate in a regular manner (due to reasons that stem from the security threat). Under such circumstances, the IAA will allow certain types of cooperation between competing factories – in accordance with terms detailed in the outline – if the purpose of such cooperation is regaining the ability to operate in a regular manner.

Merger control regime

Definition

The Law defines the term 'merger of companies' broadly by providing a non-exhaustive list that includes:

the acquisition of a company's main assets by another company or the acquisition of shares in a company by another company by which the acquiring company is accorded more than a quarter of the nominal value of the issued share capital, or of the voting power, or the power to appoint more than a quarter of the directors, or participation in more than a quarter of the profits of such company; the acquisition may be direct or indirect or by way of rights accorded by contract.

Nevertheless, since the Law does not provide a conclusive set of characteristics that will constitute a merger, even the acquisition of less than a quarter of any of the above-mentioned rights may constitute a merger if further affinity exists between the parties (such as loans or involvement in the management of a firm).

Mergers involving foreign parties

The Law will apply to a merger involving a foreign party if each of the merging parties meets the conditions of the 'nexus test' set forth in the IAA's Merger Guidelines (the Guidelines):

- If a foreign company is registered in Israel – in such circumstances the Law applies explicitly.
- If a foreign company has a ‘merger affiliation’ with an Israeli company. According to the Guidelines, a merger transaction between a foreign company (affiliated with an Israeli company) and an Israeli company creates an indirect merger between the two Israeli companies. The Guidelines provide that when a foreign company holds more than one-quarter of any of the above-mentioned rights (ie, more than a quarter of the nominal value of the issued share capital; or the voting power; or the power to appoint more than a quarter of the directors; or participation in more than a quarter of the profits) in an Israeli company, it will be viewed as a party to any merger transaction involving the foreign company.
- If a foreign company maintains a place of business in Israel (ie, if it holds a significant influence over the conduct of a local representative).

Thresholds for filing

The Law requires all merging companies to file a merger notification with the IAA when (at least) one of the following thresholds set under the Law is met:

- the combined sales turnover of the merging companies in Israel in the fiscal year preceding the merger exceeds 150 million shekels and each of the merging companies’ sales turnover exceeds 10 million shekels. The sales turnover threshold takes into consideration the sales turnover of all the entities controlling or controlled by or through the merging company, and the turnover of any entity controlled by or controlling any of them, either directly or indirectly;
- as a result of the merger, the combined market share (in any market) of the merging companies in the total production, sales, marketing or acquisition of particular goods or similar goods, or the provision of a particular service or a similar service, exceeds 50 per cent of the market; or
- one of the parties has a ‘monopoly’ (ie, holds more than 50 per cent of the total supply or purchase in a certain market in Israel, which may be either a product or a service market, including markets not relevant to the transaction).

The market share thresholds take into account all of the entities controlling or controlled by each party.

In the case of a transaction involving a company that conducts business both in Israel and abroad, the requirements set forth above apply solely with respect to the company’s turnover and market share in Israel.

Merger evaluation process

The Law provides that the General Director is required to notify the merging companies of his decision with respect to the merger within 30 days from the date in which the completed notification forms were received by the IAA from all the merging parties. Nonetheless, the General Director may approach the parties or the Antitrust Tribunal with a request to extend the deadline. If the General Director does not render a decision within the 30-day notification period and no extension was granted, the merger is deemed approved.

As a practical matter, when cross-border merger transactions require approval in multiple jurisdictions, the IAA will sometimes take into account the decisions made by other authorities in different jurisdictions (primarily the US Federal Trade Commission,

Department of Justice and the European Commission), where there are no unique circumstances concerning the Israeli market. It is also possible that parties in such circumstances waive their right to confidentiality with respect to information provided to competition authorities, in order to enable the IAA to seek information from those authorities with respect to the merger.

The General Director is mandated to object to a merger of companies, or to stipulate conditions for the merger, if he finds that there is reasonable likelihood that, as a result of the merger, competition in the relevant sector would be significantly harmed or that the public would be harmed by:

- the high price level of an asset or of a service;
- the low quality of an asset or of a service; or
- the available quantity of the asset, of the scope of the service supplied, or the constancy and conditions of supply.

Recent developments in the merger control regime

On 31 March 2015 the IAA published a proposed reform to the merger control regime. This proposes extensive changes to the merger chapter of the Law, which has not been substantially amended since the Law’s enactment in 1988. The material changes in merger reform include, inter alia:

- amending the definition of ‘company’ under the Law to include various types of foreign corporations and other entities;
- amending the definition of ‘merger of companies’ to include mergers with an individual;
- amending the thresholds for merger filing under the Law. This change will result in the application of the merger control regime to foreign corporations that have no sales in Israel, in certain cases; and
- prohibiting mergers that do not meet the filing thresholds, but are anticompetitive (ie, likely to harm competition or the public). This amendment basically subjects the merging parties to a ‘self-assessment’ mechanism in cases where the parties had no duty to file with the IAA.

In May 2016, the IAA initiated a pilot programme for the ‘fast-track’ approval of mergers, which is intended to focus the efforts of the IAA on cases in which there is a concern that competition will be harmed. According to this procedure, a merger that clearly does not present a threat to competition will be given an internal classification by the IAA of an ‘ultra green merger’. The merger request will be examined in a shortened proceeding and the decision regarding the merger will be made within a period of time significantly shorter than 30 days. The ‘fast-track’ initiative is currently being evaluated during a three months test period.

In recent months, the IAA has objected to several mergers it reviewed. In April 2016, the IAA rejected the contemplated merger of the cellular operators Cellcom and Golan Telecom. The primary reason for the IAA’s decision is the disappearance of a firm that increases the level of competition (Maverick). As a result of such disappearance, the market is liable to return to the situation in which the large cellular operators do not have any incentive to compete, so that they essentially follow one another in raising prices to the consumer.

Also in April 2016, the IAA has rejected the purchase of Electra-Bar by Mei Eden, both of which are active in the water dispensers market. The IAA, in its decision, makes the distinction between branded water dispensers and non-branded water dispensers and establishes that they constitute two separate markets. The IAA concluded that there is a major difference in the perception of the

consumer and of the firms themselves between the two types of water dispensers. Essentially, the IAA decided that the non-branded water dispensers are not considered to be competitors of the branded water dispensers. The IAA stated that the approval of the merger would have led to the loss of a competitor and was liable to result in higher prices.

Monopoly control regime

Definition

According to section 26(a) of the Law, the concentration of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of a service, in the hands of one person shall be deemed a monopoly.

Under the current regime, the declaration of a monopoly by the General Director is of declaratory validity only, meaning that a monopoly is a matter of 'status.' Therefore, the obligations and limitations applied to a monopoly owner exist regardless of the general director's declaration or lack thereof.

In addition, section 26(c) of the Law permits the application of the monopoly laws also to those with a market share of less than 50 per cent, pursuant to a ruling by the Minister of Economy and with the recommendation of the General Director, where an entity has a 'decisive impact' on the market. However, in practice, this section has hardly been used.

Limitations

In general, a status of monopoly is not prohibited. Nonetheless, monopolists must abide by several strict standards of conduct:

- a monopoly owner may not unreasonably refuse to deal (supply or purchase) goods or services in a market in which it holds a monopolistic market share; and
- a monopoly owner may not act in a manner that constitutes abuse of its dominant position in the market, in a manner likely to reduce competition in business or to harm the public. An abuse of a dominant position by a monopoly owner includes, inter alia:
 - charging unfair prices for products or services;
 - reducing or increasing quantity of products or services that the monopoly owner offers, not in the framework of a fair competitive action;
 - applying dissimilar contractual conditions to similar transactions, which might grant certain customers and suppliers an unfair advantage over their competitors; and
 - subjecting a transaction with regard to an asset or service of the monopoly to conditions which are unrelated to the subject matter of the transaction (tying).

The Law also states that any harm relating to one of the following shall be deemed to be harmful to competition or to the public: price of asset or service; quality of asset or service, quantity of asset or service; terms of supply and the regularity and conditions of such supply; and a barrier to entry to the market or to a switching barrier within the market.

In this regard, the General Director has the authority to supervise and instruct the monopolist in its business activities, to ensure that its behaviour, or that the mere existence of a monopoly, does not harm competition in the market or the public.

Recent developments in the monopoly control regime

The IAA has published several papers concerning the monopoly control regime over the past few years. On 30 April 2015, the IAA published a memorandum detailing suggested revisions of the Israeli monopoly regime. The memorandum suggests, inter alia, to extend

the application of the monopoly regime to a person who possesses market power, even if the said person does not possess market share of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of a service (market power monopoly). Furthermore, the memorandum suggests that the declaration of the General Director of market power monopoly shall have constitutional validity.

On 31 March 2015, the IAA published a memorandum detailing a proposed reform concerning parallel import. The parallel import reform aims to prevent harm to competition caused by the uncompetitive behaviour of an official importer. The parallel import reform proposes to prohibit the abuse of dominant position on official importers, even in the case where such an importer is not considered a monopoly under the Law. According to the memorandum, conducts of official importers that are likely to reduce competition, arising from parallel import, will be deemed as abuse of dominant position.

An additional amendment of the Law determines that the Antitrust Tribunal may, upon application by the General Director, instruct the monopolist to sell an asset in its possession, whether all or part of it, if it has found that this may prevent harm or the risk of significant harm to business competition or to the public.

On October, 2015, the Israeli Central District Court (Hon Judge, Prof Ofer Grosskopf) rendered a precedential decision in the matter of TA 33666-07-11 *Unipharm v Sanofi* (8 October 2015). The Court stated in its decision that misleading the Patents Registrar, intentionally or due to gross negligence, may be considered, under certain circumstances (eg, providing misleading information), as an abuse of monopoly power. The Court decided to apply a wide approach to interpretation of the prohibition to abuse monopoly power with respect to patent extension proceedings (the Court relied on the European law approach taken in *AstraZeneca v Commission*).

On 5 April 2016, the Israeli District Court certified a class action which claims that Tnuva, the largest Israeli dairy producer, abused its dominant position by setting excessive unfair prices on cottage cheese. The decision is grounded, inter alia, in the IAA's Guideline on the Prohibition on Excessive Pricing by a Monopoly (published in 2014), according to which the prohibition of abuse of a monopoly position includes not only the ban of unfair pricing through predatory pricing, but also through excessive pricing.

In this regard, in April 2016, the IAA announced the reconsideration of its 2014 policy with regard to prohibition on excessive pricing by a monopoly, and is currently holding a public hearing on the subject. The IAA stated that it has invested significant resources in order to implement the 2014 policy, however due to implementation difficulties, no move has yet been made to enforce the prohibition, despite the effort invested.

In addition, IAA officials have publicly expressed, at an antitrust convention held recently, that the IAA is considering ceasing its active declaration of monopolies. The IAA stated that the active declaration of monopolies greatly consumes the IAA's resources, however such efforts bear little contribution to competition. Nonetheless, to the extent that the IAA finds out during a review of a merger of companies that a certain entity is a monopoly holder, it will declare it as such.

Concerted group control regime

Definition

According to the Law, the General Director may determine that a limited group of persons conducting business and possessing a concentration of more than half of the total supply or acquisition of an

asset or provision or acquisition of a service constitutes a concerted group, and that every such person is a member of the concerted group, if the General Director determines that the following conditions are met:

- there is limited competition or there are conditions for limited competition between the group's members or within the market in which they operate; and
- instructions imposed by the General Director are expected to prevent a significant harm or concern for harm to competition in the market or to the public, or may significantly strengthen competition or may create conditions for significant improvement of market competition.

In addition, the Law lists several barriers to entry to a market; a combination of two or more of such barriers shall be regarded as conditions for limited competition.

The determination of a concerted group by the General Director has a constitutional validity.

Implications

The General Director may order a concerted group to take steps that would prevent harm or concern for harm to competition or to the public or steps that are expected to significantly increase the competition between the members of the concerted group, or to create conditions for such increase.

In addition, the Antitrust Tribunal, upon the request of the General Director, may order the sale of holdings (entirely or partly) of members of the concerted group under certain circumstances, if the sale would prevent significant harm or concern for harm to competition or to the public, or if it would significantly strengthen competition between the members of the concerted group.

Enforcement

Any violation of the Law has criminal, administrative and civil consequences:

Criminal enforcement

In general, all of the provisions of the Law are criminal offences, however, criminal sanctions are not often used and are reserved, mostly, for the most significant violations of the Law. Notwithstanding this, in the upcoming years, we expect to see increased criminal enforcement alongside greater sanctions owing to developments of the Law as well as an increase in the IAA's influence. With respect to criminal enforcement we note the following:

- Responsibility of a corporation – the Law states that if an offence under the Law was committed by a corporation, then every person that was, at the time of the offence, an active director, a partner (except a limited partner) or a senior officer responsible for that field, shall also be charged with that offence, unless that person has proven that the offence was committed without his or her knowledge and that he or she took all reasonable measures to ensure compliance with the Law.
- Maximum fine – the maximum fine against a person in a criminal procedure is 2.26 million shekels for every violation of the Law and an additional fine of up to 14,000 shekels for each day the offence continues. In the case of a company, the fine or the additional fine is doubled.
- Maximum punishment – the maximum punishment for an individual is three years' imprisonment, and if the offence has been committed in aggravated circumstances, up to five years. Aggravating circumstances include factors that will likely

harm competition, such as the market share and position of the accused in the market that was affected by the offence; the period during which the offence took place; the damage that was caused or is expected to be caused to the public as a result of the offence; and the profits that the accused achieved. To date, the record imprisonment was a term of one year in jail.

- Leniency programme – the IAA's leniency programme provides that every person, including a corporation, a director or an employee of a corporation, will be granted full immunity from criminal prosecution relating to a restrictive arrangement offence, if it is the first to come forward to the IAA and provide all information known to it, in connection with the restrictive arrangement to which it was party.

The IAA has repeatedly stated that it ascribes great importance to the programme and that the programme constitutes a major component of the Israeli enforcement regime concerning cartels. However, according to a report published by the State Comptroller as of August 2009, over four years since the establishment of the leniency programme, the IAA received two applications for inclusion in the leniency programme, and only two immunity agreements were signed. The leniency programme is not considered to be successful in Israel.

Administrative enforcement

The Law includes several administrative enforcement tolls:

- Administrative determination (decision) – the General Director may issue an administrative determination declaring that a certain violation has occurred. The General Director's determination serves as prima facie evidence in court.
- Administrative fines – for every violation of the Law, the General Director may impose administrative fines of up to 8 per cent of the sales turnover of a corporation's revenue in the year preceding the violation. The Law sets a maximum amount of approximately 24 million shekels. For individuals or corporations that, in the year preceding the violation, had sales turnover of less than 10 million shekels, the Law sets a maximum fine of approximately 1 million shekels.

The Law details a non-exhaustive list of circumstances and considerations for the General Director to weigh when determining the amount of the administrative fines to be imposed. Inter alia, the duration of the offence; the harm that the offence was liable to cause to competition or to the public; the offender's share in the offence, and its level of influence over its commission; the existence or absence of prior offences and the date of their commission; actions taken by the offender to prevent repetition of the offence or to terminate the offence, including reporting the offence on its own initiative, or actions taken to repair the effects of the offence.

Regarding an offender who is an individual – his or her financial capacity, including income derived or accrued from the corporation related to the offence, and personal circumstances owing to which the offence was committed, including severe personal circumstances which justify not applying the full extent of the law against the offender. Regarding an offender that is a corporation – the existence of a significant risk that as a result of imposing the penalty, the offender will not be able to pay its debts and its activities will be terminated.

Also, the IAA has published guidelines in order to clarify when it will convert to administrative fines as the primary enforcement measure (instead of seeking criminal sanctions). The guidelines

list numerous offences which will typically be enforced through administrative fines, including non-horizontal restrictive arrangements, gun-jumping violations, information exchange of non-secret information, abuse of dominant position and failure to comply with data requests.

Recently, there has been an increase in cases in which the IAA imposed administrative fines. Inter alia, On 22 December 2015, the IAA published a decision according to which the Port of Ashdod abused its monopoly position in the vehicles unloading market. The port granted to the vehicle importers tailor made target rebates for each importer, whereby it punished them for not achieving the targets set for them and thus reduced the ability of the Port of Haifa to compete. The IAA decided to impose on the port financial sanctions in the amount of 9 million shekels and personal sanctions in the amount of 20,000 shekels on former senior port executives.

The Law authorises the General Director and third parties to agree to a consent decree that provides, inter alia, for an amount of money to be paid to the State Treasury in lieu of other enforcement measures.

Private enforcement

Class actions

Any violation of the Law is deemed a tort under the Torts Ordinance [New Version], 5728-1968. The Israeli Class Action Law enables the submission of motion to certify class actions in antitrust cases. In recent years, an increasing number of motions to certify class actions based on alleged global cartels are being filed with the Israeli district courts. The typical petitioners in these cases are Israeli private consumers or private consumer organisations while the respondents are global companies that allegedly were parties to (alleged) global cartels.

Often, the trigger for private enforcement in the past was based on criminal or an administrative enforcement action taken by the IAA. However, the new trend expands the said trigger to enforcement actions taken by foreign competition authorities worldwide. Other motions to certify class actions are based on claims against monopolists regarding excessive pricing.

The IAA published a notice regarding its intention to encourage civil claims, including class actions, pursuant to violations of the Law. The IAA will do so by offering to advise and guide – informally – any entity that has filed or considered to file such a claim.

Treble damages

A legislative bill to amend the Law was submitted during 2013. Treble damages offer consumers and companies harmed by certain violations of the Law an option to seek an award of triple their damages, an injunction, and costs of the action (including attorney fees) against a party that harmed competition. The IAA has publicly announced its intention to pursue this bill, however the bill is still pending.

Pro-competitive legislation

As noted, the past couple of years have seen many significant and influential developments in Israeli competition law and in the enforcement authorities of the General Director, inter alia, against the backdrop of unprecedented social protest against the increase in the cost of living. Two significant developments are new and revolutionary laws:

- The Food Law, which was enacted in 2014, deals primarily with vertical relations between food suppliers and retailers and regulates the commercial relations between them. The Food Law imposes criminal, administrative and civil liability on corporations and their officers. The Law also empowers the general director, in connection with products or substitute products, to instruct a large retailer that is selling the products of a large supplier regarding sale spaces, as well as to give instructions to a retailer that is selling private label products.
- The Concentration Law: the stated purpose of the Law, which was enacted in 2013, is to reduce economy-wide market concentration, and to promote competition in various sectors of the Israeli economy. The Concentration Law poses limitations on cross-holdings in a significant non-financial entity with a significant financial entity and the control of public corporations through a pyramidal ownership structure. The Concentration Law also requires consulting with the General Director, inter alia, regarding the advancement of competition in a specific sector.



Tal Eyal-Boger
FBC – Fischer Behar Chen Well Orion & Co

Ms Eyal-Boger, head of FBC's competition and antitrust department, is one of Israel's leading antitrust practitioners. She specialises in all aspects of competition and antitrust matters and represents clients in complex litigation and class actions, including following international cartels.

Ms Eyal-Boger has consistently featured in the international rankings of *Who's Who Legal*. She was also the only non-academic Israeli lawyer to have been selected by the international journal, *Global Competition Review*, in its survey of the best worldwide antitrust practitioners under 40 years of age.

Ms Eyal-Boger regularly assists multinational and domestic companies in obtaining the approval of the Israel Antitrust Authority for M&A transactions, investments and agreements containing restrictive provisions, and provides counsel with respect to matters involving potential restrictive trade practices and abusive behaviour. Ms Eyal-Boger also works closely with companies to create and implement antitrust compliance programmes.

Ms Eyal-Boger was invited by the Israeli Antitrust Authority to act as a non-governmental adviser to the European Commission at the International Competition Network. Ms Eyal-Boger served as the Deputy Chairman of the Israel Bar Association's Antitrust Committee and is frequently called upon to lecture on antitrust matters before various legal and business forums.

Ms Eyal-Boger is also a lecturer at the Law School of the College of Management-Academic Studies (COMAS), Israel's largest and oldest college, in the area of antitrust law.



Ziv Schwartz
FBC – Fischer Behar Chen Well Orion & Co

Mr Schwartz is a partner in the competition and antitrust department, where he specialises in competition and antitrust, litigation, and commercial disputes. Mr Schwartz provides legal counsel to individuals and private companies with respect to antitrust matters relating to complex merger transactions, restrictive arrangements, and cases involving monopolies and abusive business practices. Mr Schwartz also represents companies in civil lawsuits and arbitration, including class actions and proceedings before the Antitrust Tribunal.

Mr Schwartz received his LL.M degree from Columbia University School of Law, where he was named a Harlan Fiske Stone Scholar. During his studies, Mr Schwartz served as a research assistant and was a member of the editorial board of the *Columbia Business Law Review*. During his undergraduate studies, Mr Schwartz served as a research assistant at Tel Aviv University, Faculty of Law, and also served as a member of the editorial board of the *Tel Aviv University Law Review*.



Shani Brown
FBC – Fischer Behar Chen Well Orion & Co

Ms Brown is an associate in the competition and antitrust department, where she specialises in competition and antitrust law, litigation and regulation.

Ms Brown provides legal counsel to domestic and foreign companies in diverse competition and antitrust matters, including mergers and acquisitions, proceedings before the Israeli Antitrust Authority, class actions, commercial disputes and other potentially restrictive trade practices.

FBC & Co

Fischer Behar Chen Well Orion & Co
פישר בכר חן וול אוריון ושות'

3 Daniel Frisch Street
Tel Aviv 6473104
Israel
Tel: +972 3 694 4111
Fax: +972 3 694 1351

Tal Eyal-Boger
teyal@fbclawyers.com

Ziv Schwartz
zschwartz@fbclawyers.com

Shani Brown
sbrown@fbclawyers.com

www.fbclawyers.com

FBC, founded in 1958, is one of Israel's premier full-service law firms. FBC offers its clients professional excellence and personal attention across the spectrum of multi-disciplinary business legal services, and is involved in a wide range of representations at the forefront of Israel's legal-economic agenda.

Since 2000, FBC has been Israel's fastest-growing and most dynamic law firm, and is repeatedly ranked by international and domestic indices among Israel's leading law firms.

FBC has Israel's leading and largest competition and antitrust practice. It represents companies on the full spectrum of criminal, administrative and civil antitrust matters, including merger control, abusive behaviour, restrictive arrangements and regulation of cartels, monopolies and oligopolies.

FBC's competition team provides ongoing advice on antitrust compliance and represents multinational and local companies in commercial transactions, as well as class actions – including following international cartels – and complex litigation before civil courts, criminal courts, the Antitrust Tribunal and the Israel Antitrust Authority.

FBC has been ranked consistently by *Global Competition Review* as one of the world's 100 leading competition practices and as Israel's premier antitrust firm.



Strategic Research Sponsor of the
ABA Section of International Law



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012