GCR INSIGHT

EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2020
For further information please contact Natalie.Clarke@lbresearch.com

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL

www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

ISBN: 978-1-83862-260-2

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Israel: Overview

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

In summary

The Economic Competition Law, 5748-1988 (amended in January 2019) has led to a significant reform in the Israeli antitrust regime. The amendment's declared goal is to decrease the regulatory burden that currently applies to legitimate and efficient practices, while strengthening the enforcement against anticompetitive conduct. This reform is aligned with the recent trend in the Israeli antitrust regime, whereby the Director General of the Israeli Competition Authority and the Israeli Competition Authority itself have gradually expanded their respective powers. Further to the legislative amendment, the Authority has also recently published important public statements and guidelines, including with respect to the imposition of administrative fines, how to calculate the fines, trade associations, the merger control regime and the monopoly control regime.

Discussion points

- 2019 amendments to the Law
- Restrictive arrangements control regime
- Merger control regime, and amendments to the thresholds
- Monopoly control regime
- Guidelines on the imposition of administrative fines

Referenced in this article

- Economic Competition Law and the Regulations promulgated thereunder
- *Central Bottling Company* decision (fine for monopoly conduct)
- *Bezeq* decision (fines for monopoly conduct)
- Merger decision between Discount Bank and Dexia Israel Bank
- Merger decisions between Bank Igud and Bank Mizrahi Tefahot
- Indictment against gas suppliers in Israel regarding a restrictive arrangement
- Orders against S Schestowitz (Colgate Palmolive's official importer in Israel)
- Merger decision between Delek Group and Noble Energy

The Economic Competition Law, 5748-1988 (the Law) is the primary law dealing with competition and antitrust issues in Israel and its objective is to prevent harm to competition or to the public. The Law contains the substantive rules that apply to the various restrictive trade practices (restrictive arrangements, mergers, monopolies, concerted groups and official importers).

In addition, the Law encompasses rules concerning the structure and the powers of the Israeli Competition Authority (ICA), the Director General of the ICA, and the Competition Tribunal (the Tribunal), and the procedural rules that apply to cases brought before each of them.

Recent years have been characterised by trends to:

- strengthen the position of the ICA;
- increase administrative enforcement, criminal enforcement and the ICA's focus on its advisory capacity within the government;
- expand block exemptions to allow parties to move forward towards a regime based on self-assessment, rather than regulatory permits; and
- increase civil 'follow-on' class actions against international cartels.

On 1 January 2019, the Israeli parliament approved a significant amendment to the Law. This amendment created material and comprehensive revisions to the language of the Law, including to key provisions relating to the Israeli monopoly control regime, the Israeli merger control regime, the enforcement mechanisms of the Law, and other aspects, as detailed below. Also, the amended Law encompasses an overall terminological change: the term 'restrictive trade practices' was changed to the term 'competition'. Thus, *inter alia*, the Law became known as the Economic Competition Law instead of the Restrictive Trade Practices Law, as it was before.

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 a 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; or
- the quantity, quality or type of assets or services in the business.

In general, a restrictive arrangement is prohibited according to the Law, unless it is permitted in accordance with the Law. Section 4 of the Law establishes that parties to a restrictive arrangement can receive an approval from the Tribunal if the Tribunal finds that the arrangement is in the public interest; or it can be exempted by the Director General of the ICA at the request of a party to a restrictive arrangement and following consultation of the Director General of the ICA with the Exemptions and Mergers Committee. The Director General of the ICA considers whether the

restrictive arrangement considerably reduces competition or causes 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.

Section 14 of the Law authorises the Director General of the ICA to exempt the parties to a restrictive practice from the duty to obtain the approval of the Tribunal for the arrangement, when certain conditions are fulfilled: when the objective of the arrangement is not to reduce or eliminate competition, and the restraints in the restrictive arrangement do not limit the competition in a considerable share of a market affected by the arrangement, or they are liable to limit the competition in a considerable share of the market but are not sufficient to substantially harm the competition in that market. A similar provision is set forth in section 15A(a)(2) as a condition to the authority of the Director General of the ICA to determine a block exemption rule. To assist parties to restrictive arrangements in evaluating the effect of a certain arrangement, the ICA published a public statement on the interpretation of sections 14 and 15a(a)(2) of the Law. This statement provides clarification that not only do the parties need to indicate that there is no significant harm to competition or that there is no harm to competition in a significant part of the market, they are also required to indicate that the arrangement between the parties has a legitimate purpose and that the restraints are necessary to fulfil the legitimate purpose of the arrangement. In essence, the ICA broadened the block exemptions and included a self-assessment regime and, accordingly, restrictive arrangements are now rarely evaluated by force of section 14 of the Law.

With regard to the extraterritorial application of the restrictive arrangement control regime, the ICA applies the 'effects doctrine' to acquire extraterritorial jurisdiction over restrictive arrangements, including cartels executed outside Israel that harm competition in Israel.

Statutory exemptions

A statutory exemption may also apply to certain arrangements, detailed within section 3 of the Law relating to arrangements, among others:

- involving restraints, all of which are established by law;
- relating to specific business sectors (eg, agricultural, international air or sea transportation); and
- involving restraints relating to intellectual property rights.

Block exemptions

As noted, section 15A of the Law grants the Director General of the ICA the power to establish block exemptions. By publishing block exemptions, the Director General essentially exempts parties to a restrictive arrangement from seeking a specific exemption from the Director General or the approval of the Tribunal, subject to the fulfilment of the terms of the various block exemptions. In recent years, the ICA has published various block exemptions, including for:

- syndicated loans and restrictive arrangements causing *de minimis* harm to competition;
- joint ventures;
- research and development agreements;
- exclusive dealing;
- exclusive distribution or franchise;

- non-horizontal arrangements without price restrictions; and
- joint ventures for the marketing and supply of security equipment in foreign countries.

During 2019, the ICA renewed and amended the block exemption for the marketing and supply of security equipment in foreign countries. Prior to that, in November 2018, the ICA renewed and amended the block exemptions for joint ventures and for restraints that are ancillary to mergers. The purpose of the renewed block exemptions is to facilitate the conduct of business in Israel and to allow parties to transactions that do not significantly harm competition to execute their businesses promptly and without unnecessary regulatory burden. The renewed block exemptions also include a self-assessment clause, according to which a restrictive arrangement will not require the approval of the Tribunal or the Director General of the ICA if it does not raise significant concern of harm to competition in the relevant markets and if its purpose is not to reduce competition (regarding the block exemption for joint ventures, the self-assessment excludes joint ventures between competitors regarding marketing).

Recent developments in restrictive arrangements control regime

On 6 March 2019, the Jerusalem District Court issued a sentence of 11 months' imprisonment and a criminal fine against a company officer of one of the members of the *pruning* cartel (which involved restrictive arrangements, fraudulent receipts and money laundering among tree pruning companies). On 15 January 2020, the Supreme Court dismissed an appeal in the matter and increased the amount of forfeiture significantly, to a total of 4 million shekels.

On 15 October 2019, the ICA published updated guidelines concerning trade associations and their activity. The changes to the guidelines concern, among other things:

- rules pertaining to the collection of information by trade associations;
- rules regarding competition for employees; and
- clarifications regarding the conduct of trade associations in the framework of legal proceedings and public processes.

On 9 September 2019, the Jerusalem District Court found that the cloud service provider Triple C and its chief executive officer (CEO) were involved in bid rigging. The CEO was indicted for violating his supervision duty under the Law, and on 14 June 2020, he was sentenced to seven months' community service and fined 50,000 shekels.

On 27 January 2020, the ICA announced that it was considering filing an indictment against several elevator companies and their CEOs, for engaging in bid rigging. A hearing is pending.

It was also announced in January that, following an investigation by the ICA, Aloniel (the Israeli franchisee for fast food chain McDonald's) cancelled its exclusivity agreements in shopping centres, and clauses in its leases that included an agreement on a reduction in the rent in the event of entry by a competitor.

In February 2020, the ICA filed an indictment in the Central District Court against the gas company Amisragas, a senior officer of Amisragas and an employee of the gas company Pasgas regarding their alleged restrictive arrangement aimed at harming the activity of Kolbogas (an additional gas company). It is noted that, as part of their alleged arrangement, the parties agreed not to compete with each other on the basis of the information they exchanged regarding Kolbogas.

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, owing to the broad definition of 'merger' under the Law, even the acquisition of less than a quarter of any of the above-mentioned rights may constitute a merger, under certain circumstances.

Mergers involving foreign parties

The Law will apply to a merger involving a foreign party if at least two of the merging parties meet the conditions of the nexus test, set forth in the ICA's Merger Guidelines (the Guidelines), namely:

- if a foreign company is registered in Israel – in this circumstance, 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 a quarter of any of the above-mentioned rights in an Israeli company (ie, the nominal value of the issued share capital, the voting power, the power to appoint more than a quarter of the directors or participation in more than a quarter of the profits), it will be viewed as a party to any merger transaction involving the foreign company; and
- if a foreign company maintains a place of business in Israel (ie, if it holds 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 ICA when at least one of the following thresholds set under the Law is met:

- with the amended Law, the aggregated sales turnover threshold that necessitates the submission of notices of merger to the ICA was updated, so that if the aggregated sales turnover of the parties to the merger is greater than 360 million shekels in the fiscal year preceding the merger (and not 150 million shekels, the aggregated sales turnover under the Law prior to the amendment) and the sales turnover of each of the merging companies exceeds 10 million shekels, then the parties will be required to receive advance approval from the Director General of the ICA;

- as a result of the merger, the combined market share (in any market) of the merging companies in the total supply or acquisition of particular goods or similar goods, or the provision or acquisition 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 acquisition in a certain market in Israel, which may be either a product or a service market, including markets not relevant to the transaction). It should also be noted that, according to the amended Law, while 'significant market power' is sufficient for establishing a monopoly, it will not be considered a trigger for the submission of notices of merger to the ICA (please see below for further updates regarding the monopoly regime in Israel in this context).

The market share and turnover calculations must take into consideration all the entities controlling or controlled by each party.

The requirements set forth above apply solely with respect to a company's turnover and market share in Israel.

Merger evaluation process

The Law provides that the Director General of the ICA is required to notify the merging companies of her or his decision with respect to the merger within 30 days of the date on which the completed notification forms were received from all the merging parties. According to the amended Law, an extension of time is given to the Director General for the review of mergers without the need to request the consent of the parties to the merger or without the need to approach the Tribunal. The Director General will be permitted to extend the time limit for the evaluation of a merger transaction (30 days) by two additional 30-day periods and to extend the evaluation period by an additional 60 days after consulting with the Exemptions and Mergers Advisory Committee. Thus, cumulatively, the Director General has up to 150 days to review a merger transaction.

As a practical matter, when cross-border merger transactions require approval in multiple jurisdictions, the ICA will sometimes take into account the decisions made by other authorities in different jurisdictions (primarily the US Federal Trade Commission, the US Department of Justice and the European Commission) if there are no unique circumstances concerning the Israeli market. It is also possible that parties in these circumstances waive their right to confidentiality with respect to information provided to competition authorities, to enable the ICA to seek information from those authorities with respect to the merger. The Director General of the ICA is mandated to object to a merger of companies, or to stipulate conditions for the merger, if the Director General 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, the scope of the service supplied, or the constancy and conditions of supply.

Recent developments in the merger control regime

In February 2017, the ICA published a notice regarding a fast track for the approval of mergers that do not harm competition (the ultra-green mergers procedure). Decisions regarding ultra-green mergers are rendered in a significantly shorter amount of time than provided under the Law (on average, fewer than five days). The review of an ultra-green merger by the ICA is limited in scope and based, principally, on the submitted merger notices. Accordingly, to be classified as an ultra-green merger, the parties are required to submit, *inter alia*, full merger notices that are signed by the CEO and internal legal adviser of the submitting party, to provide each party's holding structure and to expand on relevant information.

In 2019, the ICA published a draft amendment to the Antitrust Regulations (Registry, Publication and Reporting of Transactions) 5764/2004 for public consultation. The draft includes significant and extensive changes, such as:

- updating the minimum turnover, such that the turnover threshold will be met only when there are at least two parties, each of whose sales turnover is not less than 20 million shekels (the combined sales turnover was already updated at the beginning of 2019);
- including all entities connected to the filing entity when calculating a merging party's turnover, in accordance with the broader definition of the term 'control' in the Israeli Securities Law, 5728-1968;
- with respect to international mergers that must be reported to the ICA, details relating to filings made in other jurisdictions will be required, as well as information regarding their agents, distributors or other representatives in Israel.

Following a draft memorandum, the ICA announced in November 2019 that in any case in which the parties to a merger cross the minimum threshold as currently defined, but do not cross the minimum threshold defined in the memorandum to amend the Regulations – that is, when the sales turnover of the parties is between 10 million and 20 million shekels (and the combined sales turnover of the merging companies exceeds 360 million shekels) – the ICA could inform the parties that they are not required to give notice of the merger in these circumstances. This notice from the ICA will be given on the basis of an individual application from the parties to the merger.

In May 2019, the ICA approved a merger between Discount Bank and Dexia Israel Bank, on the condition that the parties sell a part of of their municipal credit portfolio to a non-related third party. The ICA was concerned that a merger would substantially reduce the number of competitors offering the service and approved the merger only on the condition that the parties sell to third parties the aforementioned municipal credit portfolios they already held in relation to local authorities, as well as other financially weak local authorities. In line with the ICA's 'fix it first' policy, the merger did not take effect until the fulfilment of the condition. An appeal filed with the Tribunal was dismissed *in limine*.

In July 2019, the ICA authorised Delek Group and Noble Energy to acquire part of the natural gas pipeline between Israel and Egypt owned by East Mediterranean Gas. The approval was subject to three main conditions: (1) a commitment to swap deals by the partners in the Leviathan gas

reservoir; (2) a commitment by the pipeline owners to the pipeline owners of other gas reservoirs; and (3) an agreement by Delek Group and Noble Energy to reopen the operating agreement for the pipelines after 10 years. An appeal on the decision is currently pending.

In November 2019, the Tribunal granted an appeal against the ICA's decision in 2018 not to approve the merger between Bank Igud and Bank Mizrahi Tefahot (the ICA came to the conclusion that such a merger would result in harm to competition). The ICA subsequently approved the merger in January 2020, subject to conditions, including, *inter alia*, the requirement that one of the parties to the merger sell its diamond dealers' credit portfolio in full to a third party, currently not active in the field, and which would receive prior approval by the Director General of the ICA.

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 (or entity) shall be deemed a monopoly. The amended Law expands the definition of the term 'monopolist' under Israeli law, in a way that a monopolist is now not only a person or entity who has a market share of more than 50 per cent in the supply or purchase of a product or service, but includes anyone who has 'significant market power' in relation to the supply or purchase of an asset or service (even if the person or entity does not hold a market share of more than 50 per cent).

Under the current regime, the declaration of a monopoly by the Director General of the ICA 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 Director General's declaration or lack thereof.

Limitations

In general, a status of monopoly is not prohibited. Nonetheless, monopolists must abide by several strict standards of conduct, namely that 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
- 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 the 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 (discrimination); and
    - subjecting a transaction with regard to an asset or service of the monopoly to conditions that are unrelated to the subject matter of the transaction (tying).

In this regard, the Director General of the ICA 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.

The Tribunal may, upon application by the Director General of the ICA, instruct the monopolist to sell an asset in its possession if it has found that this may prevent harm or the risk of significant harm to competition or to the public.

Recent developments in the monopoly control regime

Following the amendments to the Law, the ICA published guidance on how to determine the existence of significant market power. As the guidance explains, 'significant market power' is the power to charge a price that is significantly higher than the price that would be charged in a competitive market. The guidance provides a list of characteristics relevant to examining significant market power, including market share, the number and standing of competitors in the same sector, volatility of market share, the degree of differentiation between products in the sector, the importance of the product for retailers and the existence of barriers to transfer for customers. The statement also deals with barriers to entry into the specific market, barriers to expansion in the market and movement of customers from supplier to supplier.

In January 2019, the ICA reached a consent decree with Huliot (Agricultural Cooperation Association) Ltd, in which Huliot admitted to the abuse of its monopoly position and was ordered to pay 2.5 million shekels in addition to a payment order imposed on the company's deputy CEO in the amount of 95,000 shekels, ordered to be paid to the State Treasury.

In September 2019, the ICA imposed fines totalling 30 million shekels on Bezeq (Israel's largest telecommunications group), plus a fine of 500,000 shekels on an officer of the company, for an alleged abuse of Bezeq's status as a monopoly in passive infrastructure necessary for the deployment of optical fibre. Bezeq has appealed the decision.

In December 2019, the Director General of the ICA imposed fines of approximately 39 million shekels on Coca-Cola's Israeli bottler. The ICA had initially informed the company in 2017 of its intent to impose fines of approximately 62 million shekels, and eventually decided to impose a reduced fine after examining the company's claims and after consulting the Exemptions and Mergers Committee. The decision against the company was based, *inter alia*, on it having:

- abused its monopolistic status in the cola soft drink market;
- violated orders it received as a monopoly;
- unreasonably refused to supply products;
- breached a consent decree; and
- breached merger conditions.

In June 2020, the Attorney General of the State of Israel (AG) submitted a position with the Supreme Court regarding how the Court should best approach an excessive-pricing claim. The position was submitted in the framework of a motion for leave to appeal the lower court's decision to certify a class action against Coca-Cola's Israeli bottler (The Central Bottling Company). While recognising the existence of an excessive pricing claim under the Law, the AG argued that the Court should exercise caution and restraint for these claims, and set out a two-stage test to

determine whether there has been a breach of the Law: first, the Court should examine whether a price is excessive compared to what would otherwise be charged in a competitive market; and second, it should be examined if the price is unfair.

In June 2019, the Central District Court certified a class action claiming that Tnuva (Israel's largest dairy company) abused its dominant position by setting excessive unfair prices for packed and sliced hard cheese. In September 2019, a motion for leave to appeal the decision was filed to the Supreme Court.

An earlier motion to certify a class action was filed in July 2011 against Tnuva, claiming it abused its dominant position by setting excessive unfair prices for cottage cheese. In April 2016, the Central District Court certified the class. In March 2020, the Court rendered a judgment in favour of the class, ordering Tnuva to compensate its consumers. Tnuva intends to appeal the judgment to the Supreme Court.

Concerted group control regime

Definition

According to the Law, the Director General of the ICA 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, if the Director General determines that all 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 Director General are expected to prevent 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 these barriers shall be regarded as a condition for limited competition.

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

Implications

The Director General of the ICA 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 an increase.

In addition, the Tribunal, upon the request of the Director General of the ICA, may order the sale of holdings (entirely or partly) of members of the concerted group under certain circumstances.

Import

On 18 July 2018, the Israeli parliament approved a revision to the Law with the purpose of removing barriers to entry in import activities and to prevent harm to competition caused by official importers. The Law grants the Director General of the ICA the authority to impose orders

against an official importer regarding actions it must take to prevent significant harm to competition. Violation of such an order imposed by the Director General may result in criminal or administrative sanctions.

Recent developments in the import control regime include the ICA publishing, on 13 February 2019, that, according to its examination, the S Schestowitz Company (Schestowitz), which is Colgate-Palmolive's (Colgate) official importer in Israel, reports to Colgate regarding products that were imported into Israel via parallel import, including toothpaste sold in Israel under the Colgate brand. The ICA mentioned that this conduct allegedly raises a concern of harming the parallel import and accordingly harming competition in the toothpaste sector. On 12 March 2019, the ICA imposed an order against Schestowitz, preventing the company from providing any such reports to Colgate. This is the first time that the ICA has exercised this specific power under the Law. Schestowitz submitted an appeal of the ICA order to the Tribunal.

On 21 August 2019, the Tribunal rendered an interim decision, in the framework of which it decided that the ICA order would be partially suspended. The interim decision also recognised the contribution of certain discussions between Schestowitz and Colgate in encouraging competition. Further to the Tribunal's decision, and in light thereof, Schestowitz and the ICA agreed to resolve the matter through settlement. Accordingly, on 7 June 2020, the parties filed a motion for the approval of a settlement agreement. The motion clarifies that the ICA's decision from 12 March 2019, and the order, are forward-looking and do not concern allegations of past violations of the Law. At the time of writing, a decision on the motion had not yet been rendered.

Enforcement

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

Criminal enforcement

In general, all the provisions of the Law are criminal offences. However, criminal sanctions are not often imposed and are reserved, mostly, for significant violations of the Law (eg, cartels or bid rigging). This said, in the coming years, we expect to see increased criminal enforcement alongside greater sanctions owing to developments of the Law and an increase in the ICA's influence. With respect to criminal enforcement, we note the following.

Responsibility of a corporation

According to the amended Law, an independent duty was imposed on officers in a corporation to supervise and do everything possible to prevent any violation of the Law by the corporation or its employees (the supervision duty). A violation of the supervision duty may result in the imposition of a criminal sanction of imprisonment for up to one year and a fine. It was also established that if the corporation or a corporation's employee carried out an offence, then there will be a presumption that the officer breached the supervision duty, except if the officer proved that he or she did everything in his or her power to fulfil the supervision duty.

Maximum fine

The maximum fine against a person in a criminal procedure is approximately 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 or, if the offence has been committed in aggravated circumstances, up to five years. Aggravating circumstances include factors that are likely to harm competition. It should be noted, that according to the amended Law, the maximum criminal penalty for the offence of a restrictive arrangement was increased from three years' to five years' imprisonment, without the need to establish aggravating circumstances.

Leniency programme

The ICA'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 ICA and provide all information known to it, in connection with the restrictive arrangement to which it was a party. The ICA has repeatedly stated that it ascribes great importance to the programme and that it constitutes a major component of the Israeli enforcement regime for cartels. However, the leniency programme is not considered to be successful in Israel as it has only been applied a few times since its initiation.

Administrative enforcement

Administrative determination (decision)

The Director General of the ICA may issue an administrative determination declaring that a certain violation has occurred. The Director General's determination serves as *prima facie* evidence in court.

Administrative fines

For every violation of the Law, the Director General of the ICA 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. Under the amended Law, the maximum amount that can be imposed shall not be greater than approximately 100 million shekels (for each violation). Before the amendment, the maximum amount was set at approximately 24.5 million shekels. For individuals or corporations that, in the year preceding the violation, had a sales turnover of less than approximately 10 million shekels, the Law sets a maximum fine of approximately 1.03 million shekels.

The Law contains a non-exhaustive list of circumstances and considerations for the Director General of the ICA to weigh when determining the amount of the administrative fines to be imposed. Among others, these are:

- 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; and
- 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.

In November 2019, the ICA published an amendment to a previous public statement on calculating the amounts of financial fines (the New Guidance). The main changes introduced by the New Guidance are, among others:

- raising the cap of fines that the ICA can impose to 100 million shekels per violation (in accordance with the recent amendment to the Law);
- changing the method according to which an initial fine is calculated. For corporations with a turnover of more than 10 million shekels, the initial fine will be 8 per cent of the turnover (the base fine) and only when, after all considerations are taken into account, the calculated fine exceeds the cap amount, the base fine will be reduced to 100 million shekels;
- allowing for an exclusion of part of the corporation's turnover, in certain activities, when calculating the corporation's turnover for the purpose of setting the base fine; and
- introducing a new factor when calculating the fine, namely that under certain circumstances, the reliance on legal advice prior to the alleged conduct can be taken into consideration.

Further, the ICA published guidelines to clarify when it will impose administrative fines as the primary enforcement measure (instead of seeking criminal sanctions). The guidelines list numerous offences that 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 requests for information.

Consent decree

The Law authorises the Director General of the ICA and third parties to agree to a consent decree that provides for, *inter alia*, an amount of money to be paid to the State Treasury in lieu of other enforcement measures. In recent years, the ICA has increased its use of consent decrees and has reached consent decrees with, *inter alia*:

- Huliot (Agricultural Cooperation Association) Ltd (Huliot), in which Huliot admitted abuse of its monopoly position. The company was fined 2.5 million shekels and the company deputy CEO was fined 95,000 shekels; and
- E Schnapp & Co Works Ltd and the International JCI Group, according to which the cooperation between the parties was ordered significantly reduced and the parties were fined 1.1 million shekels and 250,000 shekels, respectively.

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 a 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 have been 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 ICA. However, the new trend has seen more enforcement actions taken by competition authorities in other countries. Other motions to certify class actions are based on claims against monopolists regarding excessive pricing.

Pro-competitive developments

As noted, the past couple of years has seen many significant and influential developments in Israeli competition law and in the enforcement authorities of the Director General of the ICA, *inter alia*, against the backdrop of unprecedented social protests against the increase in the cost of living.

For example, the ICA has published a call for comments on competition in the internet and digital economy. The aim of the call for comments is to receive input from the public, including start-up companies and leading and established companies in the high-tech sector, regarding contemporary issues in competition as they relate to the online world and the Israeli economy. Also, the ICA has published a call for comments on competition failures that stem from regulation as a part of the ICA's markets department's remapping of regulatory failures in various sectors.

The Food Law

The Food Law, enacted in 2014, deals primarily with vertical relationships between food suppliers and retailers and regulates the commercial relationships between them. The Food Law imposes criminal, administrative and civil liability on corporations and their officers. The Law also empowers the Director General of the ICA to instruct a large retailer that is selling the products of a large supplier regarding sale slots, and to give instructions to a retailer that is selling private label products.

The Concentration Law

The purpose of the Concentration Law, 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, *inter alia*, 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 consultation with the Director General of the ICA regarding, among other things, the advancement of competition in a specific sector.

The ICA's advisory capacity

In addition to its role as a regulator and enforcer, the ICA performs competitive market analysis of various sectors and advises other regulators. In recent years, the ICA published reports, *inter alia*:

- concerning the baby formula sector, outlining competitive issues and recommendations of regulatory steps;

- jointly with the Israel Securities Authority, examining competition in the retail brokerage market in Israel and formulating a number of recommendations to encourage competition in the brokerage sector and to strengthen the resilience of parties operating in the sector; and
- on personal importing as a measure to promote competition, which in its conclusion states that Israel has significant regulatory and bureaucratic barriers to the expansion and growth of personal importing.

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

Tal 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 is 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 Competition Authority for mergers and acquisitions 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 competition and antitrust compliance programmes.

Ms Eyal-Boger was invited by the International Compliance Association to act as a non-governmental adviser to the European Commission at the International Competition Network. Ms Eyal-Boger served as the deputy chair of the Israel Bar Association's competition and antitrust committee and is frequently called upon to lecture on competition and antitrust matters before various legal and business forums.

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

Ziv Schwartz
FBC – Fischer Behar Chen Well Orion & Co

Ziv 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 competition and 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 Competition Tribunal.

Mr Schwartz received his LLM 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 as a member of the editorial board of the Tel Aviv University Law Review.

Mr Schwartz appears in the 2020 edition of Global Competition Review's '40 Under 40' and in the 2018 and 2019 editions of *Who's Who Legal Competition: Future Leaders*. He is also ranked as a 'Next Generation Partners' by *The Legal 500* and by *Chambers*.

Shani Brown
FBC – Fischer Behar Chen Well Orion & Co

Shani 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 International Compliance Association, class actions, commercial disputes and other potentially restrictive trade practices.

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

FBC is one of Israel's premier and largest full-service law firms, acting for prominent multinational and Israeli clients, and offering professional excellence and personal attention across the spectrum of multidisciplinary legal services in a wide variety of sectors, including automotive, aviation and aerospace, banking, communications, construction, cybersecurity, energy, financial institutions, food and beverage, gaming, government, infrastructure, insurance, investment funds, life sciences and healthcare, manufacturing, media, entertainment and sport, professional services, real estate, retail, technology, transportation, and more.

FBC is repeatedly ranked as one of Israel's leading practitioners in many areas by international and domestic indices, including *Chambers and Partners* (most Band 1 rankings of any Israeli law firm), *The Legal 500* (most Tier 1 rankings of any Israeli law firm) and *IFLR1000* (2020 Israel Law Firm of the Year).

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

FBC's competition team provides continuing advice on competition and 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 Competition Tribunal and the Israel Competition Authority.

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

3 Daniel Frisch Street
Tel Aviv 6473104
Israel
Tel: +972 3 694 4111
Fax: +972 3 609 1116

www.fbclawyers.com

Tal Eyal-Boger
teyal@fbclawyers.com

Ziv Schwartz
zschwartz@fbclawyers.com

Shani Brown
sbrown@fbclawyers.com

The 2021 edition of the *Europe, Middle East and Africa Antitrust Review* is part of the Global Competition Review Insight series of books that also covers the Americas and Asia-Pacific. Each book delivers specialist intelligence and research designed to help readers – general counsel, government agencies and private practitioners – successfully navigate the world's increasingly complex competition regimes.

Global Competition Review works exclusively with leading competition practitioners in each region, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put it into context – that makes this report particularly valuable to anyone doing business in Europe, Africa and the Middle East today.

Visit globalcompetitionreview.com
Follow @GCR_alerts on Twitter
Find us on LinkedIn

an LBR business

ISBN: 978-1-83862-260-2