

The International Comparative Legal Guide to:

Cartels & Leniency 2009

A practical insight to cross-border Cartels & Leniency



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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Israel law addressing cartels is found in the Restrictive Trade Practices Law 5748 - 1988 (the "Law"). The Law confers both civil and criminal jurisdiction on the Israel Antitrust Authority ("IAA") to investigate and pursue prohibited "restrictive arrangements", among other antitrust violations. Its General Director has authority to determine whether an arrangement violates the Law and to pursue an administrative remedy including sanctions such as orders to cease and desist, or a criminal complaint with penalties including up to five years' imprisonment for violations that include certain aggravating circumstances. The Law also provides that its breach gives rise to a private remedy that anyone affected may pursue.

1.2 What are the specific substantive provisions for the cartel prohibition?

The Law prohibits arrangements among parties who manage businesses whereby at least one of them imposes a restriction on itself in a manner liable to eliminate or reduce competition among it and all or some parties to the arrangement or among it and a third party. No distinction is made between vertical or horizontal restraints. Unless the arrangement falls under certain exemptions or is granted approval, it is an offence both for a business entity to be a party to such arrangement or for any person who acts in accordance therewith.

Although the IAA would normally need to prove that an arrangement had an effect on competition, the Law provides a list of arrangements that are irrefutably "deemed" restrictive without either the need to show effect or regard to whether it is horizontal or vertical, so long as the prosecution can prove the underlying facts: agreements on the price to be asked, offered or paid; the profit to be derived; division of all or of part of the market, geographically or by the people or categories of people with whom business is to be transacted; or, the quantity, quality or type of assets or services in the business. The Law contains both substantive exceptions (discussed in question 1.5) as well as mechanisms to enable parties to seek prior approval of their proposed dealings. For instance, approval of a restrictive arrangement may be sought from the Antitrust Tribunal, a forum comprised of a judge and two public representatives such as those affiliated with consumer or business organisations as well as civil servants (the "Tribunal"). The application is subject to public notice and a hearing including the

IAA. In making its decision to approve an arrangement, the Tribunal weighs against possible harms various countervailing public interest considerations. On recommendation of the Director General, the President of the Tribunal may grant temporary permits pending the Tribunal's decision.

The Director General may also exempt a would-be applicant from seeking Tribunal Approval, so long as the arrangement does not considerably reduce competition (or reduce competition in a considerable share of the market), and the restrictions are narrowly tailored and do not have an anticompetitive motive.

Overarching "block" exemptions have also been established, most notably for vertical or horizontal arrangements representing minimal market shares and that would cause immaterial harm to competition. Other block exemptions have been enacted for joint ventures of competitors as well as competitors who enter into research and development agreements, in both cases subject to certain criteria and so long as they constitute less than a certain combined percentage of the market, depending on whether the venture is in a field in which they compete or not. Further exemptions include vertical exclusive dealing arrangements or purchase or supply contracts. All of these exemptions too are subject to specific conditions.

1.3 Who enforces the cartel prohibition?

As a general matter, the investigative and legal staff of the IAA enforces the Law. The Law grants extensive investigative powers, such as interrogation of witnesses and search of premises, as well as authority to seek administrative sanctions by consent or proceedings, in either case before the Tribunal. The General Director may also make declarative "Determinations" of violations, which provide prima facie evidence in any future litigation including for the benefit of a private litigant. For criminal matters, Israel's Attorney General has deputized the IAA's staff to indict and bring cases against suspected violators in the name of the State. Criminal cases are heard by the District Court of Jerusalem.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Investigations are typically initiated by the IAA's investigative staff and begin confidentially. After enough intelligence is collected the staff will generally open a public investigation. Depending on the type of investigative tools sought (search of a home or office, seizure of evidence, arrest of individuals, etc.), a court order may be required. See section 2 below. Once adequate evidence is developed, the matter is transferred to the legal Staff, which exercises the IAA's prosecutorial role. It may bring a civil suit to

the Tribunal or proceed criminally before the District Court. Short of such proceedings, there are opportunities to settle or announce the IAA's Determination regarding illegal conduct.

The Determination may be employed for civil matters. The IAA General Director determines (and announces) that a restrictive arrangement has occurred. The parties may appeal and request a hearing before the Tribunal, which may reaffirm, revoke, or amend the Determination. The holding may be used as prima facie proof against the violating parties in any subsequent legal procedure. The Tribunal's decisions may be appealed to the Supreme Court.

The General Director may also negotiate an administrative consent decree with the parties to the restrictive arrangement. The decree is reached without admission of liability and may include, among other things, an obligation to pay money to the State treasury or a commitment to do or refrain from doing specific actions. The General Director presents the grounds for the decree to the Tribunal (or District Court), which may "take it or leave it" but is not free to alter it without the assent of both sides. The decree will, if approved, be treated with the force of an order. If not approved, there is no estoppel. A case may be brought on the same facts. But none of the decree, testimony during the proceedings to consider the decree, nor documents prepared for the hearings at the behest of the General Director, is admissible in such subsequent case.

Given that violations of the Law give rise to potential criminal liability, the IAA is equipped with an arsenal of tools to pursue alleged misconduct accordingly. Staff receive police training and are empowered to conduct investigations, search premises, seize evidence, and make arrests, in a manner similar to police officers. See section 2 below.

For criminal matters, a preliminary hearing before indictment is conducted by the IAA's chief legal counsel. (It is technically required only to indict for conduct that might include aggravating circumstances (see question 3.2)). Plea bargains may be negotiated at any point in the process and are subject to approval and/or modification by the District Court.

Following indictment, the District Court of Jerusalem would hear the case. For convictions, separate proceedings are convened to hear arguments on sanctions. After their imposition, the case may be appealed by either party to the Supreme Court.

1.5 Are there any sector-specific offences or exemptions?

Sector-specific restraints that are permitted include the following arrangements:

- Restraints approved by law.
- Those which relate to the right to use patents, designs, trademarks, copyrights, performers' rights, or developers' rights, so long as the arrangement is between the proprietor of the asset and the party receiving the right to use it and, if the asset is subject to legal registration, it is registered.
- Those entered into between a person assigning a right to real property and the person acquiring such right, where the restraint involves the type of assets or services in which the acquirer may deal with or engage on such property.
- Those involving the growing or marketing of fruits, vegetables, crops, milk, eggs, honey, cattle, sheep, poultry, or fish, in all cases as between or among growers and wholesale sellers of such produce. This provision does not apply to goods manufactured from the produce.
- Those entered into between a company and its subsidiary.
- Those involving a sole supply and sole purchase agreement, provided that both parties do not engage in production of the same goods or services.

- Those involving companies that provide maritime and/or aviation services under certain circumstances. A recent amendment limited the exemption and carved out arrangements between Israeli air carriers, Israeli and non-Israeli air carriers, or non-Israeli air carriers with operations or representatives in Israel and involving carriage to Israel, unless the arrangement was approved by the relevant ministries in consultation with the IAA for, among other purposes, protecting foreign relations or ensuring air service to Israel. In addition, a new block exemption was enacted to allow a few types of arrangements among air carriers following such amendment.
- Those involving a non-competition covenant by the seller of a business, in accordance with reasonable and established practices.
- Those entered between an employee organisation and an employer organisation, relating to employment and working conditions.

1.6 Is cartel conduct outside Israel covered by the prohibition?

The IAA General Director once addressed such a matter publicly in his Determination in the case of *James Richardson PTY Israel* relating to selling foreign-manufactured perfume within Israel. According to its Determination, the Law will apply on foreign commerce when the unlawful conduct impacts competition in Israel. There have to date been no relevant judicial cases affirming such a test or applying a different standard. The general rules of Israel's penal law regarding such provisions as territorial, personal or protective liability also apply to cartels.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	No	Yes
Carry out an unannounced search of business premises	No	Yes
Carry out an unannounced search of residential premises	No	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	No	Yes*
■ Right to retain original documents	Yes	Yes
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	No	No

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

IAA staff is empowered to detain individuals for questioning for three hours or, by approval of a supervising investigative official or deputy, an additional three hours. During such period, the individual is not considered under arrest and therefore right to counsel would not yet be triggered. However, if the questioning continues past such period and the individual refuses to remain voluntarily, this may result in arrest. Arrest is also permitted if an individual refuses to be detained or if the IAA has adequate grounds to believe that an offence has or will be committed, or if there is a concern of obstruction of justice or flight. Arrestees have a right to counsel and a hearing before a Magistrate Judge within 24 hours.

It should be noted that as a matter of practice, arrests in line with the Law have been limited to several hours.

It should also be noted that the right of the IAA to retain original documents for more than six months requires a court order.

2.3 Are there general surveillance powers (e.g. bugging)?

Surveillance may only be conducted after seeking authority from the president or deputy of the District Court, on application showing sufficient grounds that an offence including aggravating circumstances has occurred (see question 3.2).

2.4 Are there any other significant powers of investigation?

No there are not.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

IAA investigative Staff and, if more are required, other staff members may be deputised by the IAA General Director for this purpose and they need not wait for counsel.

2.6 Is in-house legal advice protected by the rules of privilege?

There is no specific precedent on this point. As such, in-house legal advice remains privileged. According to IAA policy, privilege claims are, as a general matter, addressed to the Israel Bar Association, which will send a representative to the place of the search. Arrangements between the government and the bar association provide that all documents for which the parties claim privilege be sealed and brought before a judge to decide what the prosecution may use.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Israeli law affords a right against self-incrimination for individuals, right to counsel if an individual is under arrest, right to a hearing before the Magistrate Court if the arrest lasts for at least 24 hours, and limitations on the period during which an individual may be held without prosecution.

More generally, an individual may contest each of the investigative powers employed by the IAA by filing a motion with the Magistrate Court.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

Although the IAA has authority to investigate obstruction and has done so on numerous occasions, it does not have general authority to prosecute such obstruction. Prosecution is within the jurisdiction of the Attorney General.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

As a general matter, the Law provides for fines in an amount equal to twice those that might apply to individuals that are deemed to be parties to the conspiracy. The fine for an individual is two million and twenty-thousand NIS (approximately \$532,000) and thirteen thousand NIS (approximately \$3,400) for every day during which the violation continued.

The General Director also has the power to publish a Determination (see question 1.4 above) and to seek orders to cease and desist.

3.2 What are the sanctions for individuals?

Individuals may be fined or incarcerated. Being a party to a restrictive arrangement not involving aggravating circumstances, or failing to comply with conditions of an IAA approval for a restrictive arrangement, could result in fines or up to three years' imprisonment.

The presence of aggravating circumstances elevates the offence to a felony-level crime and the concomitant penalty to up to five years' imprisonment. Aggravating circumstances exist when there has been significant damage to competition, because of one or more of the following factors: the share and standing of the accused in the market affected by the offence; the length of the period during which the offence continued; the damage caused or expected to be caused to the public because of the offence; or the benefit derived by the accused. However, allegations of aggravating circumstances are rarely pursued, or if they are, are not necessarily successful. The only such prosecution to date was the case of the envelope producers' cartel, indicted in 2004 (CF 377/04 the State of Israel v. Yaron Woll et. al). Although the parties were convicted of the cartel activities, they were acquitted as to the aggravating circumstances. This ruling is currently pending appeal by the IAA before the Supreme Court.

Company employees and directors may be implicated in an action against such company. Specifically, an officer that was involved in conspiratorial conduct of the company is considered a separate party to the cartel and could be liable for fines and a three-year prison sentence. In addition, simply as a function of her or his general responsibility to oversee company affairs, any officer that is responsible for the activity that is under prosecution can also be found liable for the conduct of the company even if not involved in such conduct unless he or she can show that the offence was committed without her or his knowledge and that she/he otherwise took reasonable steps to ensure antitrust compliance.

3.3 What are the applicable limitation periods?

The statute of limitations is based on the general criminal code and is a function of the severity of the offence. Being a party to a cartel or failing to comply with conditions of an exemption order have a limitation of five years while felony-level crimes, meaning, those

involving aggravating circumstances, have a limitation of ten years. If the sanctions or category for an offence were to be elevated, the limitation period would be increased accordingly. The existence of any investigative activity on the part of IAA tolls the limitation period. The periods restart in their entirety on completion of an investigation or indictment, whichever is earlier.

3.4 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

A company may not pay financial penalties imposed on a former or current employee. Generally speaking, if the company's articles of incorporation or by-laws so provide, an employee may be indemnified for reasonable legal and court costs incurred so long as she or he has either been found not guilty in a criminal matter, or sanctioned only with respect to offences not requiring *mens rea*.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Any person, including a corporation or a director or employee thereof who is first to approach the IAA and provide all information known or to become known about an illegal cartel is granted full immunity from criminal prosecution, so long as the party is not the clear leader of the cartel, has not been involved in prior antitrust offences, and the IAA has not yet opened an investigation. Overtures by a corporation must be in line with an official corporate act, and will benefit all directors and employees.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

There is no formal quantitative system to reduce penalties in the context of the leniency programme but, as a general policy, one of the considerations in approving plea bargains is the degree of cooperation received from the accused and the stage at which it approaches the IAA or enters negotiations. See question 4.6.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Initial applications may be made orally, but ultimately a leniency agreement is reduced to writing with numerous conditions, for the purpose of enforcing the party's obligations (or, upon a breach, to revoke the immunity and use any information obtained against such party).

4.4 To what extent will a leniency application be treated confidentially and for how long?

Although no guarantees are made, applications will be treated confidentially as long as plausible. The IAA offers the additional protection that information provided in line with applications that were made in good faith but subsequently rejected cannot be used to prosecute the provider. Once an indictment is handed down, the relevant documentation is subject to discovery unless such application is subject to a confidentiality certificate granted by the relevant Ministry for the purpose of protecting an important public interest. Such certificate may be challenged by the accused.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

According to the IAA's leniency programme, cooperation in a variety of respects is expected on a continuous basis. First, the applicant may not without IAA consent expose the essence of the application to any third party (except counsel). Second, the IAA may dictate the manner in which the applicant should terminate its part in the cartel. Third, immunity is conditioned on providing full and continuing cooperation with the IAA, including providing information that is (or may come to be) either in the possession or within the reach of the applicant, in truthful and detailed statements. Fourth, the applicant should act according to the IAA's directions during and after the investigation, to assist the IAA in the investigation and testify fully in connection with the cartel, if and when required. There is no case law and very little experience with such applications generally, and a cessation of immunity in particular.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no formal policy on plus factors. However, short of full immunity (or prosecution for the entirety of an alleged violation), the prosecution may use its discretion in crediting various factors toward reaching plea bargains and making agreements with a co-conspirator to become state's witness against other parties to the cartel.

Considerations in fashioning plea bargains include the degree of cooperation received from the accused and the stage of the investigation in which it enters into a negotiated settlement. In a well-known prosecution of a cartel among four providers of home cooking gas, the court explicitly enumerated various factors, such as economizing judicial resources necessitated by prosecution and trials, which warranted going easier on parties that cooperated sooner. Indeed, although sentences always depend on the particular circumstances, there were discernable differences in penalties. Three current and former executives of prominent co-conspirator Pazgaz paid fines of between 55,000 and 1,250,000 NIS but were subject to prison sentences to be served only by performing community service ranging from between two weeks and six months. By comparison, a steeper punishment of four months' jail time plus a fine of 950,000 NIS was later meted out to the former head of Dorgaz, the smallest co-conspirator and prior market maverick. This was due, among other considerations, to the fact that he initiated plea bargaining later.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

When a company does not itself seek leniency, a director or employee thereof may come forward to the IAA and provide complete information without the consent of the company. He or she would receive personal immunity, provided that all other conditions for receiving immunity are met.

There are no provisions that would protect a whistle-blower from termination of employment.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

A substantial number of matters are resolved in some sort of settlement, such as a consent decree or a plea bargain (see question 1.4), procedures for both of which there is considerable precedent.

7 Appeal Process

7.1 What is the appeal process?

In civil proceedings, interim orders and final decisions of the Tribunal are appealable to the Supreme Court. Decisions of the District Court of Jerusalem, which has exclusive jurisdiction over criminal antitrust matters, are also appealable to the Supreme Court by either a party found guilty or, in the case of an acquittal, by the IAA. Appeals must be filed within 45 days.

7.2 Does the appeal process allow for the cross-examination of witnesses?

Appeals are generally based on legal arguments and as a general matter the Supreme Court will not interfere in the fact-finding of a lower court. Exceptions are quite rare. Nonetheless, the Supreme Court may for the purposes of rendering an accurate ruling charge the lower court to take additional evidence. The lower court will then come back with its findings. In addition, the Supreme Court itself may accept additional evidence or hear witnesses. In particular, in circumstances in which a lower court has refused to hear evidence that it should have, or if the Supreme Court believes that it is necessary to enable a ruling, or for any other important reason, the Court may convene fact-finding proceedings in whatever format it determines, the procedures for which would presumably entail cross-examination.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

An act or omission contrary to the provisions of the Law constitutes a tort under Israel's civil wrongs ordinances. As such, a private litigant may invoke the normal procedures for filing a suit, conducting discovery, and acting as a plaintiff in a trial.

Findings in line with a Determination by the General Director, or findings and the conclusions of a verdict in criminal proceedings that resulted in a conviction of the defendant, are admissible in a private claim against such defendant and can be relied upon in civil claims as prima facie evidence. If such a verdict is filed with the court in connection with a civil claim, the convicted person will not be allowed to file contradicting or any other evidence that was submitted during the criminal proceedings, unless it receives specific permission from the court.

The evidentiary standard is akin to a "balance of probabilities". However, according to judicial precedents, where the conduct at issue in a tort claim is fraud, the court may determine that the standard of proof is higher. In light of the criminal consequences of breaches of the Law, one can assume that the courts will wish to apply a standard that lies between the balance of probabilities and

the criminal standard "beyond a reasonable doubt". The Law does not provide for punitive or exemplary damages.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes. In 2006, Israel enacted new procedures for class actions.

8.3 What are the applicable limitation periods?

For civil damages claims, the applicable statute of limitations is generally measured such that cases may only be brought within seven years following the circumstances giving rise to the claim. However, the period is lengthened considerably for fraudulent or deceitful conduct. Specifically, suit must be brought within seven years from the date in which the fraud or deceit was discovered by the plaintiff any such delay not owing to reasons of his or her own making.

8.4 What are the cost rules for civil damages follow-on claims in cartel cases?

Courts have the authority to charge the losing party with costs incurred by the prevailing party but, as a matter of practice, such amounts are determined to be far less than the actual costs incurred by the prevailing party.

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

Yes. For example, in 2004, Israeli telecommunications carrier Bezeq seized on a violation of the Law among a cartel of conduit manufacturers. In its private litigation, Bezeq, as a primary consumer of the piping through which it pulls telephone wires, claimed that it was harmed by the market division. The case was settled for over 28 million NIS.

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

Until several years ago there was a clear tendency by the IAA to use more criminal tools in the struggle against cartels. In the late 90's and early 2000's the IAA pushed for more severe punishments for corporations and their executives. The courts gradually increased the punishments and in a few cases sent executives to prison for periods longer than six months, which cannot be served by community service. However, in the last few years the IAA initiated very few criminal proceedings. For their part, courts are not always willing to indulge the prosecution by handing down overly tough punishments on cartel offences.

The leniency programme was introduced in 2005. Since then, only two applications for leniency were brought to the IAA which, accordingly, has little experience addressing such requests.

9.2 Please mention any other issues of particular interest in Israel not covered by the above.

In 2005, the IAA prepared a proposal to amend the Law's definition of restrictive arrangements. According to the proposal, there would

be a distinction between horizontal and vertical restraints and the irrefutable presumption of harm to competition would apply only to horizontal arrangements. Legislative proceedings have not yet begun. However, such an amendment would bring about a major change in cartel enforcement.



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Michal previously served as General Counsel of the Israel Antitrust Authority (IAA), where she headed a team of 25 attorneys and interns. As chief legal counsel of the IAA, Michal was responsible for the prosecution of antitrust charges. Michal also handled all mergers that presented competition issues and was in charge of the enforcement of antitrust law against monopolies. Michal represented the IAA before the Supreme Court and the Antitrust Tribunal. Michal represented the IAA in the OECD and in the ICN - International Competition Network.

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