

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

**Excessive Pricing in Pharmaceutical Markets - Note by Israel**

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## Israel

### 1. Introduction and Overview: Recent Years' Developments in the IAA's Position

1. The Israeli Antitrust Authority's (hereinafter: the "**IAA**") stated positions on the question of a monopolist charging an unfair high price, has undergone recent developments. Including, *inter alia*, as reflected in Public Statements issued by the Director General of the IAA (hereinafter: the "**Director General**").

2. As background, in April 2014 the IAA issued a Public Statement regarding the Prohibition on Charging an Unfair Excessive Price by a Monopolist (hereinafter: "**Public Statement 1/14**")<sup>1</sup>. Until this publication, the IAA *rarely* dealt with the subject, and its enforcement actions against monopolists were concentrated mainly on exclusionary practices aimed at forcing competitors out of the market. Public Statement 1/14 set forth that the IAA would enforce the prohibition on charging an unfair excessive price by a Monopolist. To this end, it sought to set parameters for determining what is an "unfair high price", while specifying various alternative methods for calculating the "fair price" that a monopolist may charge. This Statement further prescribed a "safe harbor" rule whereby monopolists whose prices are no more than 20% above the costs recognized in the Statement, will not be subject to enforcement of the prohibition by the IAA.

3. Since the publication of Public Statement 1/14, it has been subject to extensive public debate in Israel, with regard to the very decision to prohibit an unfairly high price; the question of what is an unfairly high price; as well as the safe harbor prescribed therein.

4. In February 2017, the Director General issued Public Statement 1/17 concerning the IAA's Considerations in Enforcing the Prohibition against Unfairly High Prices (hereinafter: "**Public Statement 1/17**")<sup>2</sup> – which *replaces* Public Statement 1/14.

5. Public Statement 1/17, sets forth the IAA's updated policy. It sets out the main considerations and rules guiding the Director General in taking enforcement measures in cases where a concern arises that an unfairly high price has been charged. It also revokes the safe harbor presented in Public Statement 1/14. Public Statement 1/17 followed a comprehensive hearing conducted by the IAA regarding the issue.<sup>3</sup> In this framework, a variety of positions were submitted to the IAA; the IAA consulted international experts, and received an opinion from Prof. Frederic Jenny, former Judge of the French Supreme

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<sup>1</sup> For the full version of Public Statement 1/14, see: [http://www.antitrust.gov.il/files/34133/Opinion%2014%20prohibition%20of%20excessive%20pricing%20by%20monopolist\\_0414.pdf](http://www.antitrust.gov.il/files/34133/Opinion%2014%20prohibition%20of%20excessive%20pricing%20by%20monopolist_0414.pdf)

<sup>2</sup> For the full version of Public Statement 1/17, see: <http://www.antitrust.gov.il/files/34609/Publicn%20statement%2017%20unfairly%20prices.pdf>

<sup>3</sup> See *Inter alia*, a Background Document for the Reevaluation of Public Statement 1/14 was published on April 18 2016 (Background Document for the Reevaluation of Public Statement 1/14 on the Prohibition on Charging an Excessive Price by a Monopolist (18.04.2016), Antitrust 500966 ("**the Background Document**")); On 21 September 2016, a draft public statement was published for the public's remarks.

Court, and Chairman of the OECD Competition Committee<sup>4</sup>; also, an internal learning process took place based on the experience accumulated by the IAA in its implementation of Public Statement 1/14, since its publication.

6. Accordingly, this contribution will focus on the main criteria set forth by the IAA for taking enforcement measures in cases where the concern arises, that an unfairly high price has been charged, as outlined in Public Statement 1/17.

## 2. Brief Normative Framework: Israeli Competition Law and Monopolies

7. According to the Antitrust Law, 5748-1988 (hereinafter: the "**Antitrust Law**" or the "**Law**"), anyone possessing more than one half of all the supply of assets or the purchase thereof in a certain market is deemed a "Monopolist".

8. The two main restrictions applicable to a Monopolist pursuant to the Law are the prohibition set forth in Section 29 of the Law on refusing to supply the monopoly product on unreasonable grounds; and the prohibition – relevant to this contribution – set forth in Section 29A of the Law, concerning abuse of status in a manner liable to harm competition or the public. More particularly, Section 29A of the Antitrust Law prescribes as follows:

*"29A. (a) A monopolist shall not abuse its status in the market in a manner liable to reduce business competition or injure the public.*

*(b) A monopolist shall be deemed to be abusing its status in the market in a manner which might reduce business competition or harm the public, in any of the following instances:*

*(1) Establishing an unfair buying or selling price for the asset or service over which the monopoly exists;*

*(2) Reducing or increasing the quantity of the assets or the scope of the services offered by the monopolist, not within the context of fair competitive activity;*

*(3) Establishing different contractual conditions for similar transactions in a manner which may grant certain customers or suppliers an unfair advantage vis-à-vis their competitors;*

*(4) Conditioning the contract regarding the asset or service over which the monopoly with conditions that, by their nature or according to accepted trading practices, are unrelated to the subject matter of the contract.*

*The provisions of this subsection are supplementary to the provisions of subsection (a).*

9. The presumption relevant to the current discussion, is the one set forth in Section 29A(b)(1) above, whereby a monopolist that sets an unfair buying or selling price for the monopoly product shall be deemed to have abused its position.

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<sup>4</sup> See Frederic Jenny, "Abuse of dominance by firms charging excessive or unfair prices: an assessment"; Available at the IAA's website at: <http://www.antitrust.gov.il/files/34246/Excessive%20prices%20Final%20%20Signed%20Sept%202015%202016.pdf>

10. Before Public Statement 1/14 was published, this presumption was traditionally interpreted by the IAA as applying in cases where "predatory" prices were charged, i.e. as an exclusionary prohibition. Accordingly, with regard to unfairly high prices, the IAA in practice, *did not* take any enforcement measures. In this regard, the IAA's approach was aligned with the lack of clarity in Israeli case law: the only time that the Supreme Court discussed whether the prohibition existed, it refrained from ruling and noted that this was not an obvious question.<sup>5</sup>

11. However, in Public Statement 1/14 the IAA set out, for the first time, a position whereby charging an unfair high price by a monopolist is included within the definition of restrictions on the conduct of a monopolist by virtue of the conclusive presumption dictated in Section 29A(b)(1), and whereby the IAA will take enforcement measures against excessive prices of monopolists.

12. The frame of reference for Statement 1/17 is that charging an unfairly high price may, under the appropriate circumstances, be regarded as abuse of monopoly position. However, recognizing the existence of the prohibition on charging an unfairly high price is not the end of the debate but merely its beginning. Accordingly, Public Statement 1/17 sets a list of considerations, the existence of which will incline the Director General to enforce the prohibition on charging an unfair high price against a monopolist.

13. The considerations for enforcement shall be discussed hereafter.

### 3. The IAA's Principles and Considerations in Enforcing the Prohibition against Unfairly High Prices

14. The following underlying principles, ground the IAA's concrete considerations on whether to enforce the prohibition:

- *Enforcing the prohibition against an unfairly high price will be done only in the appropriate cases.* The IAA's is of the opinion that the substantive and practical difficulties in the doctrine of unfairly high prices do not lead to a conclusion that rules out enforcement against unfairly high prices. When it is not possible to take steps to correct the market structure, the IAA will examine the possibility of rectifying some of the harm by enforcing the prohibition against charging unfairly high prices.
- *The prohibition against unfairly high prices has disadvantages that should be considered when shaping the enforcement policy.* On the substantive side, price control chills incentives for investment and innovation; on the practical side, enforcing the prohibition against charging unfairly high prices may drain considerable resources; on the institutional side, it is doubtful whether the competition authority is the most appropriate body to regulate prices (for instance, in comparison with the Israel's Prices Supervision Committee operating pursuant to the Regulation of Prices of Goods and Services Law, 5756-1996, as well as the sectoral regulators). These are some of the concerns arising from use of the prohibition against charging unfairly high prices in a manner that is liable to be more harmful than beneficial.

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<sup>5</sup> See Paragraphs 15-17 of the judgment of Judge Naor (former) in Leave for Civil Appeal 2616/03 **Isracard Ltd. vs. Reiss** (published in Nevo, 14.3.2005).

15. Accordingly, alongside the recognition of the existence of a prohibition against a monopolist charging unfairly high prices, the IAA takes a *restrained* approach regarding cases that may be considered as violations of this prohibition and with regard to cases that may justify starting enforcement proceedings concerning the violation.

- *European law and European Competition Commission policy are an interpretive source in shaping the enforcement policy.* Section 29A of the Law was inspired by Section 102 of the TFEU, and the IAA's position is that the considerations to be exercised with regard to enforcement shall be similar to those common worldwide. Nevertheless, when the IAA considers enforcement in relation to a particular product, it shall take into account the specific characteristics of the market examined and *inter alia* the unique dynamics of the product market in Israel – a highly centralized economy, with imports restrictions, that in practice operates almost as an island economy.
- The IAA's enforcement of the prohibition against unfairly high prices is carried out with caution and in moderation, and focuses on clear cases where the benefit in enforcement outweighs the harm.

16. In line with the above, the two leading considerations, which form the basis for concrete criteria are the following: Firstly, enforcement will focus on the circumstances in which the IAA's static competitive analysis of the market, indicates that the monopolistic party is especially dominant; while the dynamic competitive analysis leads to the conclusion that natural competitive pressures or removal of barriers to entry are insufficient to encourage competition or to provide a solution for the absence of competition in the relevant market. Secondly, the *prima facie* severity of the violation will be weighed against the negative effects that may be caused by over-enforcement of the prohibition.

17. Against this background, the concrete criteria to be weighed by the IAA when deciding whether to enforce the prohibition against charging unfairly high prices with reference to a monopolist, are set forth below (such considerations are examined collectively, and in light of the specific circumstances of each case):

### 3.1. The Absence of Alternative Competitive Remedies

18. As a rule, structural measures that promote competition or prevent harm to competition are preferable to direct intervention in prices. Hence, the IAA will be more inclined to enforce structural measures such as removing the barriers blocking entry or barriers to expansion or to customer transfer; imposing behavioral prohibitions designed to prevent harm to competition; and creating a competitive process that will be beneficial for consumers. When it is possible to promote competition in the market and thus deal with the monopolistic firm's ability to raise prices, the IAA will prefer this solution over direct intervention in the price.

19. Moreover, since intervention in prices, in itself, affects the market dynamics, when the IAA identifies developing competition in the market or when structural measures, regulatory changes or other provisions aimed at promoting competition in the market are adopted, the IAA will refrain from intervention by way of enforcing unfairly high prices.

20. Thus, first and foremost, the IAA examines whether it is possible to rectify a contemplated market by creating a competitive process. When this is the case, the IAA takes action to prevent the monopolistic firm from adopting practices designed to fortify its monopolistic status and force out competitors. Alongside, the IAA may exercise its

authority to impose instructions to a monopolist with the aim of removing barriers and improving the competitive reality in the market. Furthermore, the IAA may counsel government ministries as to actions that will improve the competitive situation in the market.

### **3.2. The Price is Significantly Higher than the Price Expected to Have Been Set Under Competitive Conditions**

21. Naturally, an essential step in enforcing a norm prohibiting a monopolist entity from charging an unfairly high price, is determining that the price charged by the monopolist is higher than the one which would have been set under competitive conditions. This is a complex challenge both methodologically and the practically; and it is important to create a sufficiently clear test, *inter alia* so that a firm reasonably knows in advance that the price it is charging may lead to enforcement measures being taken. Whereas no such test is free of difficulties, any conclusion concerning unfairly high price should be supported by as broad as possible a range of indications.

22. As a bottom line, it appears that the cases where this challenge can be met will be cases where clear indications arise that the price charged is *significantly* higher than the price that would have been charged under competitive conditions. These indications may arise from the circumstances of the case as a whole, and generally, the IAA will be inclined towards a standard of excessiveness that is *blatant and clear*.

23. In appropriate cases, use can also be made of the tests accepted around the world and which are elaborated upon in the appendix to Public Statement 1/17. In any event, the threshold above which enforcement measures may be taken will be set in each specific case, taking into account the product's characteristics, on both the supply side and the demand side, as well as the market characteristics, such as investments, risk and tendency to innovation.

### **3.3. The High Price Charged is Unfair**

24. Deciding when a price higher than the price that would have been set under competitive conditions also becomes unfair, is complex. It includes a values-based judgement regarding the fairness of the price charged to consumers. Unlike predatory prices, where the main purpose of the Law – protecting competition – serves as an important tool in determining whether the price is unfair, in the case of high prices the main aim of the prohibition – preventing harm to the public – is more vague, and thus ruling on this matter is more complex. This evaluation cannot aim for an economic answer, but it must take into account its effect on the economy, which is examined with economic tools. This ruling integrates a balance between short-term and long-term considerations.

25. As a bottom line, when the IAA faces this question, it takes into account the power balance between the monopolist and the consumer. The greater the power difference is between the parties – the more inclined the IAA will be to view prices which are significantly higher than the prices that would have been charged under competitive conditions, to be an unfair act on the part of a monopolist.

26. In this context, the IAA will also take into account the monopolist's status in the market and the direct harm that has been caused to consumers. In most cases, measures against charging unfairly high prices will be taken when a monopolist, consistently and over time, has near-absolute control of the market. Similarly, when the concern arises that

the high prices charged by the firm prevent the creation of new products and services in adjacent markets or for competitors out of adjacent markets, this will also be a special consideration supporting intervening in the price. In addition, the concern regarding enforcing the prohibition against charging unfairly high prices of harming dynamic competition and firms' incentives to innovate and invest, is also considered.

27. Finally, when examination of the above considerations indicates that an unfairly high price may have been charged, the IAA may also take other considerations into account before deciding whether to enforce the prohibition, including *inter alia*, the existence of a sectoral Regulator – as is the case, for instance, in the pharmaceuticals market – as well as considerations relating to resource allocation.

#### 4. Revocation of the Safe Harbor Protection

28. Notably, in the framework of Public Statement 1/17, the IAA revoked its previously instated "safe harbor" protection prescribed in Public Statement 1/14, whereby a monopolist is protected against enforcement by the IAA as long as the gap between the price of its products and the cost of their production, does not exceed 20%.

29. The previous safe harbor protection arose from the desire to promote certainty and make it easier for a monopolist to plan its behavior, yet the Israeli experience gained since the publication of Public Statement 1/14 and the re-examination by the IAA have shown that it raises significant difficulties, such that the damage created by the protection and its harm to consumer welfare in the long term, considerably outweigh its benefits. Indeed, the main problem with the safe harbor was that courts interpreted it as a threshold indicating excessive pricing. Hence, monopolists that charged more than 20% above production cost would be considered as *prima facie* violators.

#### 5. The Type of Enforcement Measures Applied regarding Excessive Prices

30. The Israeli Law *inter alia* grants the Director General the power to take administrative enforcement measures against a monopolist that charges unfairly high prices (such as administrative sanctions pursuant to Section 50D(a)(3)). The Law also allows criminal enforcement measures to be taken against it (Section 47(a)(4A) of the Law), all subject to the conditions detailed in the Law.

31. The means of enforcement that the Director General will implement for charging an unfairly high price will be imposition of administrative sanctions on a monopolist; the IAA will not exercise criminal enforcement powers against charging unfairly high prices. Notably, the IAA has additional authorities, *inter alia* it may impose instructions and it may request an injunction from Court.

#### 6. Conclusions

32. As elaborated above, the IAA's policy on the question of a monopolist charging an unfair high price, has evolved in recent years, and is currently more consistent with the accepted theory in competition law worldwide, as well as, in the IAA's opinion, with conclusions drawn from enforcing the prohibition worldwide. The current policy is intended to focus the IAA's enforcement efforts on those cases where it is right to take

action against an unfair high price, in terms of the purpose of the Law and the core of the IAA's activity; the effective use of the IAA's resources; and in terms of minimizing the concern of harming incentives for innovation, and ultimately – consumer welfare.

33. Finally, it should be noted, that the Israeli economy is a unique one. It is a highly centralized economy which in practice operates almost as an island economy. These characteristics of the Israeli economy have given rise to the question of whether the policy instituted in Israel with regard to the prohibition against unfairly high prices should be different than the one accepted in the rest of the world. Different scholars have reached various conclusion on this matter. As is also discussed above, the IAA is of the opinion that the unique characteristics of the Israeli economy are insufficient to change the list of considerations to be exercised in relation to enforcement, but they may be relevant to a specific examination of a particular product market.