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Case Prioritisation and Prosecutorial Discretion – Note by Israel

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1. Introduction

1. The Israeli Antitrust Authority (the "ICA") inevitably operates under severe resource constraints. The ICA cannot investigate every complaint or prosecute each potential infringement. Consequently, mechanisms for case prioritisation and the strategic exercise of prosecutorial discretion are central to maintaining an effective enforcement pipeline.

2. This document analyzes how the ICA balances administrative efficiency, legal rigor, and transparency when selecting cases in the framework of its criminal enforcement program. It focuses on the formulation of objective case screening methodologies, and the boundaries of legal challenges of the 'unfair selective enforcement' defense.

2. Legal Framework

3. The principle of equality before the law is a foundational value of the Israeli legal system. A direct consequence of this principle is an individual's right to the equal and non-discriminatory enforcement of the law. The establishment of enforcement priorities inherently challenges this right, due to the very fact that the law may be enforced against one individual but not against another.

4. Nevertheless, Israeli Supreme Court has acknowledged the inherent resource constraints faced by every enforcement agency, recognizing that, in practice, full enforcement of the law is not possible. The Supreme Court emphasized "In practice, due to an inherent shortage of human and material resources, comprehensive enforcement is neither practical nor possible."¹ Against this backdrop, the Israeli Supreme Court established a legal framework for determining whether a case of enforcement priorities is in fact an 'unfair selective enforcement' in a manner that realizes the principle of equality on the one hand, while accommodating the limitations of enforcement resources on the other.

5. Israel jurisprudence developed the 'unfair selective enforcement' defense is part of the 'abuse of process' doctrine.² The Supreme Court ruled that in order to examine the 'unfair selective enforcement', three questions must be addressed: (1) what is the comparison group (equality group) to which the person raising the claim belongs; (2) how should situations of improper selective enforcement be distinguished from regular and legitimate situations of partial enforcement due to resource constraints and priorities; (3) what is the evidentiary burden imposed on the person making a claim of selective

¹ *Case 6328/12 State of Israel v. Poldi Perez* (10.9.13), in para. 29 (hereinafter: the *Infrastructure Contractors cartel* matter)

² The 'abuse of process' doctrine (literally: justice defense) was anchored in Section 149(10) of the Criminal Procedure Law, after it was first recognized in the Supreme Court's ruling in *Case 2910/94 Yefet v. State of Israel*, PD 50(2) 353 (1996). In this matter, the Court established the "Intolerable conduct of the authority" test, noting that this claim would arise and be accepted in extremely rare cases (para. 171). The doctrine is intended only for cases in which: "...the filing of the indictment or the management of the criminal proceeding fundamentally contradicts the principles of justice and judicial fairness." (Section 149(10))

enforcement.³ In this context, the Court clarified that even when it can be determined that different people belong to the same comparison group, certain differences in their circumstances can influence the determination of enforcement priorities within the framework of the second stage of the examination. The Supreme Court recognized that partial enforcement does not in itself constitute selective enforcement.

6. The Prosecution Authorities are vested with broad discretion in enforcement, and *inter alia*, including regarding decisions relating to prosecution. In the *Infrastructure Contractors cartel* matter, the Court referred to this discretion and ruled that the law and case law leave the authorities substantial scope of discretion in aspects relating to criminal enforcement, provided that the prosecutor decision while weighted the relevant considerations and those considerations alone, in good faith, fairly, without discrimination, in a reasonable fashion. Within the scope of this discretion, the Prosecution must examine the degree of public interest there is in full enforcement versus the possible advantages of partial prosecution, and the discretion granted to it in this matter is broad. When deciding which suspects or defendants to focus on, enforcement authorities may consider distinctions between the various suspects on the basis of the severity of their actions and their centrality in the commission of the offenses.

7. The Israeli Supreme Court clarified that to sustain a claim of illegal selective enforcement, the defendant bears the initial burden of presenting a *prima facie* case showing unequal treatment among true legal equals.⁴ Once that baseline is established, the burden shifts to the prosecution to demonstrate that its case selection rested on legitimate, relevant, and objective considerations.

8. A selective enforcement claim manifests in two patterns:

1. Intra-case Asymmetry: Prosecuting only a small subset of co-conspirators within the exact same criminal scheme without a rational justification.
2. Inter-case Asymmetry: Prosecuting for a violation of the law while historically failing to initiate similar criminal proceedings in similar cases.

9. Israeli courts treat the total dismissal of a criminal indictment as an extreme remedy of last resort. If an administrative fault in equality is discovered, courts favor proportional remedies. Minor deviations in equal treatment are typically addressed during the sentencing phase as mitigating factors, rather than by dismissing the charges entirely before trial.

2.1. Inter-case Asymmetry: The Infrastructure Contractors Cartel

10. In the Infrastructure Contractors Cartel case, contractors who boycotted a government tender tried to have their indictments dismissed by pointing to a previous antitrust matter (the Private Hospitals Case). In that Private Hospitals case, the ICA issued a non-criminal administrative decision and didn't file criminal charges.

11. The Supreme Court rejected this defense, maintaining that if the prosecution demonstrates a consistent, long-standing historical baseline of criminally prosecuting bid-rigging and collusive bidding, an isolated past exception does not dilute the legitimacy of the decision.⁵ Moreover, one case of relatively lenient exercise of prosecutorial discretion

³ *Case 8551/11 Yitzhak Cohen Salchagi v. State of Israel* (12.8.12), Section 14 (hereinafter: the *Salchagi* matter)

⁴ the *Infrastructure Contractors cartel* matter.

⁵ the *Infrastructure Contractors Cartel* Matter.

does not legally bind the prosecution to repeat that decision indefinitely. An isolated oversight cannot force the prosecution to permanently abandon its enforcement duties.

2.2. Intra-case Asymmetry: The Passenger Transport Companies' Cartel Case

12. In the passenger transport companies' cartel⁶, the ICA uncovered a cartel involving approximately 100 separate suspects (individuals and firms) and the alleged rigging of 160 distinct public procurement tenders. To prevent judicial gridlock and prevent the investigation from running for many years, the ICA deployed a two-stage filtering process grounded in economic and administrative parameters.

13. The ICA filtered the investigation to roughly 50 core suspects based on four cumulative criteria designed to isolate the most harmful market infractions:

- Execution Status: The arrangement had to have been fully operationalized into the market.⁷
- Fraudulent Fruit: The bid-rigging mechanism must have successfully yielded material financial proceeds via corporate deception.
- Financial Threshold: The prospective volume of the targeted tender had to be at least 4,000,000 NIS (~1,300,000 \$).
- Public Interest: The procurement entity targeted by the cartel had to be a public body (such as local municipalities, public hospitals, or the Israel Electric Corporation).

14. The ICA Prosecution further concentrated its resources on the most legally significant offenders. The Prosecution calculated a standardized "criminal score" ranging from 0 to 4 for each suspect. This score was derived by aggregating four equal parts (1:1:1:1) across two clear dimensions:

- Number of Infringements: The volume of independent cartel, fraud, and money laundering counts attributable to the individual.
- Financial Scope: The total volume of illicit revenue directly taken by the suspect.

15. Ultimately, a cut-off line was established by ranking the suspects and prosecuting the 17 individuals who achieved the highest scores, corresponding directly to the widest gap in the data between rank 17 and rank 18. Eventually, 13 individuals and 13 firms were indicted. The case is still pending.

16. The Court ordered the Prosecution to provide a detailed justification for its weights or recalculate its scores using a fairer, more transparent model. After the Prosecution submitted additional clarifications to the Court and conducted a recalculation of the criminal score, the Court found that there was no basis for allegations that the Prosecution rendered a decision that deviates from reasonableness. In reviewing the criteria, the Court ruled that the Prosecution acted within the scope of its discretion and selected clear parameters that reflect the severity of the acts. Therefore, and bearing in mind the rule regarding non-intervention by the Court in reasonable decisions made by the Prosecution, it found no cause to intervene in the Prosecution prioritization decision even if the

⁶ Case 4577-07-24 *Competition Authority v. Perez et al.* (24.10.25) hereinafter: *the passenger transport companies' cartel matter*).

⁷ Although the implementation of the arrangement is not part of the elements of the offense.

Prosecution could have made a different decision regarding the number of involved individuals to be prosecuted and even regarding the method for calculating the criminal score, as other reasonable possibilities exist.

3. Conclusion

17. The Israeli approach demonstrates that quantitative, criteria-based priorities models are highly effective tools for managing complex, multi-party antitrust cases under tight resource constraints. Such enforcement challenges are inherent to antitrust cases, predominantly in bid-rigging cases, which typically feature a vast web of co-conspirators and multiple interconnected instances of collusion. Consequently, these characteristics demand systematic assessment and consistent, reasonable prioritization from the very earliest stages of the investigation. However, to withstand legal challenges like 'unfair selective enforcement' defense, these models must be constructed on clear economic logic, applied consistently, and remain fully transparent under judicial review.