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Criminalisation of cartels and bid rigging conspiracies – Note by Israel

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http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm

Please contact Ms Sabine ZIGELSKI if you have any questions about this document
[Email: Sabine.Zigelski@oecd.org, Tel: +(33-1) 45 24 74 39]

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Israel

1. Introduction

1. The criminal prosecution of cartels and bid rigging cases is one of the stone pillars of the Israel Competition Authority's (the "ICA"). Cartels constitute criminal offenses under Israeli law, with violators investigated, indicted and sanctioned with imprisonment, for violations of the Economic Competition Law - 1988[1] (the "Economic Competition Law").
2. This contribution, opens with a discussion on the normative framework of the cartel offence under Israeli law, with a particular focus stemming from the Israeli experience, on the manner in which cartel and bid-rigging offences fit to be deliberated within in a criminal regime, and enforced through criminal measures. ICA's enforcement policy of cartel and bid-rigging violations is mainly criminal (while it has the authority to do so, ICA refrains from imposing administrative fines with reference to cartel and bid rigging cases).
3. Since its establishment, the ICA's Investigations Department initiated dozens of criminal investigations of cartels and bid rigging cases in a broad array of sectors, including home gas, bakeries, water meters, and elevator maintenance. The ICA's Legal Department has indicted over 50 cartels and bid rigging cases; and over 350 participants (individuals and corporations) have been found guilty.
4. ICA's experience shows, that the success of criminal enforcement of cartel and bid-rigging cases is not instant. It is a process, still undergo. It is built gradually, over the years – with considerable agency resources invested continually. Throughout the years, through increased enforcement by the ICA, both awareness of the public has been achieved as well as recognition by the courts of the severity of these offences. We will highlight this trend through an overview of the evolution of enforcement and punishments, as reflected through cases handled by the ICA. We will follow up with insights on practical aspects from ICA's experience, involved in this process – including the establishment of an internal investigations department, and an internal criminal-prosecution team. We will conclude with a short discussion on completing competition enforcement with fraud investigations and anti-money laundering offences, and recent developments in case law in this regard.

2. The Cartel Offence under Israeli Law: Normative Framework

2.1. Basic Legal Background

5. Cartel and bid-rigging offences have constituted criminal offences under Israeli law, from the outset, and the ICA itself, has held criminal enforcement authorities, as early as its establishment in 1994. The basic legal outline of the cartel and bid-rigging offences, is set forth under the Economic Competition Law. Article 2 of the Economic Competition Law, sets forth the definition of "a restrictive arrangement". Subsection (a) states that "A restrictive arrangement is an arrangement made between persons conducting business, under which at least one of the parties restricts itself in a manner which may prevent or reduce business competition between it and the other parties to the arrangement, or some

[1] Previously titled the Restrictive Trade Practices Act-1988. As part of an amendment to the law enacted in 2019, it was re-titled as the Economic Competition Law coinciding with replacing the agency title from the Israel Antitrust Authority to the Israel Competition Authority.

of them, or between it and a person who is not a party to the arrangement". According to Section 2(b), certain kinds of agreements are presumed to cause competitive harm: Arrangements involving any restraint "that relates to" price or profit-fixing; geographic or customer market allocation; or restraints on output quantity, quality, or type - are irrebuttably presumed to be restrictive.

6. According to section 4 of the Economic Competition Law, being a party to a restrictive arrangement, as defined under section 2, is prohibited unless the arrangement is covered by a block exemption[2], the parties obtained a specific exemption from the ICA's General Director[3] or an approval from the Competition Tribunal[4]. An arrangement can be found restrictive if it poses any cognizable prospect of competitive harm. In accordance with Section 2(b) of the Economic Competition Law, as mentioned above, certain *per se* conduct is irrebuttably presumed to have such effect.

7. Under Section 47(a1) arrangements that are not covered by a block exemption, nor protected by a specific exemption or granted with a Tribunal approval are a criminal offense. Section 47(a1) *inter alia* defines up to a 5 years prison term, or a criminal fine for any violation of article 2.

8. Section 48 of the Economic Competition Law sets forth that a corporation office-holder[5] is obliged to supervise and do everything possible to prevent an offense under the Economic Competition Law by the corporation or any of its employees; Anyone contravening this provision shall be subject to one year's imprisonment and the fine prescribed for an individual for that offense. In addition, if an offense has been committed under the Economic Competition Law by a corporation or any of its employees, it shall be presumed that an office-holder of the corporation breached its aforesaid duty, unless such office-holder has proved that it did everything possible to perform its duty.

9. For completion it should be noted, that while any violation of the Economic Competition Law constitutes a criminal offence, the decision to devote ICA's criminal powers, almost solely to cartels and bid-rigging violations, is an ICA enforcement policy decision. The framework for this enforcement policy is set forth in Guideline 1/12 on Enforcement Procedures for the Use of Financial Sanctions[6], furnished by the General Director.

[2] Section 15A of the Economic Competition Law, grants the General Director the power to establish block exemptions (the general director has published block exemptions, including, for instance for joint ventures; for research and development agreements; exclusive dealing; exclusive distribution or franchise and more.

[3] The Economic Competition Law, Section 14.

[4] Ibid, Section 13.

[5] "office-holder" in this section , is defined as an active manager in a corporation, a partner except a limited partner, or company official in charge of the field in which the offense was committed.

[6] Guideline 1/12 is available in English at: http://hegbelim.bvtech.co.il/eng/subject/177/item/32905.aspx .

2.2. A Closer Look at some of the Elements which Make Cartel and Bid-Rigging Violations fit to be deliberated under the Criminal Umbrella

10. Notwithstanding the increased adoption of criminal sanctions around the world, there is no international consensus on criminalisation of cartels[7]. In addition to the basic legal framework presented above, we will briefly discuss a number of prominent elements of cartel and bid-rigging offences which make such offences appropriate and well-fitting for criminal enforcement. All, as reflected through the Israeli experience in this arena.

11. Firstly, it appears that broad consensus does exists with reference to cartel and bid-rigging offences constituting the hard core of antitrust violations. They *inter alia* represent naked restrictions, the purpose of which is to harm competition; and indeed, there is no dispute as to harm which they cause to competition and to the public.

12. Cartel and bid-rigging offences are tantamount to non-violent theft offences, no-different than any other white-collar crime. As evident from experience, such offences are many times executed by "normative" business-persons. However, they reflect a simple deed: taking money in violation of the law from the pockets of consumers – and into the pockets of the offender. It is true that not always does the victim have a name; not always does the victim have a face. Many times harm is caused, to a large public or to public funds in general. Nonetheless, it is a variation of theft, and is thus fitting to be treated as such. The experience gained at ICA throughout the years, has provided various manners – some with clearer conspiracy elements than others – in which persons conducting business stole the competition and its benefits from the public. some examples include; conducting cartel meetings in hut-tubs, whereby participants were stripped off their clothes, in an attempt to prevent recording of the meeting; coding conversations within the cartel, fearing wire-tap; preparing fictitious agreements and false documentation to conceal the cartel; obstruction of investigative proceedings, and destroying incriminating documentation; switching bid offers; bidders fill-in suggested prices in their competitors bids; statements of an organizer of a cartel, according to which as many "back-up" bids should be submitted, so that if the cartel is discovered – it would be difficult to disqualify all participants in the replacement tender; extortion, and more. When such behaviors are viewed, and the severity of the actions and their potential damage to the public is recognized, it is clear that they fit for the criminal framework.

13. Indeed, Israeli law and its interpretation under case law, allow for the examination of these offences in the criminal arena. Section 2(b) of the Economic Competition Law (see above) sets forth irrebutable presumptions – according to which, if an arrangement relates to any of the alternatives set forth therein (e.g., prices, market allocation), it is presumed to harm competition. Therefore the likelihood of harm to competition does not require proof. Rather, the content of the arrangement itself, to the extent that it relates to the matters set forth under section 2(b), should be proven. Designing the law as such, is one of the corner stones which allow for criminal enforcement of cartel and bid-rigging offences.

14. Moreover, many violations of the Economic Competition Law (such as in relation to abuse of dominant position by a monopoly) tend to require an examination of complex economic issues, at times including theoretical aspects. Criminal convictions require proof beyond reasonable doubt. The combination of significant economic complexity and a high level of proof, make the criminal tool unfitting for certain antitrust violations. The science of economy, often speaks in the language of probabilities and estimations – neither of which

[7] Directorate For Financial And Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences, background note by the secretariat, 9 June 2020. (https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf)

fit within the criminal law framework. However, it does fit, and it is appropriate to the extent cartel and bid-rigging offences are concerned, and the irrebutable presumption set forth in the Economic Competition Law – make possible the proof beyond reasonable doubt in such cases. Notably, the recognition of the presumptions set forth under section 2(b) of the Economic Competition Law, as irrebutable, was made even before criminal enforcement in Israel has developed into its current status[8]. In later case law, courts reiterated it time and time again[9].

15. Another element which allows for criminal enforcement under Israeli competition regime, and which was stabilized primarily through case law, concerns the definition itself, of a restrictive arrangement, under Section 2 of the Economic Competition Law (see above). The Israeli legislator, was well aware of the different variations in which persons who conduct businesses could become parties to a restrictive arrangement – and thus intentionally set forth the term "arrangement", in order to describe the prohibited engagement. It furthermore broadly defines the term arrangement, under Section 1 of the Economic Competition Law as follows: "*whether express or implied, whether written, oral or by conduct, whether legally binding or not*". The words of the honorable Judge Verdimos Zeiler in the Kisin Case[10] illustrate this point very clearly:

> *"In light of the above, it appears, that the only interpretation which accomplishes the goal of the law in this area should determine, that the word arrangement includes any coordinated manner, executed by persons, who conduct businesses, the purpose of which is to impose a restrictive arrangement. It is none of the interest of the law, if such coordination was achieved through conspiracy, or through an arrangement, or through a third party, or by a wink of an eye, or by an understanding laughter, or by a coordinator who is a stranger to the arrangement, or by things said to someone who does not relate to the matter, in order for them to be heard by someone who does relate to the matter, or in any other way. The word "arrangement" set forth by the legislator is broad enough, to catch within it the entire span of possibilities described above, and any other possibility, and any novelty or invention made in the future, which bring about the coordination between the parties, which the law describes. The law speaks to its readers as follows: any way which you take, which has, or which leads, to a coordination which leads to a restrictive arrangement, is "the arrangement" written in the law."*

16. Indeed, the understanding achieved by both the legislator and the courts, according to which coordination between parties of a cartel can be illusive – paved the way, and justifiably so – to the broad interpretation of the term "arrangement". This recognition, is another element, which allows for the ability to prove a cartel or a bid-rigging case in an Israeli criminal court room.

17. Another element which allows for criminal enforcement in bid-rigging cases (and serves as one of the bases for its justification) is the recognition of the importance of the eradication of the phenomena due to its severity. Such recognition is well evident from Israeli case law. See for instance the following statement, made in the Traffic Lights Case case, see [7068/06][11]:

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[8] IsrSc 4465/98 **Tivol (1993) Inc. v. Shef Hayam (1994) Inc. et al.**

[9] For example, see: IscSc 4855/02 **State of Israel v. Dr. Itamar Borovitz**, 59(6) 776 , p. 868.

[10] srDc (Jer) 396/87 **Uri Kisin v. Petrolgas the Israeli Gas Company (1969) Inc.** (the "Kisin Case")

[11] IsrDc (Jer) 7068/06 **State of Israel v. Ariel Traffic Light Engineering and Control**, (the "Traffic Lights Case"), para. 13.

> *"…the severity which should be accorded to the deed of bid-rigging of a public tender is clear and understood. It is a conduct which undermines the main goal of the tender, and renders its rules and directions absent of content. Such conduct, especially when it is executed between competitors who hold a significant share of the relevant market, significantly harms the transparency of the tender, and the equal chance rendered to all competitors to win the bid, and especially the ability to keep the tender as an efficient tool meant to allow an authority to win maximum quality in a minimum price, for the welfare of the public.*
>
> *The Damage from the coordination of a public bid, stems also from the fact that the administrative authority is obliged according to law to examine the entities with which it engages in a tender, whereas generally, it will have to choose the lowest offer. Even in case that the lower offer is significantly more expensive than what was originally estimated by the authority… in the case of a continued coordination in a specific market, which is not discovered… the authority might have to pay time after times, significantly higher sums than the real value of the work which it requires or its preliminary assessment, without having control over this, and without being able to choose the entities with which it engages in another way. This is the case, whereas the burden of the financial damage cause by the coordination is imposed on the tax paying public"*

18. On the backdrop of the legal framework afforded by the Israel Economic Competition Regime, together with a criminal enforcement policy targeted at cartels and bid-rigging cases, we will provide an overview of the evolution of enforcement, and the clear trend in recent years towards stricter punishments imposed by courts.

3. An Evolution of Enforcement: Stricter Enforcement; Harsher Punishment

19. Successful criminal enforcement has been reached through an arduous step-by step process, which included establishing public awareness and obtaining judicial recognition that cartel offenses deserve severe punishment including incarceration.

20. Criminal enforcement commenced soon after the establishment of the authority in 1994 with the criminal investigation against the leading insurance companies in Israel for price fixing[12]. Indicted by the Economic Department of the Public Prosecutor, as the agency did not have internal prosecutors at that time, this case exposed an industry-wide cartel of the major insurance companies in Israel. Those companies, together with their directors, were indicted, convicted, and ultimately sentenced to either probation or community service.

21. Initially, notwithstanding harsh statements by the courts on the severity of such offences and appropriate sanctions, only suspended imprisonment verdicts, community service and fines were imposed; only in later years, more and more in de-facto imprisonment sanctions on violator, were imposed. Several major indictments marked this development.

22. In 2002, the ICA successfully concluded the prosecution of a nation-wide floor tile cartel, which had endured for over a decade. Now prosecuted by attorneys from within the agency itself – these indictments resulted in criminal convictions of several tile manufacturers including significant jail sentences. The court decided for the first time to send executives of entities that were involved in criminal cases to prison. For example, in one of the

[12] *See* IsrDc (Jer) 417/97 **State of Israel v. Israel Phoenix, Insur. Co.** (Sentencing Decision), 334 (sentencing Israel Phoenix Insurance Company to a fine of NIS 12 million and another company, Ayalon Ins urance Company to a fine of NIS 6.6 million NIS; the Supreme Court ultimately affirmed one sentence but did not review the other sentence).

proceedings[13] a CEO of a floor tiles company was sentenced, *inter alia*, to nine months incarceration.

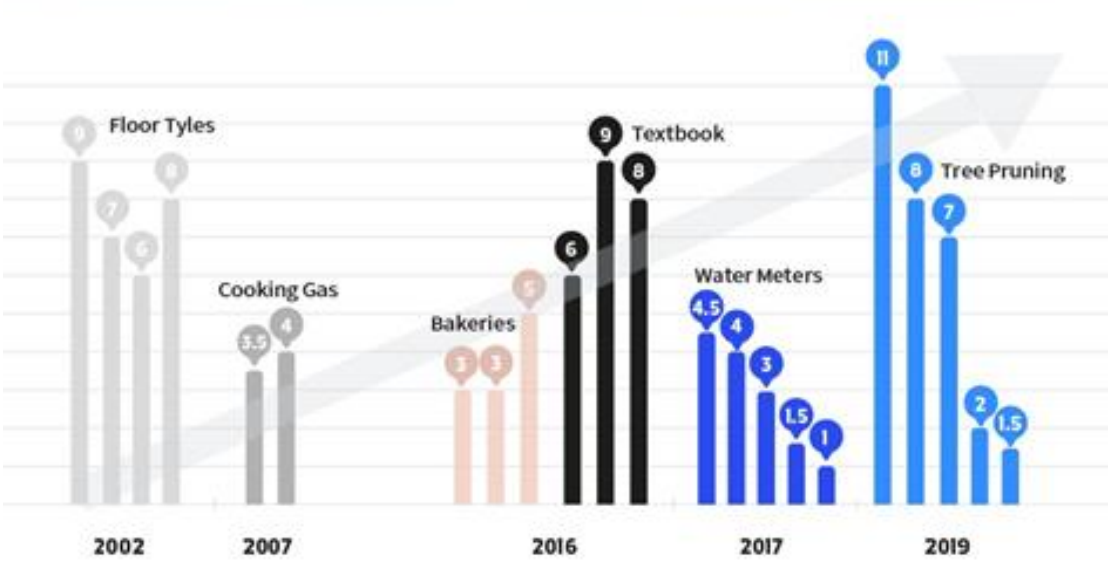
23. A 2007 conviction of the members of what was referenced as the home cooking gas cartel, which had colluded to allocate the market between the four major companies in the market, did not provide harsher sentencing. Managers of the suspect companies received relatively short sentences[14].

24. The Bakeries Cartel Case, which saw sentencing in 2016, was an initial signal by the courts that it had accepted the normative claim regarding the severity of cartel offenses. In this cartel, general managers in the main bakeries in Israel colluded to both fix the prices of bread and divide the client base. Sentencing by the District Court included up to 12 months incarceration, citing the severity of the crimes and justifying harsh sentencing. Nevertheless, reasoning that incarceration for such a long period for competition violations was novel and had no precedent, the Supreme Court decided on appeal, to shorten the sentence to a three months prison term[15].

25. The gradual process of harsher sentencing continued in the Water Meter Cartel Case, in the following months[16].

26. The most recent conviction in the Tree Pruning Cartel, further elaborated below, is the culmination of the process, in which the Supreme Court sentenced members of the cartel to sentences ranging from 4 up to 11 months of actual incarceration[17].

Figure 1. Actual Prison Sentencing for Cartel Offenders



[13] IsrDc (Jer) 2919/02 **Aloni v. State of Israel**.

[14] See IsrDc (Jer) **366/04 State of Israel v. Pinkhas (Piki) Biderman**.

[15] IsrSc 1656/16 **Yeshayahu Davidovith and others v. The State of Israel.** (the "Bakeries Cartel Case").

[16] For example see IsrDC (Jer) 49529-12-11 **State of Israel v. Ben Dror and others** (the "Water Meter Cartels).

[17] IsrSC 6339/18 **State of Israel v. Yaron Balva and others.**

4. Criminal Enforcement of Cartel and Bid Rigging Offences: Practical Aspects

27. Along-side, achieving courts' recognition of the severity of cartel and bid-rigging offences and increased sanctions imposed, the process of creating an effective criminal enforcement regime at the ICA, entailed a combination of elements, including *inter alia* creating and training an investigations department and establishing an effective in-house prosecution team.

4.1. ICA's Investigations Department

28. The Economic Competition Law provides the ICA with criminal enforcement powers, including the authority to detain, interrogate and arrest suspects, as well as to search offices and private dwellings, subject to a judicial warrant[18].

29. Implementing the Law on Cartel and bid-rigging offences required creating an effective criminal enforcement mechanism, which is both complicated and resource extensive. Such an enforcement mechanism relies on an intelligence apparatus able to locate potential violations and initial evidence, investigators qualified in gathering evidence, questioning, and finally implementing complex computer investigations. Following a successful investigation, a highly skilled array of specialized prosecutors is required to handle the unique aspects of a competition criminal case able to analyze the evidence and convincingly present it in front of a district court. Demonstrating the vast resources required - out of 140 employees in the Israeli Competition Authority, 34 are investigators, intelligence agents and supporting administrative staff.

30. The task of establishing an effective investigations department was complex and multi phased. Initially the ICA utilized private investigators for the purpose of investigation. This method was limited and subject to criticism[19]. The decision was made, therefore, to establish in-house investigation capabilities. For the purpose of creating an intelligence unit, former military police and national police officers were recruited. These agents brought with them vast experience from their respective agencies and working relations with sister agencies including the Israeli National Police Fraud Task Force. These agents recruited the first human sources which supplied substantive information regarding live cartels. The next step involved training investigators, many former employees from sister agencies, in the legal attributes of competition law and the basics of white-collar criminal enforcement. The department also utilized specialized enforcement tools, including wiretapping and advanced computer investigation tools.

31. With trained personnel, good working relations with sister agencies and combining technological tools - the established investigations department was able to uncover cartels in an ever-growing magnitude. This included uncovering multi member cartels including over 60 suspects, while limiting the use of immunity to only minor members of the cartel.

4.2. Establishing an In-house Prosecution Team

32. At first, prosecution was conducted by the Attorney General personnel. Later on, prioritizing anti-cartel investigations, a criminal prosecution team - within the legal department of the ICA - was established including district-attorney certified attorneys. This team gathered extensive experience in competition cases, handling vast amounts of evidence and tackling complicated legal issues. Encountering experienced defense lawyers,

[18] Article 45 and 46, Economic Competition Act.

[19] IsrSC (CA) **4855/02 State of Israel v. Borowitz** 59(6) 776.

competition cases routinely appeared on appeal in the Israeli Supreme Court. Notably, several general legal doctrines stem from competition cases in Israel[20].

5. Recent years' development: Completing Competition Enforcement with Fraud investigations and Anti-Money Laundering Offences

33. In recent years, deceit violations have become part of competition investigations and indictments reflecting the actual, full story of the violations, occurring during the implementation of an elicit cartel agreement. Indeed, in cases of bid-rigging, competition violations are often accompanied by other criminal offences. For instance, in addition to the cartel offence, by misrepresenting sincere participation in a tender and hiding their cartel agreement from the issuer - an act of deceit, is carried out. Another example is forgery of documentation, which may be executed during the production of false bids.

34. Under Sections 3 and 4 of the Israeli Anti Money Laundering Act[21] any income received after committing a violation listed in the first addendum to Act ("predicate offenses") can be seized. While competition violations are not predicate offences, deceit is. Therefore, any income received after winning a fixed tender by deceit is subject to forfeiture. When competition violations are conducted concurrent with deceit – subject to a court warrant and periodical judicial supervision – assets may be frozen upon the initiation of a bid-rigging investigation.

35. Indeed, making sure that all aspects of the illegal acts are indicted was made possible through the describe below two steps.

5.1. Enhanced Intelligence and Investigation Capabilities

36. Proving fraud violations in addition to competition violations and providing the necessary evidence for economic sanctions required the authority to develop intelligence and investigation capabilities comparable to those of the National Fraud Investigations Units – including human source handling, extensive wire-tapping and management capabilities of large volume investigations, among the largest within all Israeli investigational authorities.

37. The Tree Pruning Cartel referenced above, a cartel involving contractors who handle clearing trees, obstructing power lines and pruning trees for forest-fire control - is an example of the resources required for a combined competition, fraud anti-money laundering investigation. In the Tree Pruning cartel, a leniency applicant initially came forward with information claiming an existing multi-year wide scale cartel. Nevertheless, the applicant provided only scarce evidence regarding past bid rigging events. Accepting this information as a starting point, experienced intelligence handlers guided the applicant, now an intelligence source, to conduct recorded conversations, some even taking place inside hot tubs late at night.

38. Intelligence operators then combined source handling with wiretapping capabilities. Assisted with information as to where to target their efforts, the authority was able to

[20] For example, the legal precedent regarding the limits of the criminal protection from liability when acting in accordance with legal advice stems from IsrSc **845/02 State of Israel v. Tnuva Cooperative Center for the Marketing of Dairy Products.**

[21] Articles 3 and 4, to the Prohibition on Money Laundering Act, 5760 – 2000 (the "Money Laundering Act") – unofficial translation available at: https://www.justice.gov.il/En/Units/IMPA/MainDocs/Prohibition%20on%20Money%20Laundering%20Law,%205760%20-%202000.pdf

intercept incriminating conversation between members of the cartel regarding on-going violations, at volumes much higher than the data initially brought by the applicant.

39. These enhanced intelligence tactics proved successful as initial data from the applicant involved only few suspects. Following extensive wire-tapping and recordings brought in involving the source, the investigation now included over 60 suspects involved in a long year cartel including tens of tenders from all over Israel.

40. Combining forces with the Israeli National Fraud Unit, economic data regarding the assets held by the suspect companies and their directors was gathered prior to the launch of the investigation. A joint task force was established including agents from the National Police and the ICA to combat such a large scale investigation, with the overt investigation commencing in December 2010.

41. The overt investigation established even more elements of the cartel in other geographical parts of Israel. Handling so many suspects involved in numerous violations required meticulous organization of the evidence to make sure that the case against each suspect was complete and the human error was brought down to a minimum.

5.2. Criminal Prosecution of fraud and anti-money laundering

42. The process of establishing fraud prosecution capabilities occurred over several years and required side-by-side collaboration with the Economic Department of the Attorney General Office. The first implementation of fraud elements into the indictment occurred during the Water Meter Cartel and involved defending claims that adding fraud violations in cases of bid rigging was illegal and was de-facto charging double for the same criminal offense. This required extensive legal work spanning over several years. Eventually the court recognized that fraud violations occur separately and independently following the competition violations.

43. The next step was the addition of anti-money laundering enforcement. The Tree Pruning Cartel was the first to involve anti money laundering violations in addition to fraud indictments.

44. Initial reception in courts was mixed as defendants objected the freezing of their assets. On the one hand, the courts backed the use of anti-money laundering measures for bid-rigging violations, including deceit. On the other hand, lower instances set fourth that only direct profit, excluding expenses carried out during the implementation of the tender, should be frozen if at all[22]. Several years after the first implementation of anti-money-laundering measures in competition cases, in a recent Supreme Court decision it was decided that all income could be frozen, and no expenses could be subtracted from the frozen asset[23].

45. The combined implementation of novel legal thinking, enhanced intelligence capabilities and robust prosecution had led to a successful addition of notable tools into the arsenal of criminal competition enforcement – in an effort to reflect the full conduct, and its implications, as executed by offenders in cartel and bid-rigging cases.

[22] For example, see: IsrDC (Center) 52185-03-17 **Academy Travel and others v. State of Israel** 11.06.17 (Hebrew).

[23] IsrSC 6339/18 **State of Israel v. Yaron Balva and others** (Hebrew).

6. Conclusion

46. In a step-by-step process, the Israeli Competition Authority has worked to develop extensive case law and build the required capacities to create an enforcement mechanism with the ability both to uncover clandestine cartels and substantial prison sentences.

47. Establishing acceptance regarding the severity of competition violations, and the practical aspects of recruiting, training and operation both require extensive resources, and their implementation includes step-backs along the way. Nevertheless, in the end, ICA has acquired intelligence and investigation capabilities that allow it to uncover long-standing cartels and an in-house prosecution able to provide effective sentencing.

48. As detailed above, this process has resulted in an effective criminal enforcement regime providing tangible results. Criminal enforcement reflects the normative perception of antitrust violations as white-collar crimes, and provides sentencing that demonstrates to the public that severity of the harmful act.