

Unclassified

English - Or. English

8 June 2022

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

Working Party No. 3 on Co-operation and Enforcement

Interim Measures in Antitrust Investigations – Note by Israel

21 June 2022

This document reproduces a written contribution from Israel submitted for Item 2 of the 135th OECD Working Party 3 meeting on 21 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. Introduction

1. In June 2022, Working Party No.3 on Co-operation and Enforcement will hold a Roundtable on "*Interim Measures in Antitrust Investigations*". Interim measures, as defined therein, are "*Protective and corrective tools that may be adopted while investigating possible infringements. The main objective of interim measures is preventing anti-competitive harm that may occur before a decision on the merits*"¹. The discussion concerning interim measures has recently risen within the international competition community, *inter alia* on the backdrop of the challenges posed by the dynamic digital economy sector. However, the use of this tool in the context of antitrust enforcement – its essentiality alongside the challenges it may pose – is continually deliberated in additional contexts as well.

2. On this backdrop, this contribution will discuss the use of an interim measure within the context of the Israeli competition regime. It will do so, specifically with reference **the temporary seizing of money and property** within the context of criminal investigations and procedures. To this end, we will discuss the normative framework and considerations involved in imposing such measure².

3. Prior to elaborating on the above, this paper will put forth the general context of criminal investigations and prosecution of cartels and bid-rigging offences under the Israeli competition regime; and on this backdrop explore why the use such interim measure is an essential tool in the antitrust criminal enforcement toolbox.

4. In addition, this contribution will provide a brief overview of the Israel Competition Authority's (the "ICA") **advocacy efforts** with regard to **disqualification from public tenders and revoking of professional licenses**, following criminal investigations. While such advocacy efforts are not part of the enforcement regime, in essence and rationales the discussion regarding disqualification and revoking of licenses is a neighboring discussion to that of interim measures within the Israeli competition enforcement regime. In essence, disqualification and revoking of licenses, serve the same objectives as interim measures by preventing anti-competitive harm that may occur before a decision on the merits. Thus, discussion about these advocacy efforts are included in this contribution as well, and shall be addressed as an interim measure for the purpose of this paper.

2. Criminal Investigation and Prosecution of Cartels and Bid-Rigging under Israeli Competition Regime

5. Cartels constitute criminal offenses under Israeli competition law, with violators investigated, indicted and sanctioned with imprisonment, for violations of the Economic Competition Law - 1988³ (the "Economic Competition Law").

¹ Chairman's letter, 14 February 2022, calling for contributions in the context of the routable on "*Interim Measures in Antitrust Investigations*" (COMP/2022.026).

² The scope of this contribution does not include reference to other interim measures, such as in the context of Israeli civil and administrative competition regimes, including the mergers regime.

³ 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.

6. *In terms of a normative framework* – 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 of them, or between it and a person who is not a party to the arrangement*”. According to Section 2(b), particular 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.

7. 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 exemption⁴, the parties obtained a specific exemption from the ICA's General Director⁵ or an approval from the Competition Tribunal⁶. 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.

8. 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.

9. As shall be further discussed below, in recent years, **fraud violations** have become part of competition investigations and indictments reflecting the actual, full story of the violations, occurring during the implementation of an elicited cartel agreement. 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 the cartel agreement from the issuer - an act of fraud is carried out. Under Sections 3 and 4 of the Israeli Prohibition on Money Laundering Law (the “PMLL”)⁷ any income received after committing a violation listed in the first addendum to the Act (“predicate offenses”), can be confiscated. While competition violations are not predicate offences, fraud is. Therefore, any income received after winning a fixed tender by fraud is subject to confiscation. When competition violations are conducted concurrent with fraud – subject to a court warrant and periodical judicial supervision – assets may be seized upon the initiation of a bid-rigging investigation.

⁴ 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.

⁵ The Economic Competition Law, Section 14.

⁶ Ibid, Section 13.

⁷ Articles 3 and 4, to the Prohibition on Money Laundering Law, 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>

10. *In the practical context* – 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. The ICA's Legal Department has indicted over 50 cartels and bid rigging cases; and over 350 participants (individuals and corporations) were found guilty.

11. The development of criminal enforcement of cartels, is a gradual process. ICA's experience shows, that throughout the years, with increased enforcement by the ICA, as well as the use and development of relevant legal and practical tools – effective results may be achieved. The use of interim measures, where appropriate, is a part of this scheme.

3. Interim Measures in Antitrust Criminal Enforcement - Rational

12. Investigating and prosecuting cartel and bid-rigging violations extends over a long period of time. An investigation of a typical cartel case takes 1-3 years, and the prosecution of it takes 5-8 years. Such prolonged timetable, has undesired implications.

13. First, **lowering deterrence**. Clearly, the criminal penalty becomes less deterring than desired, whereas the process of the investigation, prosecution as well as final verdict, take years. Moreover, together with the low chances of "getting caught", agency experience shows that typical cartel offenders tend not to take into consideration an immediate and certain penalty. Rather, they consider the potentially significant timeframe until a final verdict is granted, which they expect may work in their favor. Under these circumstances, interim measures serve to increase deterrence.

14. Second, since the criminal process tends to extend over a long period of time, if the allegations are justified and to the extent that the investigated entities remain a part of the relevant market (which is often the case), the **procurement process may be harmed**. Thus, disqualification from public tenders serves the purpose of protecting the public procurement process from ongoing bid rigging schemes and from the participation of corrupt undertakings in bids conducted by the government. In some cases, the very same tender which was subject to the bid-rigging investigated continues after a dawn-raid, which makes the need for taking immediate action, even clearer. In such cases (see examples below), ICAs position is that it is necessary to publish a new tender, including stipulations enabling the disqualification of the suspect parties, according to the issuer's judgment.

15. On this backdrop, imposing such measure serves a **justice objective** as well: disqualification from public tenders, as well as revoking professional licenses, is the just governmental response to corruption. When an undertaking fixes prices or allocates the market with its competitors, the natural consequence should be that the government, as a trustee of the people, will refrain from engaging in business with it. This logic becomes even clearer when the undertaking was part of public bid rigging, and as such was misrepresenting sincere participation in a tender; even more so, in cases when the disqualification is from the same tender that was subject to the bid-rigging investigated. The same applies to revoking professional licenses. Confiscation of money and property also serves justice objectives since the money gained by fraud is not the legitimate property of the offender. Israeli courts have titled this logic as "depriving the offender of their ill-gotten gains". Therefore, temporary seizing of money and property, provided the need to assure the final confiscation – if it will occur, i.e., subject to a decision on the merits – serves that objective as well.

16. Though serving, as mentioned, both stopping competition harm, protecting the public procurement process and justice objectives, imposing interim measures is not a simple task. Some of the challenges are discussed below, alongside the normative framework of these measures. First, with reference to temporary seizing of money and

property, and second, with reference to disqualification from public tenders and revoking of professional licenses.

4. Temporary Seizing of Money and Property

4.1. Confiscation of Money and Property - Legal framework

17. Under Israeli law, confiscation of money and property is imposed – similar to other types of criminal penalties such as imprisonment or fines – as part of the final verdict. I.e., confiscation of money and property is imposed a significant period of time after the offence is committed, at the end of the investigation and the criminal proceeding.

18. There are two main types of confiscation of money and property, under Israeli law:

19. The first, confiscation of the actual property or money that was the actual means, by which the offence was executed, or the actual property or money that was the payment for the offence or of a property that is evidence of the offence⁸.

20. The second, confiscation of money or property in the same value of the property the offence was executed with or which facilitated the execution of the offence or that was earned as a result of the offence. Thus, in this case, there is no requirement to confiscate the actual money or property related to the offence. Rather, this path enables to confiscate any property or money of the convicted offender, as long as it is no greater in value, than the property or money related to the offence.

21. According to the PMLL, in order to impose the second type of confiscation – evidently the more common type of measure in antitrust cases – three conditions should to be met⁹:

1. The offender must knowingly act with the property or money related to the offence.
2. The offence must be one of the predicate offenses.
3. The action reference in Section 1 above, should be done within a period of 2 months at a minimum value of 150,000 Israeli New Shekel (approx. 42,500€). This is not required, if it can be proven that the offender acted with the prohibited money or property **in order to disguise the forbidden source** of the money or property.

22. Notably, Israeli courts set fourth two main objectives to the seizing remedy: **The proprietary objective**, i.e., the principal that the money or property seized cannot be treated as the offender's property, since it is prohibited property; **the deterrence objective**, seeing the seizing of property as an additional part of the criminal penalty puzzle.

23. Antitrust offences are not a predicate offence. Recent developments, as mentioned above, have made confiscation in antitrust cases a possibility, specifically, the addition of fraud offences to bid-rigging cases. Adding the fraud violations to bid-rigging indictments, reflects the actual, full story of the violations. It also enables confiscation and temporary seizing of money and property, since fraud is a predicate offence. By adding confiscation into its toolbox, ICA cleared the field to more deterring penalties.

⁸ Criminal Procedure Ordinance (arrest and search) §36.

⁹ §3(a), 4, 21.

4.2. Temporary Seizing of Money and Property – Legal Framework

24. Confiscation of money or property is a remedy imposed in the last stage of the proceedings. In order to assure the existence of the property intended to be confiscate in such last stage, the Israeli law provides the Court with the ability to allow the investigative authority to seize the money or property at the very beginning of the investigation.

25. In order to seize money or property, a court order must be granted prior to a dawn-raid; such order may be granted after a confidential report is presented to the court, including the evidence gathered thus far, and proving a reasonable basis for confiscation at the end of the proceeding. Throughout the investigation, the investigative authority is required to request the court to reaffirm its order every 6 month (subject to review of a confidential report, hearing both defense and prosecution)

26. After the indictment is filed, the prosecution can apply for a temporary seizing of money and property until the end of the proceedings. Contrary to the initial stage referenced above, at this stage, the court hears both the prosecution and the defense, and the prosecution must reveal its evidence. In this stage, the prosecution's burden of prove is higher, and it is required to show a *prima facie* evidence for the offences in the indictment as well as the proportionality of the measure requested.

27. Temporary seizing of money or property assures the existence of the property intended for confiscation in the last stage of the proceedings. By assuring the final confiscation, the interim measure helps to extend the deterrence of the criminal authority in the final stage, as offenders become aware that ill-gotten money or property cannot be secured.

4.3. Seizing Money or Property – Practical Investigative Implications

28. Seizing money or property carries practical investigative implications, which require the investment of additional resources of the investigative authority, as shall be briefly addressed below.

29. **In the pre-raid phase** – Seizing property demands particular investigative preparation in the pre-raid phase. In addition to the "traditional" preparations to an antitrust dawn-raid, the investigations unit is required to prepare a financial "road map" to the suspects' property. This means, *inter alia*, that in the first phase of the investigation, investigators petition court to receive appropriate orders for financial and proprietary data from banks, land registries etc. Within the intense framework of an antitrust dawn-raid, this imposes an additional significant workload, on the investigative authority.

30. **Throughout the investigation** – the financial and proprietary data are part of every suspect's investigation. Moreover, third parties' claims for rights in the property seized (such: the partner, the bank that provided mortgage etc.) are also to be investigated.

31. In addition, in some cases, **the on-going investigation** reveals a broader violations picture. In such case, investigators need to prepare for another round of a financial investigation in order to seize additional assets according to the updated value of the offences.

5. Disqualification from Public Tenders and Revoking Professional Licenses

5.1. General

32. As mentioned above, the criminal process tends to extend over a long period of time. In many cases the investigated entities remain a part of the relevant market, and sometimes the most significant firms in that relevant market. Thus, if the allegations are justified, the procurement process may remain subject to the same misconduct. Cartels, clearly, do not need to be re-affirmed every day to remain effective and bid-rigging schemes can last after dawn-raids, even without any further communication.

33. That is the main objective (alongside the other objectives as described above) of the disqualification from public tenders - preventing anti-competitive harm that may occur before a decision on the merits. The ICA's efforts in this regard, focus on assisting the tender's issuer.

5.2. Legal Framework

5.2.1. Disqualification from Public Tenders

34. While various types of interim measures, such as temporary seizing of property, fall under developed legislation – this is not the case concerning disqualification from public tenders. The latter, is not specifically regulated under Israeli law. In terms of case law, the Israeli Supreme Court (ISC) established that the public tender issuer, has a broad scope of consideration with reference to the question whether to disqualify from public tenders - mainly focusing on due process issues rather than on the merits¹⁰. Lower courts have granted a few decisions regarding disqualifying bidders *after* filing an indictment. As an example, in the Contactors Cartel Case¹¹, a bidder charged with taking part in a group boycott of a tender in the construction industry, was disqualified from participating in a government bid. The bidder appealed to the district court against its disqualification. The Court, dismissed the appeal and upheld the issuer's decision to disqualify the bidder, stating as follows:

"Though in this case it is an antitrust suspicion, not a felony of a morality type... it is a criminal offence directly related to a public tender, an offence that undermines the public tender's main objectives – free competition and equality between bidders".¹²

35. In the same case, the Court also stated that with reference to the above, the issuer may disqualify participants, during the investigation phase, and there is no need to wait until the end of the proceeding. An appeal on this decision to the ISC, was withdrawn.

5.2.2. Revoking Professional License

36. Under Israeli law, with reference to particular professions, specific violations may result in revoking licenses. However, cartel offences are not among these. Regardless, Attorney General Directives, guide prosecutors to inform relevant regulators of a few

¹⁰ IsrSc 3190/02 Kal Binyan Ltd. vs. Ramat Livnum - Wastewater Treatment Company Ltd 58(1) 590

¹¹ IsrDc (Central) 4190-02-16 Ken Hator Engineering and Building vs. Israel Police (the "Contractors Cartel Case")

¹² Ibid

regulated occupations, about an indictment or other developments in certain proceedings (e.g. lawyers, accountants, contractors, healthcare workers, public sector employees etc.). Revoking a professional license in the context of antitrust violations, is subject to the general terms and criteria used in such laws, e.g. "inappropriate behavior", as well as the specific regulator deciding that the cartel offence meets such criteria.

37. The lack of a particular, and obligatory "revoking rule" makes it challenging to advocate for revoking one's license on the grounds of committing an antitrust offence, even after conviction; and more so, in earlier stages. Whereas the language of the law does not oblige revoking of professional licenses under the circumstances of an antitrust violation, advocacy efforts have taken place by the ICA, vis-à-vis professional regulators. A regulator may initiate such process. In such case, ICA advocacy efforts vis-à-vis such regulator, may offer assistance in terms of legal and/or factual basis.

5.3. ICA's Advocacy efforts

38. This sub-chapter will outline some of ICA's advocacy outcomes in this regard. Prior to that, we will address the challenges involved in advancing such advocacy.

39. *The presumption of innocence* – disqualifying a bidder raises questions regarding the presumption of innocence, since it may limit one's right to property only on the base of suspicion. The same applies, accordingly, to the freedom of occupation, and revoking professional licenses. Even though relevant case law specifically states that, to this end, there is no significant difference between a post-conviction phase and the investigation phase, it may be a challenge for an issuer to disqualify a bidder. The more advanced the case is (investigation phase; hearing before indictment; indictment; conviction; forfeited conviction; etc.) the greater the ability to convince the issuer, through advocacy.

40. *Litigation costs* – the process of disqualifying or revoking a professional license, can involve massive litigation costs. Before taking such actions, the issuer must grant the bidder a proper hearing. In addition to the actual costs invested in the hearing itself, this can cause a long delay of the tender. In many cases, the issuer cannot bear the delay since it requires the goods or services urgently. That makes the decision to disqualify a bidder even harder.

41. *The significance of the particular bidders to the tender* – in many cases, participants in a bid-rigging scheme are the more significant competitors in the relevant field of activity. In some cases, the issuer of the public tender is concerned that disqualifying all entities that took part in the bid-rigging, will render the issuer without enough experienced potential bidders. Notably, such concern may itself raise competition questions, when the issuer wishes to refrain from reducing the number of potential bidders.

5.3.1. Sincere Bid Declaration

42. On the backdrop of these challenges, the ICA has recommended to include a "sincere bid declaration" (SBD) in every public tender, on the grounds that including such declaration can prevent bid-rigging in advance. These advocacy efforts took form in numerous lectures provided by the ICA to hundreds of public procurement officers, every year.

43. Following these actions, approximately four years ago, the Israeli Accountant General has directed that every public tender must include an SBD.

44. These directions clear the way for imposing two interim measures in the framework of a bid rigging investigation: **first**, the fact that a member of the bid-rigging conspiracy has signed an SBD, helps the issuer to disqualify that bidder, as no *bona fide* claims can be

raised. **Second**, the signed SBD also assists ICA in proving the fraud offence, which is necessary for confiscating the ill-gotten money (see above).

5.3.2. The Bus Transportation Cartel

45. In May 2018, after an extensive covert investigation, the ICA opened an overt investigation regarding suspicions of restrictive arrangements between bus transportation companies. The suspicions related *inter alia* to the companies dividing the market between them and bid rigging. After the investigation became public, a few issuers contacted the ICA to inquire whether their tenders were subject to bid rigging investigated.

46. In that early stage of the investigation, and taking into consideration on the one hand, the need not to disrupt the investigation, and on the other hand the importance of imposing interim measures, in order to stop the bid that was rigged by the suspects, the ICA agreed to disclose some evidences to an issuer who wanted to consider the disqualification of an undertaking that was allegedly part of the conspiracy investigated. Following this, the issuer called the bidder for a hearing, in which he was confronted with the evidence gathered by the ICA. Following the hearing, the issuer decided to terminate the contract at the first exit point and did not exercise an option to renew the agreement with the bidders involved in the conspiracy.

5.3.3. Cartel of Organizers of Youth Delegations to Poland

47. The Israeli Ministry of Education (MOE) organizes youth delegations to memorial sites and concentrations camps in Poland as part of the Holocaust memorial studies. In 2016 ICA initiated an investigation, suspecting a few main travel agencies for a cartel in the context of handling these delegations. Since the indictment was filed, several public offices have disqualified the agencies indicted, from Poland delegations tenders.

48. One of those, and certainly the most significant of them, was MOE itself. Since the indictment was filed, MOE has made efforts, bearing massive litigation costs, in order to disqualify the defendants from participating in the bids for executing the delegations. With the assistant of ICA, providing factual and legal basis for those efforts, MOE added a stipulation in the tender, which enabled – according to issuer's judgement – the disqualification of the indicted parties.

49. Following that, in March 2022, MOE temporarily disqualified those agencies from the next two years' Youth Delegations to Poland. Three of these agencies challenged the decision in Court, the petition of two was withdrawn; the third is pending.

5.3.4. The Tree Pruning Cartel

50. The Tree Pruning Cartel illustrates some of the obstacles, which a public tender issuer can encounter, concerning disqualification from public tenders of suspects or indicted parties to a bid rigging conspiracy. The case involved contractors who handle clearing trees, obstructing power lines and pruning trees for forest-fire control.

51. From the initial stages of the investigation, the Israel Electric Corporation (IEC) (the cartel victim) has invested efforts to disqualify the cartel members from upcoming tenders. At first, IEC added a precondition, disqualifying suspects or indicted parties of the cartel, while lowering other precondition, in order to enable new entrants to the tree pruning market. Despite IEC's efforts, no fitting bid was submitted. In a new attempt, IEC added a criterion to the tender, giving weight to the fact a bidder is a suspect or was indicted for being party to a cartel. In parallel, IEC noticed that several "new" players entered the market: the same pruning contractors involved in the cartel - in a new corporate suit. IEC

revealed the actual identity of the "new" parties, weighing in their participation in the cartel nonetheless. One of such parties, challenged this decision in Court, however the petition was withdrawn. Notably, to this date, every IEC public tender includes a precondition, disqualifying convicted parties in a cartel for 5 years after a conviction.

6. Conclusions

52. In recent years, it is becoming clearer to the ICA, particularly in the context of the criminal process, that immediate actions must be part of the proceeding, alongside the classic, lengthy investigation and litigations process. To this end, despite the challenges discussed, and the complexities in terms of resources, the incorporation of interim measures as well as advocacy efforts as described above, into the authority's toolbox, is thus critical.