International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Israel Antitrust Authority
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Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

The relevant legal provisions governing unilateral conduct in Israel are included in Chapter IV: Monopoly*;* of the Restrictive Trade Practices Law-1988 (hereinafter: "The Antitrust Law" or "the Law") a monopoly is defined by Article 26(a) of the Law as the concentration of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of a service in the hands of one person. According to Article 26(c) the Minister of Industry and Trade (hereinafter: "the Minister") may, pursuant to the Israeli Antitrust Authority General Director's recommendation (hereinafter: "IAA" and "the General Director" correspondingly), determine that, with respect to certain assets or to certain services, a concentration lower than one half shall be deemed to be a monopoly. Such a determination would occur if the Minister believes that a person holding such concentration has a decisive impact in the market relevant to such assets or services.

Notably, the monopoly provisions of the Law apply to any firm that meets the formal definition of a monopoly under Article 26, whether or not that firm actually possesses market power.

According to Article 30 of the Antitrust Law, the General Director may impose administrative instructions on a monopolist regarding measures to be taken by the monopolist in order to eliminate harm to competition or the public (hereinafter: "monopoly instructions"). A breach of those instructions is a criminal offense and a civil tort.

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

The Israeli jurisdiction recognizes a refusal to deal (hereinafter: "refusal to deal" or "RTD") as a possible violation of the Law. The RTD violation is recognized in Article 29 of the Law. In some cases Article 29A of the Law (Abuse of Position) may be applied.

Historically, Article 29: *Unreasonable Refusal* sets the rule for illegal RTD in Israel's jurisdiction. While RTD is not defined, the article states that for an RTD to be illegal, it must be "unreasonable".

Article 29A: *Abuse of Position*, which was added to the Law later on, sets the general prohibition imposed on a monopoly to abuse its position in a market in a manner which might reduce competition in the marketplace or injure the public. Its application requires a demonstration of market power.

Article 29A also enumerates irrebuttable presumptions stating when a monopoly is deemed to be abusing its position in a manner which reduces competition or injures the public: (1) the establishment of an unfair buying or selling price of an asset or a service over which a monopoly exists; (2) a reduction or increase in the quantity of the assets or the scope of the services offered by the monopoly, not within the contet of fair competitive activity; (3) the establishment of different contractual conditions for similar transactions in a manner which is likely to grant certain customers or suppliers with an unfair advantage vis-à-vis their competitors; (4) the inclusion in a contract regarding an asset or a service over which a monopoly exists of conditions that, by their nature or according accepted trading practices, are unrelated to the subject matter of the contract.

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

The relevant statutory provisions are Articles 29 and 29A of the Antitrust Law, as explained above in the response to Question 1. There are no separate provisions for specific forms of refusal.

3. Do the relevant provisions apply only to dominant firms or also to other firms?

The relevant provisions apply only to firms that conform to the definition of a monopolist under Article 26 of the Law.

The Antitrust Tribunal's ruling in *Yediot* (AT 2/96 Gen. *Dir. v. Yediot Aharonot Ltd.* (supplemental decision), 32(7) 2000 **IAA Website** 3008136) indicates that in order to establish an abuse of position pursuant to Article 29A(a), it is necessary to show the existence of market power; however, a market share exceeding 50% is a strong indication of such market power.

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

Refusal to deal is both a civil tort and a criminal violation. Abusing position in the market pursuant to provisions of Article 29A constitutes a criminal violation (According to Article 47(a)(4a): *Penalties*), provided that the monopolist's intention to either reduce competition in the marketplace or injure the public is proven. Refusal to deal, as defined in Article 29: *Unreasonable Refusal* may constitute a criminal offense on its own, and no specific intent is required. Refusal to deal may also constitute a tort in accordance with the Torts Ordinance.

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

The IAA performed as many as 10 in-depth RTD investigations in the last ten years. However, this number may vary by classification, as many RTD complaints are received and handled without a formal administrative act. At least four resulted in a formal act of enforcement according to Article 29 of the Antitrust Law. Other instances led to other enforcement measures taken against Abuse of Position according to Article 29A of the Antitrust Law.

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought

that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

Please state whether any of these cases were brought using criminal antitrust authority.

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

Over the past ten years, the following cases may be pertinent:

<u>Criminal Indictment</u>

a. In the *Ofek-Aeropan* (Air Photography) case (CrimC 1268/01 *State of Israel v. Friedlander et. Al*. Decision of 9/5/2004), the air photography companies Ofek and Aeropan were accused of consummating an illegal merger to monopoly. Having achieved monopoly through an illegal merger, the merging parties were also accused of having unreasonably refused to deal with their competitors in the downstream market for air photography products, such as certain types of air photography based maps. The defendants reached a plea bargain, and managers of the companies were sentenced to up to 5 months imprisonments to be served in community works.

<u>Administrative Determination According to Article 43</u>

Article 43 of the Law provides that, the General Director's determination may be used as prima facie proof of its subject matter in any legal procedure, and so private parties may rely on the determination in litigation.

b. In the *Egged-Nitzba* case (*Re: Nitzba Holdings 1995 Ltd. - Egged, Israel Transp. Coop*. (Determination of Restrictive Arrangement and Monopoly) 1999 **IAA Website** 3003820E), Egged, the Israeli bus-service monopoly, held 25 out of 36 central bus terminals through partially owned subsidiaries. Egged refused to allow other public transportation operators to access those terminals. In 1999, the General Director declared that Egged and its subsidiaries held a monopoly in the relevant geographic market for each central bus terminal. The General Director also determined that Egged and its subsidiaries were bound by an illegal restrictive arrangement, which did not allow the subsidiaries to deal with other public transportation operators.

c. In the *Bezeq-Hot* case (*Re: Bezeq the Israeli Telecomm Corp. (Determination of Abuse of Position*) 2007 **IAA Website** 5000727E), Bezeq, the Israeli telecommunication monopoly was found to have abused its position against another and newer Israeli telecommunication operator, HOT. Bezeq subscribers constituted the vast majority of the market. Due to a technical problem in one of Bezeq's sites, HOT subscribers were disconnected from Bezeq subscribers for 34 hours. A labor dispute and Bezeq's management initial decision not to invoke an injunction against the workers, as well as the management's failure to anticipate the events, prevented the prompt repair of the connection. Bezeq's management could have taken the necessary procedures promptly, since the technicians' work stoppages were not classified as a warranted strike by Israeli labor law. The General Director determined, according to the authority granted to her in Article 43 of the Law, that Bezeq abused its monopoly position.

Bezeq argued the case was in essence an RTD case, which should have been dealt solely under Article 29 of the Law. Had it been accepted, this argument would grant Bezeq a formal-technical defense against the determination under Article 43 of the Law. The General Director explained in her decision that Article 29A is not ruled out even if the case was an RTD case, since Article 29A establishes a wide and general behavioral norm that monopolies must abide by. The case is currently under appeal.

Consent Decrees

d. The *Elite-Cadbury* case (AT 612/06 *IAA General Director v. Strauss-Elite*, 2007 **IAA Website** 5000477) concerned Strauss-Elite, a food manufacturer that was declared a monopoly in chocolate bars. Strauss-Elite exercised illicit practices to hinder entry to the market of the UK imported Cadbury brand of chocolate. Among other measures, Strauss-Elite decided to withdraw all discounts from wholesalers who distributed Cadbury products. The case was closed with a consent decree, instructing Strauss Elite to pay the sum of 5 millions NIS to the State's treasury.

e. The Coca-Cola case, (AT 612/05 *IAA General Director v. Central Bottling Co. Ltd*. 2005 **IAA Website** 5000148) concerned the Central Bottling Company LTD (hereinafter: "the CBC"). CBC is the Israeli licensee of the Coca Cola brand and a declared monopoly in cola flavored carbonated drinks. In 1998, the General Director imposed monopoly instructions on the company. Two years later the CBC purchased a mineral water company named "Neviot". After the merger, the CBC conditioned the supply of its cola products and the commercial terms of the contract, including discounts, to the retailers' consent to purchase mineral water from Neviot brand and avoid the purchase of the rival Mey Eden brand. The case was closed after investigation with a consent decree, instructing the Company to pay the sum of 500,000 NIS to the State's treasury. The evidence in this case did not implicate the higher managers and was not as clear as in the Elite case, and hence the smaller payment.

Prominent cases before 1999 include the *Gibor-Sabrina* stockings case (discussed hereinafter) the General Director's Monopoly Instructions to Strauss Ice-cream (1998 **IAA Website** 3006305), and the Antitrust Tribunal's monopoly instructions imposed on Dubek, the local cigarette monopoly (*General Director of Antitrust Authority* v. *Dubek, Ltd.* (District Court Rulings 52 (8) 191), Hereinafter: "*Dubek"*).

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

Private parties are allowed to challenge a refusal to deal in Israeli courts. In the following notable cases a refusal to deal was successfully claimed:

a. The *Bikur Holim Hospital v. Clalit Health Service*s (hereinafter: "Clalit") medical insurance case (Misc.M(JER) 4300/07 *Bikur Holim Hospital v. Clalit*, 4/22/2007) concerned the liquidation of a non-profit hospital in Jerusalem (Hereinafter "the Hospital"). The relevant market was defined as government-financed hospital services in Jerusalem. Clalit was a monopsony purchasing almost 60% of government financed hospital services in Jerusalem – more than all its three competitors combined. Clalit demanded a 10 million NIS discount on services from the Hospital. The Hospital could not financially accommodate the request, and the Hospital's liquidator therefore refused the request. Subsequently, Clalit informed its cardiologists to stop referring patients to the Hospital. The Jerusalem District Court concluded that Clalit's refusal to deal with the Hospital was illegal on the basis that Clalit discriminated against the Hospital relative to other hospitals in Jerusalem. Another material fact considered by the Court was that, Clalit had already been given the largest discount among all insurers. The Court therefore instructed Clalit to deal with the hospital on the same terms preceding the liquidation process.

b. .The *Bazan – Paz* case (M(JER) 590/96 *Paz v. Bazan*, 7/25/1999) concerned Bazan, at the time the only oil refinery in Israel and the sole supplier of fuel oil. In 1996, the State of Israel ceased to subsidize the emergency inventories, which the fuel marketing firms held as operating inventories on Bazan's premises. Bazan tried to force the fuel marketing companies to continue to hold operating inventories of fuel on its premises. The Court viewed this demand as a constructive refusal to deal. A declaratory remedy was issued, according to which Bazan could not condition dealing with the marketing companies on their holding inventories of fuel oil on Bazan's premises. It is important to note that an extensive reform was later enacted in the refinery sector which divided the company into two separate competing companies, each operating a different refinery .

Evaluation of an actual refusal to deal

8. What are your jurisdiction’s criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

In order for a practice to be subjected to RTD investigation, the firm in question must be a monopoly as defined by Article 26 of the Law. The relevant competitive concerns are that the monopoly must be suspected of either reducing the competition in the market or of injuring the public.

Such was the case in the *Gibor-Sabrina* decision (CrimC(TA) 4783/93 *State of Israel v. Gibor Sabrina* et. Al. 1996 **IAA Website** 3005974). In that case, a stockings producer (hereinafter: "the Producer") was convicted of an illegal refusal to deal. The Producer had a monopoly over the production and distribution of stockings in Israel and refused to supply a certain brand of stockings to one of the retailers, on the grounds that the retailer was using them as a loss leader. The Producer was convicted of an illegal refusal to deal, despite the fact that it was willing to sell the retailer another brand of stockings. "A reasonable refusal", the court explained, is a refusal "that is compatible with the principles of antitrust laws and free competition". An RTD which allowed a monopoly to control the resale prices of its products was not, in the courts opinion, compatible with those principles.

The practice in question does not necessarily have to exclude or threaten to exclude a rival from the market, although these circumstances could be taken into account when considering the reasonability of RTD.

b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?

The Law does not require the demonstration of consumer harm in order for an RTD to be illegal. Although it is not a necessary condition to establish the illegality of an RTD, consumer harm could be taken into consideration when assessing the extent to which an RTD reduces competition or injures the public.

c. Does intent play a role, and if so what role and how is it demonstrated?

Explicit intent to refuse to deal in order to reduce competition plays a role only in criminal RTD proceedings. In such proceedings and under Article 29 (Unreasonable Refusal) establishing that the defendant was merely aware of the practice (*mens rea*) is enough to constitute intent. However, if these charges are litigated under Article 29A (Abuse of Position), then awareness alone is not sufficient to establish intent. Rather, specific intent to reduce competition or harm the public must be demonstrated and therefore a harsher punishment can be inflicted on those found guilty under Article 29A relative to Article 29.

In civil cases, which make up the majority of RTD suits, intent is not required but may play an important role as part of the evidence demonstrating public injury or competition reduction.

d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

Regardless of a prior course of dealing between the parties, refusals to deal are not evaluated differently, although a history of dealing between the parties in the past can be used as evidence to establish the illegality of the current RTD.

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

Refusals to deal are not evaluated differently even if the monopolist firm has had a course of dealing with firms that are non-rivals. In the event that a firm sells all of its products to everyone except its main rival, it may serve to bolster the case that the refusal to deal is intended to either weaken or drive out a main competitor.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

There is no distinct offense of restricting access to "essential facilities". The Law does not explicitly define an "essential facility". However, the court recognized the doctrine of essential facilities in *Dubek*. The IAA recognized the doctrine of essential facilities through the General Director's decision *Egged-Nitzba* (see above 6(b)). In the decision, an essential facility was construed as a facility, a business, a proceeding, or a factor that is an essential phase in the chain of production or delivery of a service, and that its absence eliminates competition.

Although the application of the essential facility doctrine is not necessary to invoke Articles 29, 29A, or 30 of the Law, the *Egged-Nitzba* decision further determined that the doctrine may create further justification and an even stronger basis for the application of the General Director's authority to issue instructions according to Article 30 of the Law.

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

There has not been a case yet in which IP laws have trumped the Antitrust Law on RTD issues in Israel. In the *Magal case* (AT 3/97 *Magal Security Sys. Ltd. v. General Directo*r, ATTRIB**)** the Antitrust Tribunal ruled that the Antitrust Law neither contradicts the Patents Law nor clashes with it. Furthermore, the acquisition of a patent by a firm does not necessarily allow it to abuse its market position and harm the public. Thus, patents do not exclude a patent holder from complying with the Antitrust Law. However, when deciding on such cases, the test that the Tribunal should adopt for the conflicting values is not constant. Rather, it may vary in accordance with the normative status and relative strength of the contesting values. This is done to uphold the integrity of patents and preserve the incentives for companies to invest in R&D in order to claim them. According to AT 3574/00 *IFPI Israel v. The General Director* (2004 **IAA Website**, 5000812) the same applies to copyright. Hence, the analysis of RTD does not differ for IP.

b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

There are no cases that deal directly with interface information and its effects on the interoperability of products. However, the above-mentioned *Egged-*

Nitzba decision relates to the interface between public transportation lines, i.e. the bus terminals, and may serve as an analogy to interface information in hi-tech markets. As explained above, the General Director ordered Egged and its subsidiaries to allow access to competitors. Although there has been no other precedent for dealing with interoperable products, the Egged decision leaves open the possibility that a refusal to provide interface information to make a product interoperable may be found illegal.

11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

The analysis does not change if the refusal occurs in a regulated industry. The RTD provisions of the Law generally apply equally to all industries, whether they are regulated or not. In 2007 the standard criteria to establish unreasonable refusal to deal, as established by Article 29A of the Law, were applied to Bezeq. Bezeq, a former government-owned telecommunication incumbent and a declared monopoly, has been privatized but is still subject to extensive regulation. The criteria were applied to Bezeq in the same manner as to any firm in an unregulated industry (See the *Bezeq-Hot* case, discussed above Question 6(b))**.** Similarly, the Israel Electric Corporation, a government-owned electricity enterprise, was prevented from constructing a new power plant that would have stipulated exclusivity by obliging the winning bidder to sell all energy of the new plant to the IEC alone for twenty years (AT 491/98 *Israel Elec. Corp. Ltd. v. Gen. Dir.*, ATTRIB). Thus, there are no broad special circumstances that apply to regulated industries when investigating RTD cases.

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

No, the analysis does not change. Please refer to the answer to Question 11 above.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

The Israeli jurisdiction recognizes a concept of constructive refusal to deal which also covers the situations where the monopoly's offering to supply its rivals is on unreasonable terms. The interpretation granted by the court to the provision "unreasonable refusal" (Article 29) is broader than absolute refusal to deal and includes a spectrum of constructive refusal situations. For instance, such situations include price discrimination, tying and other uncompetitive conditions (*M(Jer) 590/96 Paz Oil Company LTD v. Oil Refinery LTD*, passage 44).

Practices of constructive refusal to deal have also been manifested specifically in the presumptions stated in Article 29A(b). Such practices have been banned by the legislator when undertaken by a monopoly. These include unfair pricing for the asset or service held under monopoly (Sub-Article 1), unfair reduction or increase of the asset or service held under monopoly (Sub-Article 2), establishment of different contractual conditions for similar transactions (Sub-Article 3), and tying (Sub-Article 4). The demonstration of the practices enumerated by Sub-Articles 1-4 is sufficient in itself to establish reduction of competition and injury to the public. Furthermore, these presumptions may also indicate unreasonableness according to Article 29. For more information regarding the presumptions in Article 29A, please see the answer to Question 15.

The IAA has occasionally imposed ex-ante monopoly instructions or stipulated conditions on parties to mergers where RTD was a probable outcome of the merger. These measures have been employed where possible abuse of position and unreasonable RTD raised competitive concerns.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all,

your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

The IAA recognizes a concept of "margin squeeze" but this concept has not been addressed by the courts yet.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

As mentioned in the answer to Question 1, the Law determines four presumptions for violating Article 29A: *Abuse of Position*. A monopoly is deemed to be abusing its position in the market in a manner which might reduce competition in the marketplace or injure the public, in each of the following instances: (1) the establishment of an unfair buying or selling price of an asset or a service over which a monopoly exists; (2) a reduction or increase in the quantity of the assets or the scope of the services offered by the monopoly, not within the context of fair competitive activity; (3) the establishment of different contractual conditions for similar transactions in a manner which is likely to grant certain customers or suppliers with an unfair advantage vis-à-vis their competitors; (4) the inclusion in a contract regarding an asset or a service over which a monopoly exists of conditions that, by their nature or according accepted trading practices, are unrelated to the subject matter of the contract. These presumptions are irrebuttable, unless the monopoly proves that it cannot be deemed a monopoly, according to Article 26 of the Law.

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

The Law recognizes neither safe harbors nor presumptions of legality for a refusal to deal. However, the application of the RTD articles refers only to firms deemed as monopolists by the Law.

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

The IAA considers three defenses that could justify a refusal to deal: (1) the firm proves that it is not a monopoly; (2) the firm proves that the RTD was reasonable and economically justified; (3) that the RTD neither injures the public nor harms competition or excludes rivals. For example, in *Ran Cohen v. Strauss* (CC(TA) 2242/03 *Ran Cohen v. Strauss Elite Ltd*., 1/10/2006), Strauss Elite successfully proved to the court that their refusal to supply wide ranges of products to small retailers was economically reasonable and therefore the firm was not found liable for illegal RTD conduct.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

As mentioned above, the IAA has in some cases issued a determination that the refusal to deal was unlawful according to Article 43. In at least two cases a criminal sanction was imposed (*Ofek-Aeropan* – see above Question 6(a), *Gibor Sabrina* – see above Question 8(a)). In private cases, injunction obliging the monopolist to deal has been granted in the past, and damages have been issued as well (for example see CC(TA) 421/97 *X Telecommunication v. Bezeq International*, 4/27/2003). In the *Bazan-Paz* case (see above Question 7), a declaratory remedy was issued.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

The remedies given in regulated industries, such as communications or energy were available regardless of industry regulation.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.

Article 50A of the Law allows the General Director to request the President of the Antitrust Tribunal, or any other judge of the Jerusalem District Court, to order any person not to take an action which violates the Law, or to perform an action necessary for the prevention of such violation. This article has not yet been applied to a refusal to deal case.

The IAA applies the appropriate remedy for each case from the relatively wide range of remedies available. The IAA has not had an RTD case which was not brought for lack of appropriate remedy.

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

The policy considerations applied by the IAA when assessing refusal to deal cases are the actual or potential lessening of competition or harm to the public. Those are general policy considerations which apply to all RTD practices. However, the IAA holds a case-by-case examination. As stated in the Magal decision, competition and intellectual property rights are complementary and create incentives for innovation. Thus, the Israeli jurisdiction does not regard innovation and competition as conflicting values. In the case of a specific collision between the Antitrust and the IP laws the court will seemingly strike a correct balance on a case-by-case basis.

22. **Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases**.

No comments to add.