CrimA 845/02

State of Israel

v.

1. Tenuva Co-Op for Marketing Agricultural Produce in Israel Ltd

2. Yitzhak Landsman

3. Meir Ezra Marketing Ltd Marketing Ltd

4. David Ezra

The Supreme Court sitting as the Court of Criminal Appeals

[10 October 2007]

Before President D. Beinisch and Justices E.E. Levy, S. Joubran

Appeal of the verdict of the Jerusalem District Court (Justice Y. Adiel) of 12 December 2001 in CC 149/06.

Facts: The respondents were indicted on charges relating to the making of a restrictive arrangement under the Restrictive Trade Practices Law, in which the first and third respondents, through their respective directors, the second and fourth respondents, agreed to divide the imported meat market between them and fix minimum prices for the meat products that they sold. To further this venture they formed a company, Tnuva – Meir Ezra Imports and Marketing Ltd (TME). The respondents argued in the trial that the arrangements that they made did not constitute restrictive arrangements for the reason that they were made within the context of TME within which the respondents were not competitors. The District Court rejected this argument and held that the arrangement was a restrictive one.

Notwithstanding this finding, the District Court went on to acquit the respondents after the Court had been satisfied that the respondents had made the restrictive arrangement as a result of a mistake of law. The trial court accepted the respondents' claim that they had relied on the advice of their lawyers, according to which the arrangement that they made within the context of TME was not prohibited by the law. Under s. 34S of the Penal Law, a mistake of law constitutes a defence in criminal cases, if the mistake is 'reasonably unavoidable.' The District Court held that the respondents' reliance on their lawyers' advice made their mistake 'reasonably unavoidable,' and it therefore acquitted them.

The state appealed.

Held: The defence of a 'mistake of law' contains two elements: a subjective element, that the defendant did indeed make a mistake of law, and an objective element, that the mistake was 'reasonably unavoidable.' The defence is an exception to the fundamental rule that ignorance of the law is no defence, and it is therefore a narrow one. It should be interpreted narrowly because of the dangers that it presents to the public interest.

The mistake does not need to be absolutely unavoidable, but only 'reasonably unavoidable.' The defendant needs to take reasonable measures to avoid the mistake, but not every possible measure. The defence need not rely on the opinion of a competent authority, but may be based on the advice of a private lawyer. However, not every advice of a private lawyer will give rise to a defence of a mistake of law.

Where a defence of a mistake of law relies on the advice of a lawyer, the reliance claim should itself satisfy the test of reasonableness. This test is applied with reference to the specific defendant, the possibilities available to him for ascertaining the legal position and the legal questions in the case. Where the legal question is complex and the law unclear, it is more reasonable to rely on professional advice. By contrast, where the question is less complex and the conduct under scrutiny lies closer to the heart of the relevant offence, it will be less reasonable to rely on legal advice as a justification for that conduct.

The reasonableness of the reliance also depends on the status and professional experience of the defendant. A person holding a senior office is expected to be more familiar with the laws relevant to his job. In such circumstances, blind reliance on legal advice is less reasonable.

The court laid down four criteria for determining whether a mistake of law based on legal advice is 'reasonably unavoidable.' First, the legal advice should be based on all the relevant facts. Second, the lawyer consulted should have expertise in the relevant field. Third, the legal advice should be a serious legal opinion, and it should therefore usually be in writing. Fourth, the advice of a private lawyer is only significant if there is no possibility of obtaining a prior opinion of a competent authority as to the interpretation of the relevant law.

In this case, the restrictive arrangement made by the respondents concerned the very essence of the prohibition of restrictive arrangements, namely the fixing of prices and a division of the market. The respondents had prior experience in the field of restrictive arrangements. Therefore, reliance on an oral and unreasoned legal opinion, which did not consider the distinctions between the present case and previous cases and did not address concerns raised by the director-general of the Antitrust Authority, did not constitute a 'reasonably unavoidable' mistake. Moreover, as senior directors, the second and fourth respondents should have been personally aware of the problematic nature of the TME venture from the viewpoint of restrictive trade practices law. Even if their mistake of law was a sincere mistake, as the District Court held, their reliance on the legal advice given to them, which did not examine the matter in depth or state the reasons for its conclusions, was unreasonable.

In the circumstances, the respondents' legal mistake, even if made in good faith, was not 'reasonably unavoidable.'

Appeal allowed.

Legislation cited:

Income Tax Ordinance [New Version], 5721-1961, s. 220.
Interpretation Law, 5741-1981, s. 4.
Penal Law, 5737-1977, ss. 5(a), 12, 17, 20, 34E, 34R, 34S, 34V(2), 34W.
Restrictive Trade Practices Law, 5748-1988, ss. 1, 2, 2(a), 2(b), 3(5), 4, 10, 15, 15A, 43A, 47(a)(1), 48.
Restrictive Trade Practices (Class Exemption for Joint Ventures) Rules, 5766-2006.

Israeli Supreme Court cases cited:

[1] CFH 4465/98 *Tivall (1993) Ltd v. Sea Chef (1994) Ltd* [2002] IsrSC 56(1) 56.
[2] CrimA 1182/99 *Hurvitz v. State of Israel* [2000] IsrSC 54(4) 1.
[3] CA 6222/97 *Tivall (1993) Ltd v. Ministry of Defence* [1998] IsrSC 52(3) 145.
[4] CrimA 4855/02 *State of Israel v. Borovitz* [2005] IsrSC 59(65) 776.
[5] CA 2768/90 *Petrolgas Israeli Gas Co. (1969) Ltd v. State of Israel* [1992] IsrSC 46(3) 599.
[6] CrimA 7399/95 *Nechushtan Elevator Industries Ltd v. State of Israel* [1998] IsrSC 52(2) 105.
[7] CrimA 2929/02 *State of Israel v. Svirsky* [2003] IsrSC 57(3) 135.
[8] CrimA 389/91 *State of Israel v. Weismark* [1995] IsrSC 49(5) 705.
[9] CrimA 4675/97 *Rozov v. State of Israel* [1999] IsrSC 53(4) 337.
[10] CrimA 4260/93 *Haj Yihya v. State of Israel* [1997] IsrSC 51(4) 869.
[11] CrimA 4148/03 *Cohen v. State of Israel* [2004] IsrSC 58(2) 629.
[12] CrimA 2848/90 *Asa v. State of Israel* [1990] IsrSC 44(4) 837.
[13] CrimA 3632/92 *Gabbai v. State of Israel* [1992] IsrSC 46(4) 487.

Israeli District Court cases cited:

[14] CrimC (TA) 181/99 *Tnuva Ltd v. State of Israel* (unreported decision of 1 September 1993).

American cases cited:

[15] *United States v. Penn-Olin Chemical Co*., 378 U.S. 158 (1964).
[16] *Cheek v. United States*, 498 U.S. 192 (1991).
[17] *Bisno v. United States*, 299 F. 2d 711 (1961).

For the appellant — M. Halperin, S. Keisar, D. Gideoni.
For the first respondent — A. Caesari.
For the second respondent — A. Klagsbald.
For the third and fourth respondents — I. Leshem, N. Weisman, R. Peleg.

JUDGMENT

President D. Beinisch

The respondents in the appeal before us were acquitted in the judgment of the Jerusalem District Court (Judge Y. Adiel) of offences of making a restrictive arrangement under the Restrictive Trade Practices Law, 5748-1988 (hereafter: the Restrictive Trade Practices Law). The District Court held in its judgment that the respondents should be acquitted of the offences with which they were charged, even though it found that they had in fact committed these offences, because they had a defence of mistake of law, as set out in s. 34S of the Penal Law, 5737-1977 (hereafter: the Penal Law). This led to the appeal before us, in which the state argues that the aforesaid defence does not apply in the respondents' case. The main question that we are required to decide in this case is whether, and in what circumstances, a person may rely on a legal opinion concerning the legality of a certain act in order to succeed in a defence of a mistake of law when he is indicted for committing the offence that is the subject of the opinion.

1. The first respondent (hereafter: Tnuva) is one of the largest corporations in the Israeli economy and its business is the marketing of food products, including meat products. The second respondent (hereafter: Landsman) held office as the CEO of Tnuva at the times relevant to the indictment. The third respondent (hereafter: Meir Ezra Marketing Ltd) is a company that is also in the business of marketing food, including meat. The fourth respondent (hereafter: David Ezra) held office as the CEO of Meir Ezra Marketing Ltd at the times relevant to the indictment.

The sequence of events and the judgment of the District Court

2. The following are details of the sequence of events in the case before us, as they are set out in the judgment of the District Court. In 1993 the government decided to ease restrictions on the import of frozen kosher meat into Israel, so that it could be carried out by private commercial enterprises and not by the Ministry of Industry and Trade, as had been the case until that time. The commercial import of kosher meat into Israel began in October 1993. Against the background of allowing private importers to import frozen kosher meat, Tnuva and Meir Ezra Marketing Ltd decided to collaborate and set up a joint venture that would handle the import and marketing of frozen meat into Israel. For this purpose, on 28 July 1993 Tnuva and Meir Ezra Marketing Ltd made a venture agreement to work together, in which they agreed to set up the company Tnuva – Meir Ezra Imports and Marketing Ltd (hereafter — TME). The venture agreement also provided that the issued and paid-up capital of TME would be owned by Tnuva and Meir Ezra Marketing Ltd in equal shares and that each of them would have a right to appoint half the directors in the company. On 26 July 1993 TME was indeed founded in accordance with the venture agreement. Landsman and David Ezra also held office, in addition to their other offices, as members of the small board of directors of TME, which was responsible for the day to day running of TME; Landsman held office as the chairman of the board of directors of TME and David Ezra held office until July 1994 as the CEO of TME. According to what was alleged in the indictment, TME was intended to serve as a means of implementing the joint decisions of Tnuva and Meir Ezra Marketing Ltd in the field of meat marketing. It was alleged that the two companies agreed to appoint themselves as the sole marketers of meat that would be imported through TME and that they would buy the frozen meat solely from TME on identical terms.

3. On 25 November 1993 a meeting of the board of directors of TME was held. The minutes of that meeting set out various arrangements concerning TME's marketing policy (hereafter: 'the minutes'). There is no dispute that it was decided in those arrangements that Tnuva and Meir Ezra Marketing Ltd would be appointed the marketers of TME; they contained provisions with regard to the customers to whom the meat would be marketed by TME and by Tnuva and Meir Ezra Marketing Ltd; a division was made of meat marketing quotas between Tnuva and Meir Ezra Marketing Ltd; various provisions were made with regard to the prices of the meat that was being sold and price reductions. The arrangements in

the minutes formed the basis for the indictment that was filed against the respondents, since according to the state these arrangements are an expression of agreements reached between Tnuva and Meir Ezra Marketing Ltd that constitute a prohibited restrictive arrangement under the Restrictive Trade Practices Law.

The agreements between Tnuva and Meir Ezra Marketing Ltd that the state claims should be regarded as restrictive agreements include the following: a division of the customer market so that Tnuva and Meir Ezra Marketing Ltd would not compete with one another or contact the customers that were identified as the customers of the other party; defining certain customers as 'select customers' who would be regarded as TME's customers, who would not be approached by Tnuva or Meir Ezra Marketing Ltd; dividing the quantities of meat intended for marketing so that Tnuva would buy 80% of the quantity of meat intended for marketing, whereas Meir Ezra Marketing Ltd would buy 20%; fixing minimum prices for meat that would be marketed by the two companies, by determining that they would not sell the meat at a price lower than the minimum price, or at a reduction, without mutual consent; in this respect it was agreed that the minimum price would be determined from time to time within the context of TME; determining special sales and commercial terms for customers, such as credit terms. The state further claimed that these agreements were actually implemented by Tnuva and Meir Ezra Marketing Ltd, since from the month of October 1993 until October 1994 they fixed minimum prices through TME for various types of meat, and they fixed the commercial terms and prices at which meat would be sold to various parties.

4. It can be seen from the judgment of the District Court that the defences presented by the respondents were not identical. Tnuva and Landsman admitted most of the state's factual allegations with regard to the agreements between Tnuva and Meir Ezra Marketing Ltd, but they claimed that from a legal viewpoint they do not constitute prohibited restrictive arrangements under the Restrictive Trade Practices Law. Tnuva and Landsman also argued that they were entitled to a defence of mistake of law, because of legal advice on which they relied. Meir Ezra Marketing Ltd and David Ezra also raised legal arguments similar to those of Tnuva and Landsman; but they also denied the factual allegations in the indictment, claiming that the state misinterpreted the minutes and that the respondents did not reach any agreements with regard to dividing the market and fixing the prices of the marketed meat, as alleged by the state.

5. In its judgment the District Court held, after it examined the text of the minutes and the testimonies of the various officers of Tnuva and Meir Ezra Marketing Ltd, that the recommended minimum prices to which the minutes refer are minimum prices that TME was supposed to set for its two marketers when they sold meat to their customers. In other words, it was agreed that the two marketers would not be entitled to sell meat to their customers at prices lower than the minimum prices or to give price reductions that would lead to the sale of the meat at prices lower than the minimum prices without special approval from TME. In this context the District Court rejected the version of events presented by David Ezra with regard to the meaning of the minutes, according to which the recommended minimum prices are the prices at which TME itself would sell the meat to Tnuva and Meir Ezra Marketing Ltd, since TME had no interest in the price that the marketers charged their customers. The court reached this conclusion mainly from the language of the minutes. Thus, for example, para. A2 of the minutes states that: 'The company (TME) shall determine, from time to time, a recommended minimum price for its products.' The court accepted the state's contention that if this refers to the price at which the meat was sold by TME to the marketers, the meaning of the word 'recommended' is unclear, since TME could not be expected to recommend to itself the price at which it would sell the meat, and it is also unclear why it was necessary to define this price as a minimum price. Additional provisions in the minutes also supported the conclusions of the trial court that the minutes should be interpreted as referring to various restrictions relating to the prices of meat that Tnuva and Meir Ezra Marketing Ltd would charge their customers. The District Court also pointed out that special weight should be

attached to the testimony of Landsman, who supported the state's factual contentions with regard to the price-fixing, even though this was clearly contrary to his own interest.

The court also added that the fact that the price-fixing that was agreed was never (or almost never) put into practice and the fact that Tnuva and Meir Ezra Marketing Ltd each determined its own price for selling the meat to its customers and the reductions that it would give them cannot shed any light on the interpretation of the provisions of the minutes, in view of the various reasons given to the court as to why the agreements were not implemented, including the fact that neither of the parties was interested in implementing the arrangement, the fact that the arrangement was determined on the basis of an expectation that there would be a shortage of meat, which did not in fact happen, and the difficulty inherent in implementing the provisions of any monopolistic arrangement.

Eventually the court found that Tnuva and Meir Ezra Marketing Ltd had indeed agreed to fix prices and price-reductions for the sale of the meat. This fixing related first and foremost to the sale of meat to the 'select customers,' but also to the sale of meat by Tnuva and Meir Ezra Marketing Ltd to their customers. As we have said, these agreements were not actually implemented. But the court held that this does not alter the fact that these agreements were restrictive arrangements, since according to the case law of this Court the actual implementation of an arrangement is not required for that arrangement to be deemed a restrictive arrangement that is prohibited under the Restrictive Trade Practices Law.

6. An additional agreement between Tnuva and Meir Ezra Marketing Ltd, which the state claimed amounted to a prohibited restriction, was that the two marketers should only buy meat from TME, and that TME should give both of them the same commercial terms for the purchase of the meat. The District Court held that in view of the wording of the indictment, the state's claims on the aforesaid matters went beyond the indictment, and it found that these charges could not be brought against the respondents.

7. Another accusation that was made against the respondents was the division of customers between Tnuva and Meir Ezra Marketing Ltd. The state admittedly withdrew the charge concerning the agreement between Tnuva and Meir Ezra Marketing Ltd not to compete with one another, but it claimed that they reached an agreement, which should be regarded as a restrictive arrangement, according to which only TME would market meat to customers who would be defined as 'select customers,' whereas Tnuva and Meir Ezra Marketing Ltd would refrain from marketing meat to these customers. The minutes also constituted the main evidence of this agreement, since they expressly state that TME would market meat to the customers set out in appendix A of the minutes, who would be called 'select customers,' whereas Tnuva and Meir Ezra Marketing Ltd would market the meat that they would buy from TME to customers who were not 'select customers.' In addition to what was stated in the minutes, the accusation concerning the division of customers was supported by the testimonies of Landsman and additional witnesses. The District Court found that the provisions of the minutes do indeed reflect an agreement that the sale of the meat to the select customers would be carried out by TME, rather than by Tnuva and Meir Ezra Marketing Ltd, and it added that this was sufficient to constitute a restrictive arrangement under the Restrictive Trade Practices Law. In this respect, the District Court rejected the factual claim raised by David Ezra in his testimony that the provisions of the minutes should not be understood as a prohibition to sell meat to the select customers, which was imposed on Tnuva and Meir Ezra Marketing Ltd, but as a reflection of the situation that *de facto* existed at that time, since the list of select customers reflected those customers who had bought meat in the past directly from the government, for which reason David Ezra claimed that they would have to be given a reduction by TME.

8. In addition to the division of customers, the respondents were also charged with dividing the meat market according to the quantity of products. This accusation was based on a provision in the minutes which stated that approximately 80% of the amount of meat that was not marketed to the select customers would be sold to and marketed by Tnuva, whereas

approximately 20% of the amount of meat that was not marketed to the select customers would be sold to and marketed by Meir Ezra Marketing Ltd. The District Court accepted the respondents' claim that they did not really regard this provision as a legally-binding undertaking, but it held that the provision contained a declaration of intent by the parties with regard to the manner in which they intended to divide the quantities of meat that they would market between them. In view of the broad definition of the term 'arrangement' in the Restrictive Trade Practices Law, which is not limited solely to a legally-binding arrangement, the trial court held that even though the aforementioned provision in the minutes was merely a declaration of intent and did not legally bind the parties, it could be regarded as an 'arrangement' within the meaning of this term in the Restrictive Trade Practices Law.

9. The District Court therefore found that subject to the respondents' defence claims, the minutes contained provisions that constituted prohibited restrictions under the Restrictive Trade Practices Law with regard to price and reduction fixing, a division of customers and a division of market shares between Tnuva and Meir Ezra Marketing Ltd. The District Court therefore went on to examine the claims raised by the respondents in their defence.

10. The respondents claimed in the District Court that it should acquit them on the basis of the defence of justification, since both the Ministry of Industry and Trade and the director-general of the Antitrust Authority (hereafter: the director-general) knew of the founding of TME and of the respondents' activity, and the Ministry of Industry and Trade even cooperated with TME, which imported meat for it from South America. According to the respondents, the director-general did not inform them of the possibility that their activity, of which he was aware, was contrary to the law, and he even gave them the impression that there was nothing improper in TME's activity. The District Court held that the authorities were admittedly aware that TME had been founded, but it was not claimed that they were also aware of the specific restrictive arrangements that were the subject of the indictment. The District Court also said that in two of the director-general's decisions that were given in February and July 1994, he expressed his opinion that the TME venture might be problematic from the viewpoint of restrictive trade practices law, and consequently there was no basis for the claim that the director-general was silent or encouraged the respondents to commit the offences attributed to them. Therefore the District Court held that the conduct of the authorities towards the respondents did not satisfy the conditions that have been laid down in the case law of this Court for succeeding in a defence of justification.

11. Additional defence arguments that were raised by the respondents concerned the question of the definition of the restrictive arrangement that is prohibited under ss. 2(a) and 2(b) of the Restrictive Trade Practices Law. The respondents argued that in order to convict someone of an offence of a restrictive arrangement under s. 2(a) of the Restrictive Trade Practices Law, the state needs to prove that there is a real likelihood that competition will be significantly harmed. This argument was rejected by the trial court in view of the language of s. 2(a) of the Restrictive Trade Practices Law, which speaks of a concern of 'harm' to competition, and not 'significant harm,' and also in view of the language of ss. 15 and 15A of the Restrictive Trade Practices Law, from which it can be seen that even an arrangement that harms competition to a small extent is generally considered a restrictive arrangement under s. 2 of the Restrictive Trade Practices Law. With regard to the provisions of s. 2(b) of the Restrictive Trade Practices Law, which define restrictions with regard to certain matters as a restrictive arrangement, the District Court rejected the contention that the state was required to prove harm to competition, or a *mens rea* to harm competition, as a condition for a conviction on the basis of the absolute presumptions provided in the aforementioned section. The trial court added in this respect that harm to competition was not one of the elements of the offence of a restrictive arrangement under s. 2(b) of the law.

12. Another issue that was considered extensively in the judgment of the District Court was the respondents' claim that in view of the relationship between TME, Tnuva and Meir Ezra Marketing Ltd, the resolutions in the minutes concerning TME's marketing policy should not be regarded as 'an arrangement between persons running businesses' as required

by s. 2 of the Restrictive Trade Practices Law. In considering this issue, the trial court left undecided the question whether the mere founding of a joint venture, even without the venture agreement containing an express restriction, constitutes a restrictive arrangement, since in the indictment the respondents were not charged with an offence concerning the actual founding of TME. On the other hand, the District Court held that even if there was a genuine economic justification for founding TME and even though it was not proved that the founding of TME was intended to mask the cooperation between Tnuva and Meir Ezra Marketing Ltd, this was not sufficient to legitimize this joint venture and to negate the illegality that tainted it as a result of the prohibited restrictions that were determined in connection therewith. In this respect the District Court said that the economic advantages that justify the founding of a joint venture may be included among the criteria that the Antitrust Tribunal or the director-general of the Antitrust Authority may take into account when they consider whether to approve a restrictive arrangement or when granting an exemption from approval, but they cannot legitimize the making of the arrangement without obtaining an approval or exemption as required by the law.

The court also rejected the claim that because TME has an independent legal personality, which is separate from Tnuva and Meir Ezra Marketing Ltd both from a formal legal viewpoint and from a substantive economic viewpoint, its resolutions cannot constitute a restrictive arrangement between its shareholders. The trial court said in this regard that TME's marketing policy, as determined in the minutes, is a result of the independent wishes of Tnuva and Meir Ezra Marketing Ltd and it was formulated within the framework of the agreements that were made between the two before TME was founded, and therefore those agreements should not regarded as a product of TME's internal activity, even if it ratified them after it was founded. Moreover, the District Court rejected the claim that since Tnuva and Meir Ezra Marketing Ltd acted as marketers or agents for TME, they should be regarded as one economic entity and the resolutions that were adopted by TME should not be regarded as 'an arrangement between persons running businesses.' The court based its conclusion in this regard both on the judgment in CFH 4465/98 *Tivall (1993) Ltd v. Sea Chef (1994) Ltd* [1], and also on the independent status of Tnuva and Meir Ezra Marketing Ltd as the founders of the joint venture, who initiated its formation at a time when they were active competitors in the meat marketing business and who, in the course of forming TME, arrived at arrangements on the subject of marketing policy that necessarily reduced the competition between them. The trial court further added that Tnuva and Meir Ezra Marketing Ltd continued to compete with one another in meat marketing even after TME was founded, and for this reason too they cannot be regarded merely as the shareholders of TME, rather than as independent.

13. The last defence argument of the respondents, which was accepted by the court and brought about their acquittal, was a claim of mistake of law in reliance upon legal advice. The respondents claimed in this regard that they should be held to have no criminal liability because they made the arrangements that are the subject of the indictment as a result of legal advice that they received, according to which these arrangements are not problematic from the viewpoint of restrictive trade practices law. The respondents therefore claimed that they had a defence under sections 34R and 34S of the Penal Law. There was no dispute before the District Court that the respondents did indeed receive legal advice from their lawyers, according to which there was no impediment to making the transaction that is the subject of the indictment.

The legal advice concerning the case before us was given to Tnuva and Landsman by Advocate Yanovsky, who testified in the trial court and explained in his testimony that he advised Tnuva and Landsman that the joint venture did not present any problem from the viewpoint of restrictive trade practices law. It should be noted that Advocate Yanovsky did not merely examine the legality of the joint venture from the viewpoint of restrictive trade practices law but was involved in the legal handling of the whole transaction, including the drafting of TME's venture agreement and the minutes. Meir Ezra Marketing Ltd and David Ezra were given legal advice on the transaction by Advocate Dror Brandwein, who testified in

the trial court that he examined the legality of the transaction between Tnuva and Meir Ezra Marketing Ltd from the viewpoint of restrictive trade practices law and he reached an unequivocal conclusion that it did not constitute a restrictive trade practice.

After it examined the testimonies concerning the legal advice that the respondents received, the District Court reached the conclusion that the respondents based their actions in the TME transaction, including the marketing policy that they determined as can be seen in the minutes, on the advice of their lawyers. The court went on to say that it was persuaded that both the respondents and their lawyers acted in this regard in good faith and in a sincere belief that there was no impropriety in their actions from the viewpoint of restrictive trade practices law. *Inter alia* the District Court rejected in this regard the state's claim that it was unreasonable for Tnuva and Landsman to rely on the legal advice that they were given. The state's claim was based, *inter alia*, on a previous judgment that also related to a case where Tnuva and Landsman were charged with an offence of a restrictive arrangement, on that occasion in the context of a business partnership (CrimC (TA) 181/99 *Tnuva Ltd v. State of Israel* [14]). The state argued that in view of the judgment in *Tnuva Ltd v. State of Israel* [14], the reliance of Tnuva and Landsman on the legal advice that was given to them was unreasonable, since this advice was based on an identical defence claim to the one that was rejected in that judgment. But the District Court held in the judgment that is the subject of the appeal before us that the judgment in *Tnuva Ltd v. State of Israel* [14] addressed different issues from the ones that arose in the case before us, and that since the state did not attribute bad faith to Advocate Yanovsky with regard to the relevance of the judgment in *Tnuva Ltd v. State of Israel* [14], there was no basis for attributing bad faith in this regard exclusively to Landsman.

14. After the District Court reached the conclusion that from a factual viewpoint the respondents relied in good faith on the legal advice that they were given with regard to the TME transaction, it examined whether this reliance was capable of providing them with a defence in criminal law to the offences with which they were charged. Following the opinion of Justice T. Or in CrimA 1182/99 *Hurvitz v. State of Israel* [2], the trial court held that a defendant could succeed in a defence of reliance on professional advice not only with regard to offences that require a special *mens rea* (such as the offence of intent to evade payment of tax under s. 220 of the Income Tax Ordinance [New Version], 5721-1961, which was considered in *Hurvitz v. State of Israel* [2]), but also with regard to offences that merely require a *mens rea* of awareness, such as the offence of a restrictive arrangement. Notwithstanding the District Court accepted the state's claim that the respondents' mistake in the case before us was a mistake of law that should be examined within the context of s. 34S of the Penal Law and not a mistake of fact that should be examined within the context of s. 34R of the Penal Law. The District Court also held that the respondents' mistake in the case before us, as distinct from the position in *Hurvitz v. State of Israel* [2], was a mistake of criminal law and not a mistake relating to some other field of law.

The trial court was therefore called upon to examine whether the respondents were entitled to the defence of a mistake of law that is provided in s. 34S of the Penal Law, which states the following:

> 'Mistake of law
>
> 34S. In so far as criminal liability is concerned, it makes no difference that a person thought his act was not prohibited, as a result of a mistake with regard to the existence of a criminal prohibition or with regard to the meaning of the prohibition, unless the mistake was reasonably unavoidable.'

The state argued before the District Court that the defence that is provided in the aforesaid s. 34S applies only when there is an objective impediment to knowing the correct law, whereas it does not apply when the accused knows of the existence of the law but received

mistaken professional advice with regard to its interpretation. The District Court rejected this argument of the state and held that the language of the law does not support the narrow interpretation proposed by the state and that the defence is based on the mistake being 'reasonably unavoidable,' irrespective of the source of the mistake or the reason for it. The court also went on to say that the purpose of the section is to prevent the conviction of an accused who is blameless and took all the reasonable steps available to him in order to ascertain the law, yet despite these efforts he was mistaken. In such circumstances, the trial court held that his mistake is a reasonably unavoidable mistake that is capable of exempting him from criminal liability.

15. In the specific circumstances of this case, the District Court found that the defence argument of a mistake of law that was raised by the respondents should be accepted. The court held that in view of the longstanding work relationship between the respondents and their lawyers and the fact that these lawyers handled the transaction itself and as a part of this they examined its propriety from the viewpoint of restrictive trade practices law, the absence of a written legal opinion does not diminish the weight or reasonableness of the opinion from the respondents' perspective, nor does it give rise to a concern that it was an opinion that was intended to legitimize the transaction in bad faith. Moreover, the District Court rejected the claims raised by the state that the respondents' lawyers did not have sufficient expertise in the field of restrictive trade practices law. An additional claim that was raised by the state and rejected by the District Court concerned the reasonableness of the legal advice given to the respondents. In this regard the District Court held that the reasonableness of the legal advice should be examined from the defendant's perspective, since we are speaking of his defence and he is usually unable to assess by himself the reasonableness of the legal advice, unless the circumstances in which it was given should have raised doubts in his mind as to the professional validity of the legal advice. In our case the trial court held that it is difficult to see how the respondents could have examined the reasonableness of the legal advice that their lawyers gave them. The District Court also rejected the state's claim concerning the reasonableness of the legal advice that was given to them on the merits. In this regard the court said that restrictive trade practices law was at that time at an early stage of development in Israel and that case law in this field was very limited. The court also added that the lawyers' opinion was based on the same approach concerning the applicability of restrictive trade practices law to partners in a partnership that was later adopted by Justice Türkel (in a minority opinion) in CA 6222/97 *Tivall (1993) Ltd v. Ministry of Defence* [3], and in such circumstances it could not accept the claim that the opinion is so unreasonable that the respondents should be deprived of the defence of reliance. The District Court also rejected the state's claim that the respondents' lawyers were unaware of the restrictions in the restrictive arrangements or that the respondents had not fully informed them of these restrictions.

On the basis of the aforesaid, the District Court therefore reached the conclusion that the respondents acted with regard to the agreements and the arrangements that were attributed to them in the indictment in reliance on the legal advice that they received, according to which those agreements did not constitute an offence under the Restrictive Trade Practices Law. The court went on to hold that in the circumstances of the case the respondents' mistake was unavoidable, and they therefore had a defence under s. 34S of the Penal Law. It consequently decided to acquit them.

The arguments of the parties

16. In its appeal before us, the state naturally does not challenge the determination of the District Court that the respondents made concluded a restrictive arrangement between themselves in the field of meat marketing. It attacks the finding of the trial court that in the circumstances of the case before us the respondents have a defence of a mistake of law, as determined in s. 34S of the Penal Law. According to the state, the defence of a mistake of law under section 34S should be interpreted as comprising two elements: one element is a subjective one, according to which the defendant's mistake should be examined to see if it really was a 'mistake,' and whether it was a sincere mistake made in good faith; the other

element is an objective one, according to which the mistake should be examined to see whether it was 'reasonably unavoidable.' In this respect the state claims that a distinction should be made between a reasonable mistake and a reasonably unavoidable mistake; only the latter constitutes a defence against criminal liability. The state goes on to say that the defence provided in s. 34S creates an exception to the rule that 'ignorance of the law is no defence,' and it argues that this exception should be interpreted narrowly, so that it will apply only in a complex set of circumstances in which the citizen could not have conceived, even after taking reasonable steps, that he was committing a criminal offence. The state therefore claims that the defence provided in s. 34S was intended to apply in a situation where the defendant could not have known what the law was, and not to protect someone who erred in understanding the law. Therefore the standard determined in s. 34S is, according to the state, a high standard of a kind of strict liability, and the defendant who wishes to succeed in a defence of a mistake of law is required, according to the state, to show a high standard of care and to take all reasonable steps to ascertain the law.

The state goes on to claim that in view of the high standard of conduct required by s. 34S of the Penal Law, it is insufficient for the defendant to rely on mistaken legal advice in order to succeed in the defence. The state admittedly recognizes that the mistaken legal advice may constitute evidence that a mistake was actually made and it is a circumstance that should be taken into account, but in the state's opinion it is not capable on its own of proving that the mistake was reasonably unavoidable. The state claims in this respect that the reasonableness of the legal advice reflects upon the good faith and sincerity of the defendant who relies on the advice, but it is not a sufficient condition for recognizing the defence provided in s. 34S, nor does it necessarily indicate the reasonableness of the defendant's mistake. Moreover, the state points to various legal policy considerations that it claims make it essential to adopt a very strict line with regard to a claim of reliance upon the legal advice of a lawyer. In particular the state mentions the concern of buying 'ready-made' opinions and turning a consultation with a lawyer into a fiction. According to the state, this danger mainly arises with regard to cases of 'white collar' crime, in which lawyers are regularly involved in giving legal advice. The state emphasizes in its pleadings that the actual possibility of being able to apply to, and receive clarifications from, an official body should constitute a decisive factor in examining the question whether the defendant did everything that was required of him in order to ascertain the law. When a defendant was aware of the possibility of applying to a competent official body and he did not do so, the state's position is that his mistake of law should not be regarded as a reasonably unavoidable one. The state adds in this context that an application to a competent official body (where there is an opportunity of making one) should be preferable to relying on the advice of a lawyer, since it is capable of limiting the subjectification of the law. Therefore, when the individual has an opportunity of applying to a competent official body and he does not do so, or when he acts knowingly in defiance of the position of the competent authority, he takes upon himself the risk of acting in defiance of the law. With regard to the relevance of the judgment in *Hurvitz v. State of Israel* [2], which also considered a claim of reliance upon the legal advice of a lawyer, to the present case, the state argues that this judgment is only relevant to a case where the reliance negates the existence of the *mens rea* of the offence (such as a case involving an offence that requires a special *mens rea*), whereas in our case the argument of reliance is being made with regard to the defence provided in s. 34S of the Penal Law, which the court did not consider in *Hurvitz v. State of Israel* [2] at all.

17. In the specific case of the respondents, the state claims that the District Court erred when it only examined the respondents' subjective good faith and failed to examine the means available to them for avoiding a mistake of which they did not avail themselves. In any case, the state claims that it can be seen from the findings of fact in this case that the respondents' mistake was not a sincere mistake that was made in good faith, and therefore it does not even satisfy the subjective element of the defence provided in s. 34S of the Penal Law. The state says that from the viewpoint of the offences attributed to the respondents, we are not speaking

of a complex or borderline case in so far as the applicability of restrictive trade practices law is concerned, but we are dealing with the basic prohibitions of price fixing and a division of the market, which lie at the heart of restrictive trade practices law and are included within the scope of the presumptions set out in s. 2(b) of the Restrictive Trade Practices Law.

With regard to Tnuva and Landsman, the state claims that the legal advice that they received from Advocate Yanovsky was general and informal, and that by relying on that advice Landsman chose to 'turn a blind eye' to the question of the legality of the transaction. In its pleadings, the state attaches special importance to *Tnuva Ltd v. State of Israel* [14], in which Tnuva and Landsman were admittedly acquitted by the Tel-Aviv District Court of an offence of a restrictive arrangement, but the aforesaid judgment rejected the claim that parties that form a partnership cannot be regarded as making a restrictive arrangement, which, according to the state, was in essence the claim on which Advocate Yanovksy's legal advice on the subject of the TME transaction was based. The state says in this regard that the judgment of the District Court (which was given in an appeal after they were convicted by the Magistrates Court) was given on 1 September 1993, less than two months after TME was founded, and it claims that Landsman's conduct after the judgment, and especially the fact that he ignored a criminal judgment that was given in his case, does not satisfy any standard of reasonableness. The state also claims that Advocate Yanovsky also ignored the significance of the judgment in *Tnuva Ltd v. State of Israel* [14], and that the legal advice that he gave to Landsman does not meet a standard that allows it to be relied upon for the purpose of the defence provided in s. 34S of the Penal Law. The state also says that another indication of the problematic nature of the TME transaction, which was known to Tnuva and Landsman, was the decision on 6 July 1994 of the director-general of the Antitrust Authority with regard to a merger between Tnuva and the Off HaNegev company, in which it was stated that the TME venture was being examined from the viewpoint of whether it complied with restrictive trade practices law. On the basis of the aforesaid, the state claims that Tnuva and Landsman deliberately ignored all the warning signs that were given to them and knowingly chose not to avail themselves of the possibility of applying to the competent authority.

With regard to Meir Ezra Marketing Ltd and David Ezra, the state claims that they also chose to bury their heads in the sand in so far as the question of the legality of the venture was concerned, and they deliberately ignored the warning signs that were given to them by the Antitrust Authority. They relied on the legal advice of Advocate Brandwein, which was brief and given orally. The state claims that David Ezra was aware of the reservations of the director-general of the Antitrust Authority with regard to the founding of TME, since he and Advocate Brandwein met with the director-general during November 1993, a short time after TME was founded, and at that meeting the director-general expressed his reservations with regard to the collaboration between Tnuva and Meir Ezra Marketing Ltd. Despite this, David Ezra did not take the trouble to clarify those reservations, nor did he make any further approach to his lawyer or to any other lawyer on this matter. The director-general also expressed his concerns with regard to the agreement between Tnuva and Meir Ezra Marketing Ltd in the decision of 4 February 1994 with regard to the merger between Meir Ezra Marketing Ltd and the Tohelet Ganz company and other companies, and he said that *prima facie* the agreement was likely to constitute a restrictive arrangement, but despite this Meir Ezra Marketing Ltd and David Ezra had done nothing, had not approached the director-general to ascertain his position and had not taken the steps set out in the Restrictive Trade Practices Law to 'legitimize' the restrictive arrangement.

18. In response to the state's appeal, the respondents raise arguments both with regard to the determination of the District Court that the agreements that were made within the framework of TME are a restrictive arrangement, and in response to the state's claims concerning the applicability in our case of the defence of mistake of law that is provided in s. 34S of the Penal Law. The arguments that apply to all of the respondents, as opposed to arguments that concern only some of the respondents, are the following.

According to the respondents, the District Court erred when it held that the resolutions adopted in the minutes of 25 November 1993 constitute a restrictive arrangement between TME and Meir Ezra Marketing Ltd. The respondents' main argument in this regard is that TME was set up as an independent legal personality not only from a formal perspective but also from a substantive economic perspective, and it is a separate entity from Tnuva and Meir Ezra Marketing Ltd. In view of this, the respondents argue that the minutes reflect TME's independent internal resolutions, and therefore those resolutions should not be regarded as a restrictive arrangement between Tnuva and Meir Ezra Marketing Ltd, nor should the actions of the joint venture be attributed in this case to the 'authors' of the venture, in such a way that *de facto* raises TME's veil of incorporation. The respondents also claim that once TME was founded, it was entitled to appoint Tnuva and Meir Ezra Marketing Ltd as its agents, to determine at what price they would sell the meat that was marketed by them and how its marketing would be divided between them, and to decide on the basis of its own criteria that the marketing of the meat to the select customers would be done by itself directly. The respondents also say that the indictment does not attribute to them any offence with regard to the actual founding of TME, and they claim that the restrictions under discussion with regard to dividing the marketing between Tnuva and Meir Ezra Marketing Ltd were required by the actual founding of TME. An additional claim of the respondents in this regard is that Tnuva and Meir Ezra Marketing Ltd acted as the agents of TME, and therefore their joint activity with TME should be regarded as an act of one economic entity and the arrangements made in this context are not restrictive arrangements under the Restrictive Trade Practices Law, since they are not arrangements 'between persons running businesses,' as required under s. 2 of the Restrictive Trade Practices Law.

The respondents further argue that the arrangements that were determined in the minutes were not binding in the relationship between Tnuva and Meir Ezra Marketing Ltd, and they were never even implemented, since Tnuva and Meir Ezra Marketing Ltd continued to compete with one another in the field of meat marketing. In these circumstances, they argue that the arrangements amounted to a 'dead letter' and there was no reason to seek legal advice with regard to them on a recurring basis. In addition to the aforesaid arguments, Meir Ezra Marketing Ltd and David Ezra raise more specific arguments with regard to the District Court's interpretation of the provisions of the minutes. They argue that the language of the minutes is unclear and therefore there is, at the very least, a reasonable doubt on the question whether it can be seen from the minutes that there was a price-fixing agreement between Tnuva and Meir Ezra Marketing Ltd. We should point out that the claims of Meir Ezra Marketing Ltd and David Ezra with regard to the interpretation of the provisions of the minutes are inconsistent with the interpretation of Tnuva and Landsman, who in general accept the state's interpretation of these provisions.

19. In addition to their arguments concerning the substance of the resolutions that were adopted in the minutes, the respondents argue that the defence of mistake of law applies in their case, as the District Court held. The respondents' main argument in this regard is that when the court found from a factual viewpoint that they did rely in good faith on the legal advice of their lawyers with regard to the legality of the arrangements that were adopted in the minutes, they should be entitled to succeed in the defence of a mistake of law provided in s. 34S of the Penal Law, with the result that they are not criminally liable for those arrangements. The respondents claim that neither the language nor the purpose of the aforesaid s. 34S provides any reason why the defence should be limited solely to cases of reliance on the legal position of a government authority rather than on the legal opinion of a private lawyer, since granting a defence to someone who relied on a government authority does not endanger the principle of legality any more than granting it to someone who relied on the advice of a lawyer. The respondents also claim in this respect that recognizing the possibility of relying on the legal advice of a lawyer for the purposes of the defence of a mistake of law will encourage people to consult lawyers and it will increase awareness and knowledge of the criminal law. The respondents also claim that the presumption of knowledge

of the law is in itself an exception to the fundamental principle of the criminal law, according to which there is no offence without guilt, and Landsman even claims that the punishment of someone who relied in good faith on legal advice is unconstitutional. An additional claim of the respondents in this respect is that we should apply the tests that were laid down in *Hurvitz v. State of Israel* [2] with regard to the defence of reliance on legal advice, and that, for the purpose of the applicability of this defence, there is no reason why a distinction should be made between offences that require a *mens rea* of 'special intent' and offences that require an 'ordinary' *mens rea*.

The respondents also point out that the law does not contain any requirement that 'all' reasonable measures should be adopted in order to avoid a mistake of law. They argue that sometimes it is not reasonable to avail oneself of an additional method of ascertaining the law even if such a method exists. In any case, the respondents claim that on the dates relevant to the indictment there was no possibility whatsoever of obtaining a preliminary opinion from the Antitrust Authority, since this possibility was only incorporated in the Restrictive Trade Practices Law in the year 2000 when s. 43A of the law was enacted. The respondents also argue that the offence of a restrictive arrangement under the Restrictive Trade Practices Law is not essentially a criminal offence, and that applying the offence to this case, which concerns arrangements that were made within the framework of a joint venture that was set up for a genuine commercial purpose, is not self-evident. The Restrictive Trade Practices Law is vague on the question of its applicability to a situation of this kind; this is especially the case in view of the fact that in 1993, when TME was founded, there was no reference in Israeli law to the question of arrangements between parties to a joint venture. The respondents further claim that the application of the defence of a mistake of law should be examined from the viewpoint of the defendant and not of his lawyer.

An additional claim that is raised by Meir Ezra Marketing Ltd and David Ezra is that a mistake on the question whether a certain arrangement constitutes a 'restrictive arrangement' under the Restrictive Trade Practices Law is not a mistake of criminal law but of a non-criminal field of law, and therefore it should be examined according to the defence of a mistake of fact provided in s. 34R of the Penal Law, which only requires subjective good faith on the part of the defendant. Landsman for his part raises additional defence claims that are based on the provisions of s. 48 of the Restrictive Trade Practices Law, which concerns the liability of directors of a corporation for offences under the Restrictive Trade Practices Law that are committed by the corporation.

Additional arguments of the respondents address the conduct of the authorities in their case and the concrete legal advice that they were given. According to the respondents, the founding of TME, which involved the collaboration of Tnuva and Meir Ezra Marketing Ltd, was a public and open act that no one tried to conceal. They claim that the Antitrust Authority was also aware of the founding of TME, its activity in the field of importing and marketing meat and the marketing policy that was determined by it, and the state, through the Ministry of Industry and Trade, even cooperated with TME in the import of frozen meat into Israel. The respondents further claim in this regard that the position of the director-general of the Antitrust Authority with regard to TME being a restrictive arrangement, as presented in his decisions and at the meetings held with him, was vague and not unequivocal, and he himself did not think that the case was an easy or simple one. It is argued that in such circumstances there was no impropriety in the fact that the respondents relied on the advice of their lawyers on the question of the legality of the venture or in the fact that they did not stop the activity of the joint venture.

In the matter of the legal advice that was given to them by Advocate Yanovsky, Tnuva and Landsman say that in 1993 Advocate Yanovsky had already been acting as Tnuva's main lawyer for many years, he was familiar with the TME transaction and had expertise in the field of restrictive trade practices law, and he was also asked specifically to examine the legality of the transaction from the viewpoint of these laws. Once Advocate Yanovsky had made the examination that he was asked to make and reached the conclusion, on the basis of

all of the relevant information that was in his possession, that there was no legal impediment to the activity of TME, there was no basis, according to Tnuva and Landsman, for requiring them to apply in this matter to the Antitrust Authority or to act in other ways to 'legitimize' the arrangement. Tnuva and Landsman further argue that Advocate Yanovsky was in regular contact with the director-general of the Antitrust Authority with regard to non-competitive practices on the part of Tnuva, but the director-general failed as aforesaid to adopt an unequivocal position with regard to TME. With regard to the state's claims that Landsman and Advocate Yanovsky ignored the judgment in *Tnuva Ltd v. State of Israel* [14] (which, it will be recalled, dealt with another case in which Tnuva and Landsman were charged with an offence of a restrictive arrangement in the context of a partnership), Tnuva and Landsman claim that both Landsman and Advocate Yanovsky were aware of this judgment, and Advocate Yanovsky's conclusion with regard to the legality of the TME transaction was not precluded by the judgment in *Tnuva Ltd v. State of Israel* [14], since unlike in our case, the partnership that was considered in that case was a fiction whose sole purpose was to implement the exclusivity arrangements between the partners.

Meir Ezra Marketing Ltd and David Ezra also raise claims with regard to the legal advice that they were given by Advocate Brandwein. According to them, the advice of Advocate Brandwein concerning the legality of the TME transaction was given after a thorough examination of the matter was made in accordance with David Ezra's request that Advocate Brandwein should examine the step of founding TME from the viewpoint of restrictive trade practices law. It is argued that Advocate Brandwein was an expert in the field of restrictive trade practices law, was involved in the transaction from beginning to end, was aware of its particulars and approved all of them as legal. Advocate Brandwein was also involved in drafting the minutes that led to the state charging Meir Ezra Marketing Ltd and David Ezra with criminal activity. Meir Ezra Marketing Ltd and David Ezra further claim that at the meeting that took place in November 1993 between the director-general of the Antitrust Authority, David Ezra and Advocate Brandwein the impression was that the director-general was not of the opinion that the formation of TME would involve a restrictive arrangement, and even in his decision concerning the merger with the Tohelet Ganz company all that was stated was that *prima facie* the arrangement might be a restrictive arrangement. On the basis of the aforesaid, Meir Ezra Marketing Ltd and David Ezra claim that their mistake concerning the legality of the restrictive arrangement, which resulted from their reliance on the legal advice of Advocate Brandwein, should give them a defence against being convicted for the arrangement (and they claim that the defence that should apply in their case, as stated above, is the defence of a mistake of fact under s. 34R of the Penal Law, but naturally they claim that the defence of a mistake of law under s. 34S of the Penal Law also applies to their case, as the District Court held).

Deliberations

Was a restrictive arrangement made between Tnuva and Meir Ezra Marketing Ltd?

20. Our consideration of the appeal will begin by examining the question whether a restrictive arrangement was made between Tnuva and Meir Ezra Marketing Ltd, within the meaning of this term in the Restrictive Trade Practices Law. The state claimed in the indictment that was filed in the District Court that Tnuva and Meir Ezra Marketing Ltd coordinated through TME the marketing in Israel of frozen kosher meat, which TME was supposed to begin to import following the Government Decision in 1993 to transfer the importing of this type of meat to private commercial concerns. The restrictions that the state attributed to Tnuva and Meir Ezra Marketing Ltd concerned price and price-reduction fixing for the meat marketed by them, as well as the division of the market with regard to 'select customers' and the amount of products that TME would sell to each of them and that would be marketed by each of them. These restrictions, which led to the respondents being charged with an offence of a restrictive arrangement, are set out in the minutes of the meeting of the board of directors of TME on 25 November 1993. In view of their importance to our case, we will cite below the text of the resolutions adopted in the minutes:

'a. Direct marketing

a.1. The company shall market directly to the customers listed in appendix A of these minutes (hereafter: 'the select customers'). Any change to the list of select customers shall require a resolution of the board of directors.

a.2. The company shall determine from time to time a recommended minimum price for its products (hereafter: 'the minimum price'). The company shall also determine from time to time the credit frameworks (an amount and period) and the permitted price-reduction frameworks from the minimum price in sales to the select customers.

b. Appointment of marketers

b.1. Tnuva and Meir Ezra Marketing Ltd (hereafter: 'the marketers') shall market the meat that they will buy from the company to customers that are not select customers.

b.2. The marketers may make sales at the minimum price or at a higher price.

b.3. The marketers shall be entitled to give a price-reduction on the minimum price only with the prior consent of the company.

The criteria that shall be taken into account by the company when it decides whether to allow a price-reduction shall be, *inter alia*, the following:

(*) The average amount of the price-reductions in sales to select customers.

(*) The amount of the sales to the customer for whom the price-reduction is requested.

(*) The collateral that has been received from the customer and the credit terms given to him.

…

b.6. For its sales to the marketers (less returns), the company shall pay the marketers a commission in an amount of 3% (plus VAT) of the minimum price (without VAT). No commission shall be paid at a different rate without a resolution of the board of directors. If a marketer makes a sale to a customer at a price that exceeds the minimum price, he shall be entitled to the full amount of the difference between the minimum price and the actual sale price, and no commission shall be paid by the company for this difference.

…

b.11. Approximately 80% of the amount of meat that is not marketed to select customers shall be sold to and marketed by Tnuva, and approximately 20% of the amount of meat that is not marketed to select customers shall be sold to and marketed by Meir Ezra Marketing Ltd. Within three months the board of directors shall decide whether and to what extent the amount of the marketing services that the company will purchase from Meir Ezra Marketing Ltd will be increased.

It will be recalled that the District Court held that these resolutions are a reflection of prior agreements between Tnuva and Meir Ezra Marketing Ltd that constitute a prohibited restrictive arrangement under the Restrictive Trade Practices Law. With regard to the resolutions set out in paragraphs a.2, b.2, b.3 and b.6, the District Court held that they contain a decision of TME as to the minimum prices at which Tnuva and Meir Ezra Marketing Ltd would be entitled to sell the meat to their customers. With regard to paragraphs a.1 and b.1 of the minutes, the District Court held that these reflect an arrangement between Tnuva and Meir Ezra Marketing Ltd as to the division of the customer market between Tnuva, Meir Ezra Marketing Ltd and TME, so that TME alone would be entitled to sell meat to customers who were defined as 'select customers.' With regard to paragraph b.11, the District Court held that it reflects a declaration of intent on the part of Tnuva and Meir Ezra Marketing Ltd with

regard to the division of the quantities of meat that would be sold by them to customers who are not select customers.

Tnuva and Landsman do not dispute the interpretation of the District Court with regard to the content of the arrangements set out in the minutes, but they argue that the arrangements should not be regarded as prohibited restrictive arrangements. By contrast, Meir Ezra Marketing Ltd and David Ezra dispute even the manner in which the resolutions set out in the minutes should be interpreted. According to them, the paragraphs of the minutes that address the minimum prices did not intend to determine the prices at which Tnuva and Meir Ezra Marketing Ltd would be able to sell the meat to their customers. They claim that the purpose of those paragraphs was to determine the prices at which TME could sell the meat directly to the select customers (para. a.2), and to clarify that TME would not 'recognize' the sale of meat by Tnuva and Meir Ezra Marketing Ltd to their customers at a price less than the minimum price, which is the price that TME was supposed to receive from the marketers, so that TME would be liable to pay the cost of the price-reduction (paras. b.2 and b.3). The District Court rejected the arguments of Meir Ezra Marketing Ltd and David Ezra with regard to the interpretation of the provisions of the minutes relating to the minimum prices, and we have also reached the same conclusion. Even if it is possible to accept the claim of Meir Ezra Marketing Ltd and David Ezra that paragraph a.2 relates to the price at which the meat will be sold to the select customers, who are the direct customers of TME, and not the price at which Tnuva and Meir Ezra Marketing Ltd will sell the meat to their customers, this cannot help them, because paragraphs b.2 and b.3 of the minutes stipulate an express restriction for Tnuva and Meir Ezra Marketing Ltd with regard to the minimum prices at which they would sell the meat to their customers. There is no basis in the wording of the minutes for the claim of Meir Ezra Marketing Ltd and David Ezra that the sole intention in these provisions is that TME will not recognize a sale by Tnuva and Meir Ezra Marketing Ltd below the minimum prices unless it approved it in advance. This absence of any basis in the wording of the minutes for the interpretation proposed by Meir Ezra Marketing Ltd and David Ezra with regard to the provisions concerning the minimum prices is supported by the fact that the District Court's conclusion with regard to these provisions is based on its impression from the testimonies that it heard from the persons who were involved on behalf of Tnuva and Meir Ezra Marketing Ltd in the contacts between the two companies and in formulating TME's policy. In such circumstances, we see no reason to intervene in the District Court's determination (which, it will be recalled, is not disputed by Tnuva and Landsman) that the minutes did indeed determine minimum prices for the meat that would be sold by Tnuva and Meir Ezra Marketing Ltd to their customers.

We have also reached a similar conclusion with regard to the provisions of the minutes that relate to the marketing of the meat to the select customers (paragraphs a.1 and b.1). A reading of the wording of the minutes clearly shows that these paragraphs determine the division of the customers between TME, which would market meat to the select customers, and Tnuva and Meir Ezra Marketing Ltd, which would market to customers who are not select customers. There is no support in the wording of the minutes for the contention of Meir Ezra Marketing Ltd and David Ezra that the sole purpose of the aforesaid provisions was to reflect the position that *de facto* prevailed in the market, and we see no reason to intervene in the factual determination of the District Court that the minutes reflect at the very least an 'understanding' between Tnuva and Meir Ezra Marketing Ltd that the meat would be sold to the select customers by TME and not by them. Similarly, paragraph b.11 of the minutes determines the division between Tnuva and Meir Ezra Marketing Ltd of the quantity of meat that would be marketed. Even if the provisions of this clause were not regarded by Tnuva and Meir Ezra Marketing Ltd as binding provisions from a contractual viewpoint (a claim that we shall address later), we see no reason to intervene in the interpretation that was given to them by the District Court.

In summary, we accept the District Court's conclusion that the minutes of TME did indeed contain provisions that addressed the minimum prices at which Tnuva and Meir Ezra

Marketing Ltd would sell the meat to their customers, the division of the customers between TME on the one hand and Tnuva and Meir Ezra Marketing Ltd on the other, and the division of the quantity of meat that would be bought from TME by Tnuva and Meir Ezra Marketing Ltd. Now that we have reached our conclusion with regard to the interpretation of the provisions of the minutes, we should examine whether these provisions do indeed constitute a restrictive arrangement under the Restrictive Trade Practices Law.

21. The term 'restrictive arrangement' is defined in s. 2 of the Restrictive Trade Practices Law in the following manner:

'Restrictive arrangement'

2. (a) A restrictive arrangement is an arrangement that is made between persons running businesses, according to which at least one of the parties restricts itself in a manner that is likely to eliminate or reduce competition in business between him and the other parties to the arrangement or some of them, or between him and a person who is not a party to the arrangement.

(b) Without derogating from the generality of what is stated in subsection (a), an arrangement shall be regarded as a restrictive arrangement if it relates to any of the following matters:

(1) The price that will be demanded, offered or paid;

(2) The profit that will be made;

(3) A division of the market, in whole or in part, according to the location of the business or according to the people or the type of people with whom they will do business;

(4) The amount, quality or type of the goods or the services in the business.'

It has been held in our case law that the basic definition of the term 'restrictive arrangement' in s. 2(a) of the Restrictive Trade Practices Law is made up of four elements: the making of an 'arrangement'; the arrangement is made between 'persons running businesses'; a restriction is imposed on at least one of the parties to the arrangement; the restriction is made in a manner that is likely to eliminate or reduce competition in business between the restricted party and others (see CrimA 4855/02 *State of Israel v. Borovitz* [4], at p. 860). Section 2(b) of the Restrictive Trade Practices Law expands the general definition of the term 'restrictive arrangement' in s. 2(a) of the law and provides several absolute presumptions, according to which arrangements that contain a restriction with regard to certain matters shall be considered restrictive arrangements without it being necessary to prove that those arrangements are likely to harm competition. These 'matters' relate in practice to certain areas where a restriction inherently harms competition (see *Tivall (1993) Ltd v. Sea Chef (1994) Ltd* [1], at pp. 96-97; *State of Israel v. Borovitz* [4], at p. 869). It is also important to point out that the presumptions provided in s. 2(b) of the Restrictive Trade Practices Law are absolute not only with regard to the civil and administrative aspect of the definition of 'restrictive arrangement' but also with regard to the criminal aspect of that definition. Therefore, when we are dealing with a criminal proceeding concerning a restrictive arrangement with regard to one of the matters set out in s. 2(b) of the Restrictive Trade Practices Law, the state does not need to prove that the arrangement is likely to harm competition; it only needs to prove, to the

degree of certainty required in criminal law, that the arrangement concerns one of those matters (see *State of Israel v. Borovitz* [4], at pp. 870-871).

Further to the definition of the term 'restrictive arrangement' in s. 2 of the Restrictive Trade Practices Law, s. 4 of the Restrictive Trade Practices Law lays down a prohibition of being a party to a restrictive arrangement that has not been 'legitimized' in one of the ways provided by the law (approval, permit or exemption), and s. 47(a)(1) of the Restrictive Trade Practices Law provides that a breach of the prohibition of being a party to a restrictive arrangement is an offence. Let us therefore examine whether there was a restrictive arrangement in this case that falls within the scope of the criminal prohibition in the Restrictive Trade Practices Law.

22. Three of the four elements of the restrictive arrangement that are set out above certainly exist in our case. *First*, the provisions set out in the minutes satisfy the definition of the term 'arrangement' in s. 1 of the Restrictive Trade Practices Law, where the term is defined in the following manner: 'whether express or implied, whether in writing or orally or by conduct, whether legally binding or not.' It has been held in our case law that this definition is very broad, and that it applies to every kind of consent between the parties to the arrangement, even if it does not amount to a binding contract or agreement. It has also been held with regard to the term 'arrangement' that 'any minimal level of a joint understanding, consent or cooperation between the parties is sufficient to create it' (see *State of Israel v. Borovitz* [4], at pp. 860-861, and the references cited there). In view of this broad definition, it is clear that the various resolutions that were adopted in the minutes of TME, whether they reflect an 'understanding' between Tnuva and Meir Ezra Marketing Ltd (as was held with regard to the select customers) or they merely constitute a 'declaration of intent' (as was held with regard to the division of the amount of meat marketing between Tnuva and Meir Ezra Marketing Ltd), satisfy the element of an 'arrangement' in s. 2 of the Restrictive Trade Practices Law.

Second, the resolutions that were adopted in the minutes do indeed impose restrictions on Tnuva and Meir Ezra Marketing Ltd. These restrictions relate both to the minimum prices at which they would be entitled to sell the meat to their customers and to the price-reductions that they could give, and also to the possibility of selling the meat to the select customers, which was restricted to TME.

Third, the matters addressed by the arrangements that are set out in the minutes undoubtedly fall within the scope of the absolute presumptions that are provided in s. 2(b) of the Restrictive Trade Practices Law, which, as we have said, do not require proof of the extent of the arrangement's potential for harming competition. Thus, for example, the provisions of paragraphs b.3 and b.6 of the minutes concern the minimum price that Tnuva and Meir Ezra Marketing Ltd would demand from their customers, and it follows that they determine a restriction with regard to 'the price that will be demanded, offered or paid'; paragraphs a.1 and b.1 of the minutes determine the manner in which the marketing to customers will be divided between TME, Tnuva and Meir Ezra Marketing Ltd, and thereby they determine a restriction with regard to 'the division of the market, in whole or in part, according to the location of the business or according to the people or the type of people with whom they will do business'; and paragraph b.11 of the minutes determines the division of the quantity of the products that will be marketed by Tnuva and Meir Ezra Marketing Ltd, which is a restriction that relates to 'the amount, quality or type of the goods or the services in the business.' The state is therefore correct in its contention that the matters with regard to which Tnuva and Meir Ezra Marketing Ltd reached an arrangement — which determine restrictions with regard to the minimum price, the division of the market and the quantity of products that will be marketed, and how they will be divided — clearly go to the heart of restrictive trade practices law.

The main dispute between the state and Tnuva and Meir Ezra Marketing Ltd as to whether the arrangements set out in the minutes constitute restrictive arrangements therefore focuses

on the question whether the remaining element in the definition of the term 'restrictive arrangement' — that the arrangement is made 'between persons running businesses' — is satisfied in our case.

23. According to the respondents, the requirement that the arrangement should be made 'between persons running businesses' in order that it should be regarded as a restrictive arrangement means that the arrangement should be made between different businesses, and therefore when we are speaking of an arrangement between different parties who operate within one business framework, this is not a restrictive arrangement at all within the meaning of the term in the Restrictive Trade Practices Law. Since the arrangements that led to the respondents being indicted were adopted within the framework of TME and were allegedly necessitated by its very founding, and since they were intended to regulate the relationship between TME and Tnuva and Meir Ezra Marketing Ltd, which are the agents of TME for the purpose of marketing the meat that it imports, the respondents claim that in the case before us the condition that the arrangement should be made 'between persons running businesses' is not satisfied. The respondents go on to argue that attributing the resolutions that were adopted by TME to Tnuva and Meir Ezra Marketing Ltd amounts to lifting TME's veil of incorporation, which is unjustified, since the District Court held that TME was not set up in order to conceal the collaboration and the arrangements between Tnuva and Meir Ezra Marketing Ltd, and since they were not charged with an offence on account of the actual founding of TME, which was done for genuine economic reasons.

The respondents' claims with regard to the condition that the arrangement should be made 'between persons running businesses' should be rejected. The requirement that is provided in s. 2 of the Restrictive Trade Practices Law, according to which an arrangement needs to be made 'between persons running businesses' in order for it to be considered a 'restrictive arrangement' was not intended to distinguish between persons who run 'a business' in the singular and persons who run 'businesses' in the plural (see *Tivall (1993) Ltd v. Sea Chef (1994) Ltd* [1], at p. 92). The purpose of this provision, as it has been determined in our case law, is to distinguish between businessmen and business enterprises, on the one hand, and entities that are not businesses, such as consumer bodies or the state in its executive function, on the other (see CA 2768/90 *Petrolgas Israeli Gas Co. (1969) Ltd v. State of Israel* [5], at p. 604; *Tivall (1993) Ltd v. Sea Chef (1994) Ltd* [1], at p. 92; *State of Israel v. Borovitz* [4], at p. 862). It need not be said that Tnuva and Meir Ezra Marketing Ltd are certainly business enterprises, and therefore the arrangement between them is without doubt an arrangement 'between persons running businesses' according to s. 2 of the Restrictive Trade Practices Law (in this regard it should be mentioned that the definition of the term 'person' in s. 4 of the Interpretation Law, 5741-1981, also includes corporations). Therefore the question that we are called upon to decide is whether the resolutions that are set out in the minutes of TME should indeed be regarded as an arrangement between Tnuva and Meir Ezra Marketing Ltd. The District Court answered this question in the affirmative, and after examining the respondents' arguments, we see no reason to intervene in its conclusion.

In our case we are not required to decide whether the doctrine of the single economic unit, on which the respondents base their arguments, applies in Israeli restrictive trade practices law, nor are we required to decide the question of the scope of the prohibition of a restrictive arrangement with regard to agreements between competitors that are formulated within the framework of a joint venture between them (in this regard, see the Restrictive Trade Practices (Class Exemption for Joint Ventures) Rules, 5766-2006; M. Mizrahi, 'A Joint Venture as a Restrictive Arrangement,' 23 *Hebrew Univ. L. Rev. (Mishpatim)* 213 (1994); *United States v. Penn-Olin Chemical Co.* [15]; see also s. 3(5) of the Restrictive Trade Practices Law, which provides that an arrangement between a company and its subsidiary shall not be regarded as a restrictive arrangement). From the factual findings that were established by the District Court, which the respondents are not challenging at all in the appeal before us, it can be seen that the arrangements concerning the manner in which TME would market the frozen meat that it would import were determined by Tnuva and Meir Ezra Marketing Ltd before TME was

founded. In these circumstances, the mere fact that these agreements, which from a substantive viewpoint were formulated by Tnuva and Meir Ezra Marketing Ltd before TME was founded, were subsequently enshrined in formal resolutions of TME's board of directors, does not deprive them of their original character as a restrictive arrangement between Tnuva and Meir Ezra Marketing Ltd. For similar reasons we are not required to consider the respondents' arguments concerning the supposed raising of TME's veil of incorporation, since we are not dealing with internal resolutions of TME that are being attributed to its shareholders, but we are speaking, as aforesaid, of agreements between Tnuva and Meir Ezra Marketing Ltd that were made before TME was founded and before Tnuva and Meir Ezra Marketing Ltd were supposedly appointed as TME's agents (cf. *Tivall (1993) Ltd v. Sea Chef (1994) Ltd* [1], at p. 92; in that case the question whether a restrictive arrangement could be made between partners in a partnership during the period when the partnership existed was left undecided, since it was found that the arrangements under discussion were made between the partners before the partnership was formed and they were intended to come into force during the period after it was terminated). But I should point out in passing that I doubt whether the single economic unit doctrine can be invoked when we are dealing with business enterprises such as Tnuva and Meir Ezra Marketing Ltd when the vast majority of their business activity (with the exception of the agreements between them that are alleged to constitute a restrictive arrangement) remained independent and separate. In a similar context Justice M. Cheshin held that:

> 'With regard to a non-competition arrangement, it would appear that a clear distinction should be made between a case in which two businessmen merge their businesses so that they become one business and a case in which two businessmen create a partnership only with regard to a *part* of their businesses, while each of the two retains a separate and independent framework of activity. Even if we say that the first type of case does not present a restrictive arrangement — whether the law does not apply to the arrangement at all or whether the arrangement is a restrictive arrangement for which it is entitled to receive approval or an exemption — the second type of case should be regarded differently. At any rate, in so far as the condition of "persons running businesses" is concerned, this condition is completely satisfied in the second type of case, and when the purpose of the law is examined, there is no good reason to say that it does not apply to this type of case' (see *Tivall (1993) Ltd v. Sea Chef (1994) Ltd* [1], at p. 93; emphasis in the original).

In any event, in the circumstances of this case there is no need to make any hard and fast determinations on the question of the scope of application of the one economic unit doctrine in Israeli restrictive trade practices law, since according to the findings that are based on the facts that were proved, this question does not arise at all.

24. We have therefore found that Tnuva and Meir Ezra Marketing Ltd concluded a restrictive arrangement within the meaning of this term in s. 2 of the Restrictive Trade Practices Law, and in particular that the arrangement was made with regard to matters that are included within the scope of the absolute presumptions in s. 2(b) of the Restrictive Trade Practices Law. This arrangement was not 'legitimized' in any of the ways provided by the Restrictive Trade Practices Law, and when we found that Tnuva and Meir Ezra Marketing Ltd were a party to this restrictive arrangement, the conclusion that follows is that it has been proved that they committed the *actus reus* of the offence of a restrictive arrangement. In this regard it should be said that the claim that some of the arrangements determined in the minutes were not actually implemented cannot help Tnuva and Meir Ezra Marketing Ltd, since the actual implementation of the restrictive arrangement is not a necessary element of the *actus reus* of the offence of a restrictive arrangement (see CrimA 7399/95 *Nechushtan Elevator Industries Ltd v. State of Israel* [6], at p. 121; CrimA 2929/02 *State of Israel v. Svirsky* [7], at p. 142; *State of Israel v. Borovitz* [4], at p. 857). It should also be pointed out that the existence of an economic justification for the arrangement that was made between

Tnuva and Meir Ezra Marketing Ltd is not capable of precluding the commission of the offence of a restrictive arrangement, since the economic considerations that may justify the 'legitimization' of a restrictive arrangement need to be examined within the framework of the mechanisms provided for this purpose in the Restrictive Trade Practices Law (see, for example, the considerations set out in s. 10 of the Restrictive Trade Practices Law), and they cannot in themselves prevent that arrangement from being a restrictive arrangement.

With regard to the *mens rea* of the offence, no one denies in this case that the respondents were aware of the details of the arrangement between Tnuva and Meir Ezra Marketing Ltd, including the restrictions that were later incorporated in the minutes of TME. According to the rule that was laid down in *State of Israel v. Borovitz* [4], this awareness is sufficient for constituting the *mens rea* of the offence of a restrictive arrangement (see *State of Israel v. Borovitz* [4], at p. 873). It should also be noted that the *mens rea* of the offence of a restrictive arrangement does not require awareness of the existence of the normative element of the offence, namely awareness on the part of the defendant that his acts constitute a prohibited 'restrictive arrangement' under the Restrictive Trade Practices Law (see *State of Israel v. Borovitz* [4], at pp. 875-877). For the reasons that will be set out below, the circumstances taken as a whole — including the economic status and business of the parties that made the arrangement, the previous experience that Tnuva and Landsman had on a similar issue and the fact that the arrangement clearly concerns prohibitions that are laid down in s. 2(b) of the Restrictive Trade Practices Law — decisively influence the questions before us, and especially the question whether the defence of a mistake of law provided in s. 34S of the Penal Law can succeed.

We have therefore found that Tnuva and Meir Ezra Marketing Ltd both had the *mens rea* and committed the *actus reus* of the offence of a restrictive arrangement. Now we are required to examine whether, although they committed both aspects of the offence, Tnuva and Meir Ezra Marketing Ltd are entitled to succeed in a defence of a mistake of law under s. 45S of the Penal Law, as held by the District Court.

The defence of a mistake of law

25. The defence of a mistake of law, which led to the acquittal of the respondents in the trial court, is laid down in section 34S of the Penal Law. Because of its importance in our case, we should once again set out the wording of the section:

> 'Mistake of law
>
> 34S. In so far as criminal liability is concerned, it makes no difference that a person thought his act was not prohibited, as a result of a mistake with regard to the existence of a criminal prohibition or with regard to the meaning of the prohibition, unless the mistake was reasonably unavoidable.'

The first part of s. 34S is based on the well-known rule that ignorance of the law does not excuse the defendant from criminal liability (*ignorantia juris non excusat*). But the final clause of the section provides an exception to this rule in circumstances where the defendant's mistake with regard to the law was 'reasonably unavoidable.' The language of s. 34S of the Penal Law, which refers to 'a mistake with regard to the existence of a criminal prohibition or with regard to the meaning of the prohibition,' clearly shows that the section was intended to apply in situations where the defendant made a mistake concerning the criminal law. In *State of Israel v. Borovitz* [4], which considered the distinction between a 'mistake of fact' (under s. 34R of the Penal Law) and a 'mistake of law' (under s. 34S of the Penal Law), this Court held, following the provisions of s. 34W of the Penal Law that applies the provisions of the 'General Part' of the law to offences set out in other acts of legislation, that in the absence of a contrary provision, an alleged mistake concerning a criminal norm that is provided in a non-criminal statute should be classified as a 'mistake of law' within the meaning thereof in s. 34S of the Penal Law. It was therefore held that a claim concerning a mistake in understanding a

criminal norm that is provided in the Restrictive Trade Practices Law should be examined in accordance with the provisions of s. 34S of the Penal Law that relate to a 'mistake of law' (see *State of Israel v. Borovitz* [4], at pp. 930-931). In view of this rule, the arguments of the respondents in this case with regard to a mistake in understanding the scope of the criminal prohibition of making a restrictive arrangement will be considered in accordance with the provisions of s. 34S of the Penal Law. It should also be noted that we are not required to consider the claims of Meir Ezra Marketing Ltd and David Ezra that a mistake as to whether a certain arrangement should be considered a restrictive arrangement under the Restrictive Trade Practices Law is a mistake with regard to a non-criminal statute that should be considered in accordance with the provisions of s. 34R of the Penal Law. This argument was expressly rejected in *State of Israel v. Borovitz* [4], and we see no reason to address it in this case (with regard to the distinction between a mistake with regard to a criminal statute and a mistake with regard to a non-criminal statute, see CrimA 389/91 *State of Israel v. Weismark* [8]). It should also be noted that the legislature saw no reason in s. 34S of the Penal Law to make an express distinction, with regard to the source of the mistake and the reliance on the erroneous legal position, between reliance on an official legal source, such as a competent authority that adopted an erroneous practice, and the advice of a private lawyer given to an individual. This distinction was taken into account in the American Model Penal Code and we shall address it below (see para. 29 below).

The question that we are required to decide is whether, in the circumstances of the case, the defendants' mistake with regard to the criminal law, which the District Court held was the result of the defendants' reliance on the legal advice of their lawyers that was later discovered to be erroneous, was 'reasonably unavoidable,' and therefore they should be exempted from criminal liability for the offence that they committed as a result of that mistake.

26. The exception provided as a defence in s. 34S of the Penal Law, according to which a mistake of law that is 'reasonably unavoidable' entitles the defendant to a defence, was enacted in amendment 39 of the Penal Law and changed the legal position with regard to a mistake of a defendant in a criminal trial that existed until that time. Before the aforesaid amendment was enacted, the law in force was s. 12 of the Penal Law (as it then stood), which provided that: 'Ignorance of the law shall not serve to exempt anyone from liability for an offence, unless it is expressly stated that knowledge of the law is one of the elements of the offence.' According to the provisions of the aforesaid s. 12, a defendant did not have any defence in cases of a mistake of criminal law, except in situations where knowledge of the law was one of the elements of the offence, in which case the mistake of law meant that all the elements of the offence had not been realized (see R. Kannai, 'Lack of Awareness of Elements of the Offence or Mistake of Law: The Offence of Breach of Trust as an Example,' *Criminal Law Trends — Studies in the Jurisprudence of Criminal Liability* (E. Lederman, ed., 2001) 203, at p. 227). The time-honoured rule that was originally found in s. 12 of the Penal Law, according to which ignorance of the law is no defence in criminal cases, was mainly based on the principle of legality, which requires the existence of a fixed boundary in the law — a boundary between what is permitted and what is prohibited, which is as objective as possible — that applies to all members of society equally. This is based on the outlook that the question whether certain conduct constitutes an offence or not should not be determined in accordance with the understanding, interpretation and subjective knowledge of various individuals but in accordance with the determination of the legislature and the interpretation of the authorities that are authorized for this purpose by law (see M. Gur-Arye, 'Reliance on a Lawyer's Mistaken Advice — Should it be a Defence against Criminal Liability?' 2 *Alei Mishpat* 33 (2002), at pp. 36-37). This rule was based on the absolute presumption that there is no one who does not know the law and understand its content (see S.Z. Feller, *Fundamentals of Criminal Law* (vol. 2, 1987), at p. 545).

27. An additional rationale underlying the rule that ignorance of the law is no defence against criminal liability is the interest of promoting knowledge of the criminal law in view of the social objective of the norms that it prescribes. The prohibitions prescribed by criminal

law in a given society reflect the types of conduct that are regarded by that society as forbidden and unacceptable. Some of these prohibitions concern offences that are inherently prohibited by every normative society, such as murder, rape and theft. These offences give legal expression to acts that from a moral viewpoint are wrong in themselves (*mala in se*) and do not require any positive knowledge of the law in order to know that they are prohibited. With regard to offences of these kinds, there is obviously no basis for accepting a claim of ignorance of the law, and it is hard to imagine a situation in which such a claim will be raised. But even offences that do not concern acts that are inherently prohibited reflect various values and interests that are essential for society and its development (such as the interest of ensuring free competition in the economy, which the offence of making restrictive arrangements is intended to protect). Therefore, even with regard to these offences (offences that are *mala prohibita*) — and maybe especially with regard to these offences — the individual ought to be required to ascertain the relevant criminal law in order to know where the boundary lies between what is permitted and what is prohibited in the various fields of his endeavours (see Feller, *Fundamentals of Criminal Law*, at pp. 549-550). The rule that ignorance of the law is no defence against criminal liability therefore promotes the social interest of studying and internalizing the criminal law. In this respect Prof. Miriam Gur-Arye discusses the duties that the rule imposes on society and its individual members as follows:

> 'It is well known that prescribing criminal prohibitions has an educational purpose of proclaiming what conduct is regarded by society as prohibited, so that individuals will internalize the prohibition and not offend against the law. Society is duty-bound to ensure that knowledge of the law is possible, by requiring the legislature to draft the prohibitions clearly, by requiring the publication of criminal prohibitions and by imposing special restrictions on the ways of interpreting criminal prohibitions. The individual is duty-bound to take an interest in a law that is published and to ascertain what are the prohibitions that restrict him in his conduct' (Gur-Arye, 'Reliance on a Lawyer's Mistaken Advice — Should it be a Defence against Criminal Liability?' *supra*, at p. 42).

Conversely, there is a concern that if a mistake regarding the criminal law gives an individual a defence against criminal liability, this is likely to encourage ignorance of the criminal law and lead to a result whereby individuals seek to minimize their knowledge of the law in order to limit their criminal liability (see B. Lahav, 'Ignorance of the Law,' 6 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 165 (1988), at pp. 179-180; A. Azar, 'Ignorance of the Law and Official Mistaken Advice in Criminal Law,' 10 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 535 (1985), at p. 537).

28. The principle that, as a rule, ignorance of the law is no defence against criminal liability is therefore a fundamental principle in our criminal law, as it is in other legal systems. Notwithstanding, occasionally, when it concerns offences that are not inherently criminal, this basic principle may conflict with another important basic principle of criminal law, namely the principle that there can be no liability in criminal law without fault (*nullum crimen sine culpa*). This conflict arises from the fact that when a person commits an act that constitutes a criminal offence as a result of a mistake of law, this means that he assumed that the act was permitted, or at least did not constitute a criminal offence. Such circumstances may give rise to a concern that strict adherence to the rule that a mistake of law is no defence against criminal liability is inconsistent with the requirement of fault. This difficulty arises particularly in the modern age where every individual is subject to a large number of prohibitions, of which some concern complex issues (such as taxation, restrictive trade practices, securities and environmental law) that require a not insignificant degree of professional expertise in order to identify the relevant norms that apply in a specific case. Sometimes the norms themselves are worded in language that is unintelligible to laymen; moreover, sometimes interpretation of the law is not simple and may give rise to differences of opinion between various judicial instances. In such circumstances, a strict application of the presumption that every man knows the law, without exception, appears unrealistic and is

contrary to our sense of justice (see Feller, *Fundamentals of Criminal Law*, at pp. 553-554; M. Gur-Arye, 'The Draft Penal Law (Preliminary Part and General Part),' 24 *Hebrew Univ. L. Rev. (Mishpatim)* 9 (1994), at p. 62).

29. Various legal systems have contended with the question of the relationship between the principle that ignorance of the law is no defence and the principle of fault. In order to minimize the consequences arising from the conflict between the rule that ignorance of the law is no defence and the principle of fault, various Continental legal systems have recognized as a defence that when the defendant's mistake of law was unavoidable, he should be exempt from criminal liability. The defence, which is based on the theory of fault, was developed in German law; the premise of this defence lies in the outlook that the *mens rea* of the offence admittedly does not include knowledge of the law, but in order to convict someone of an offence, an element of fault is also required. According to this approach, a mistake of law, which no one could have prevented, rules out the element of fault and should therefore constitute a defence against criminal liability (see Azar, 'Ignorance of the Law and Official Mistaken Advice in Criminal Law,' *supra*, at pp. 540-542; Kannai, 'Lack of Awareness of Elements of the Offence or Mistake of Law: The Offence of Breach of Trust as an Example,' *supra*, at pp. 226-227; Feller, *Fundamentals of Criminal Law*, at p. 555). In the German legal system, the aforesaid theory is expressed in s. 17 of the German Criminal Code (the wording of the last part of s. 34S of the Penal Law was drafted in a manner similar thereto). The section states that a mistake of law will constitute a defence against criminal liability, if the defendant could not have avoided it:

> 'Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte…'.
>
> 'If when committing an act the perpetrator is unaware that he is doing wrong, then he acts without fault if he could not avoid this mistake…' (tr. by the editor).

An additional point of interest concerning the aforesaid section 17 is that the section goes on to state that if the defendant could have avoided the mistake, it can only serve as a ground for leniency in sentencing.

It should be pointed out that American law has also considered the question of a mistake of law, but it has adopted a different approach from the Continental one. As a rule, criminal law in the United States does not recognize a mistake of law as a defence against criminal liability. The main exception to this involves offences where the *mens rea* requires an intention to contravene the law; in such a case, a mistake of law may negate the *mens rea* required for the offence (see *Cheek v. United States* [16]). It should also be noted that, in consequence of the different approaches found in German law and American law on the question of a mistake of law, these two legal systems have different approaches to a mistake of law arising from reliance on legal advice. Whereas in German criminal law the defence of a mistake of law, which is prescribed in section 17 of the German Criminal Code, may (as a rule, subject to various conditions relating, *inter alia*, to the professional competence of the lawyer and the manner in which the legal advice was given) also apply to a situation in which the mistake arises from reliance on legal advice (H. Schumann, 'Criminal Law,' in *Introduction to German Law* (W.F. Ebke & M.W. Finkin, eds., 1996), at pp. 395-396), according to the approach accepted in American law, reliance on erroneous legal advice of a lawyer will serve as a defence against criminal liability only if the reliance negates the *mens rea* required by a specific offence (see *Bisno v. United States* [17], at pp. 719-720; 21 *Am. Jur. 2d* (Criminal Law), §156 (2006)). Following this approach, section 2.04(3)(b) of the American Model Penal Code, which recognizes the existence of a defence of a mistake of law in a case of reliance on an erroneous legal position, restricts the application of the defence to several specific situations in which the reliance was based upon an official legal source — such as legislation, a judicial decision or an administrative permit — which is later found to be invalid or erroneous.

30. The defence against criminal liability provided in the last part of s. 34S of the Penal Law, in a situation where the defendant's mistake with regard to the criminal law was reasonably unavoidable, was therefore intended to reflect the principle of fault and to prevent an insult to one's sense of justice that may be caused in a situation where a person is convicted of an offence as a result of a mistake of law that he could not have avoided in any reasonable way. Similar to the approach in German law and contrary to the approach in American law, the defence prescribed in s. 34S of the Penal Law is a general defence against criminal liability and is not limited merely to offences where the standard of *mens rea* required is higher than the standard of the 'ordinary' *mens rea* under s. 20 of the Penal Law.

With regard to the purpose of this defence, the learned Prof. Miriam Gur-Arye says that:

> 'The underlying assumption in this context is that recognizing a mistake in criminal law does not affect the scope of the prohibition. This is interpreted solely by the competent court. The exemption from liability is granted because it would not be fair to attribute liability to someone who, despite all the reasonable efforts that he made, could not have correctly known the true scope of the prohibition as determined by the competent authority' (see Gur-Arye, 'The Draft Penal Law (Preliminary Part and General Part),' *supra*, at p. 63).

The provisions of s. 34S of the Penal Law therefore reflect the point of balance, which was determined by the Israeli legislator in amendment 39 to the law, between the rationales underlying the rule that ignorance of the law is no defence and the need to preserve the principle of fault in criminal law. The rule that a mistake of law does not constitute a defence in criminal cases continues to prevail in Israeli law even after amendment 39, but since the enactment of s. 34S of the Penal Law there is an exception to this rule in situations where the defendant's mistake of law was 'reasonably unavoidable' (it should be noted that s. 34S of the Penal Law applies in our case even though the offences attributed to the respondents were committed before amendment 39 of the Penal Law came into force, since it is legislation that is 'lenient' towards the defendant, within the meaning of this term in s. 5(a) of the Penal Law). It is also important to point out that the burden of raising the defence concerning the application of the defence provided in s. 34S of the Penal Law and of bringing evidence on this issue rests with the defendant, since the presumption provided in s. 34E of the Penal Law is that an act is committed in conditions where there is no defence against criminal liability. When the defendant raises the defence of a mistake of law and brings evidence on this issue that is capable of raising a reasonable doubt concerning the validity of the defence, the prosecution is required, under s. 34V(2) of the Penal Law, to prove beyond all reasonable doubt that this defence against criminal liability does not apply in the defendant's case (see CrimA 4675/97 *Rozov v. State of Israel* [9], at pp. 368-372).

A 'reasonably unavoidable' mistake — the elements of the defence and the conditions for its application

31. The question that is raised in the present case by the last part of s. 34S of the Penal Law is how we should interpret the requirement that the defendant's mistake of law should be 'reasonably unavoidable.' From a linguistic viewpoint this requirement is based on two elements: one, the existence of a 'mistake,' and the other, that the mistake is 'reasonably unavoidable.'

The first element — the element of the 'mistake' — is a subjective element that addresses the question whether the defendant did indeed make a mistake relating to the criminal law. From the first part of s. 34S it can be seen that this mistake can concern either the actual existence of a criminal prohibition in a certain case or the meaning of the prohibition (see *State of Israel v. Borovitz* [4], at pp. 931-932; for a distinction between the two types of mistake, see Feller, *Fundamentals of Criminal Law*, at pp. 545-546). For a defendant to be entitled to a defence against criminal liability, his subjective mistake should be a sincere one that was made in good faith. A defendant who suspected that his act was unlawful but chose to shut his eyes to this suspicion rather than looking into it cannot benefit from the defence of

a mistake of law, since this defence was intended to ensure, as stated in para. 30 above, that the principle of fault is upheld. When the mistake of a defendant is not a sincere one and was not made in good faith, or when the defendant has a suspicion that his act is unlawful, but despite this he averts his eyes and does nothing to verify the matter, there is no justification for departing from the rule that a mistake with regard to the criminal law is no defence against criminal liability (see *State of Israel v. Borovitz* [4], at p. 935).

The second element — the requirement that the mistake is 'reasonably unavoidable' — defines the type of mistake of law that constitutes a defence in criminal cases. This element lays down an objective standard with regard to the nature of the defendant's mistake of law. According to this objective standard, only a reasonably unavoidable mistake may constitute a defence against criminal liability. It should be noted that it is not sufficient for the defendant's mistake with regard to the criminal law to be a 'reasonable mistake.' The requirement that the mistake should be 'reasonably unavoidable' indicates that only if the defendant was unable to avoid the mistake even though he acted reasonably will he be entitled to benefit from the defence of a mistake of law. If in the circumstances of the case it was not reasonably possible to take action to prevent the mistake, or if, despite taking such action, the defendant's mistake was still unavoidable, the mistake of law will preclude the defendant's criminal liability (see Gur-Arye, 'The Draft Penal Law (Preliminary Part and General Part),' *supra*, at p. 63). It is important to point out in this regard that the legislature worded s. 34S of the Penal Law in general terms and did not define an exhaustive list of circumstances in which the defendant's mistake of law will exempt him from criminal liability.

It should also be noted that the addition of the objective test that a mistake of law should be 'reasonably unavoidable' is capable of clarifying the distinction between the defence of a mistake of law under s. 34S of the Penal Law and the defence of a mistake of fact under s. 34R of the Penal Law. The latter merely provides a subjective test of a person 'who does an act while believing in a factual position that does not exist.' This subjective test was introduced in amendment 39 of the Penal Law, and it changed the requirement that existed previously in s. 17 of the Penal Law, which contained both a subjective and an objective test, according to which the defendant's mistake of fact needed to be 'sincere and reasonable' in order to constitute a defence against criminal liability (see CrimA 4260/93 *Haj Yihya v. State of Israel* [10], at p. 873; for the view that amendment 39 of the Penal Law did not change the law concerning a mistake of fact, see S.Z. Feller, 'Mistake of Law,' 12 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 5 (1995)).

32. The defence under consideration in this case, as an exception to the wide-ranging rule in our criminal law, is a narrow one, and its limits are expressed in the fact that the two elements in the last part of the section — that the mistake is 'unavoidable' despite acting 'reasonably' — are objective elements that lay down a high standard for that defence. This leads to the conclusion that the question whether a defendant's mistake in a criminal case was reasonably unavoidable or not will be determined in accordance with the means at his disposal in the specific case for ascertaining the law, the type of offence with regard to which the defence of mistake of law is raised and the extent of the efforts made by the defendant to avail himself of the means at his disposal for ascertaining the law, as well as background information relating to the defendant and his awareness of the elements of the offence in accordance with his individual abilities. The defendant's choice of a certain way of ascertaining the law, as well as the extent of the efforts that he should make, are subject to the test of reasonableness. In this context we accept the respondents' argument that the language and purpose of s. 34S of the Penal Law do not require a defendant to avail himself of 'all' the possible methods available for ascertaining the law. If the defendant did indeed take reasonable steps to verify the criminal law, in view of the type and complexity of the offence and in view of the information that he could obtain in the circumstances of the case with reasonable efforts, and despite all this he made a mistake of law, the defendant's mistake should be regarded as reasonably unavoidable.

A. An objective unavoidability is not an absolute unavoidability but a reasonable unavoidability

33. According to the standard determined by the legislature with regard to the defence of a mistake of law, it is insufficient that the defendant was not negligent with regard to the criminal law in order for him not to be convicted; on the other hand, the requirement of reasonableness provided in s. 34S of the Penal Law is capable of making it unnecessary for the defendant to take every possible step. Therefore the defendant will admittedly be required to take steps to ascertain the relevant criminal law if he wants not to be convicted by virtue of that defence, but as we have said, these steps do not need to be absolutely 'all' the possible steps, but only those steps that are reasonable in the circumstances.

We should also point out that the purpose of the defence provided in the section under discussion — to prevent a person being convicted where he is not at fault — supports the conclusion that the defence of a mistake of law should not be restricted solely to cases where there is an absolute objective impediment to knowing the law. As we shall explain below, in certain limited circumstances the defence will apply even when the defendant was aware of the existence of the relevant criminal law, but acted only after he examined the applicability of the law to his conduct and relied on serious professional advice or knowledge with regard to the interpretation of the law in the circumstances of the case, provided that the defendant committed the offence after he was reasonably unable to avoid the legal mistake.

B. The defence is applicable to a mistake of law whether it was based on the position of the official authority or whether it was based on the advice of a lawyer

34. The broad language of s. 34S of the Penal Law does not contain any restriction on the source of, or the reason for, the mistake of law, and it makes it possible within the scope of the defence to include even a mistake that resulted from reliance on the erroneous legal advice of a lawyer. It should therefore not be said that only reliance on the opinion or interpretation of an official authority may serve as a defence of a mistake of law. We accept the respondents' argument that, in certain conditions, reliance on the legal advice of a lawyer may also exempt the defendant from criminal liability. This approach can also be seen in an article of the learned Prof. S.Z. Feller, one of the originators of the defence in our criminal law, who wrote the following:

> 'When an individual's mistake of law is the result of a reasonable — and necessarily also sincere — reliance on the erroneous interpretation, operation or implementation of the law made by a competent authority, then it must be agreed that such a mistake is reasonably unavoidable, and therefore it should serve as a ground for an exemption from criminal liability. Moreover, this should not be limited merely to an "official" interpretation, since a person may also act in this manner as a result of a reasonable reliance on erroneous legal advice. There is therefore in our opinion no reason to compile a closed list of sources or reasons for an "authoritative" erroneous interpretation, on which it is reasonable to rely. The main issue is that the court finds, in its discretion, that the defendant's mistake was, in the circumstances of the case, reasonably unavoidable, and therefore it is preferable to leave the decision to that discretion' (S.Z. Feller, 'Mistake of Criminal Law or non-Criminal Law: Where is the Dividing Line?' 5 *Hebrew Univ. L. Rev. (Mishpatim)* 508 (1974), at pp. 562-563; for a similar approach, see Gur-Arye, 'The Draft Penal Law (Preliminary Part and General Part),' *supra*, at p. 63).

Although we have said that pleading the defence does not depend upon there being an official interpretation of the law, and even the advice of a lawyer may be used as a defence, it can be determined that a distinction should be made between the weight of a defence argument that is based upon legal advice deriving from an official interpretation of a law and the weight of a defence argument that is based on legal advice given by a lawyer. It should also be noted that even the state does not deny that the defendant's reliance on the advice of a

lawyer is a circumstance that should be taken into account when we decide whether he is entitled to the defence provided in s. 34S of the Penal Law. The state even agreed in the appeal that there may be situations in which the mistake of a defendant in a criminal trial, which derived from the erroneous legal advice of his lawyer, will exempt him from criminal liability for an offence that he committed in reliance on that advice. Notwithstanding, the state claims that in many cases obtaining the advice of a lawyer will not constitute taking all the reasonable steps to ascertain the law, and therefore it will not be sufficient to enable the defendant to succeed with the defence. We accept this position of the state. The substantive issue that we need to decide — and this would appear to lie at the heart of the dispute between the parties — is what are the circumstances in which the reliance of a defendant on the legal advice of his lawyer can constitute taking reasonable steps so that his mistake will constitute an unavoidable mistake within the meaning thereof in the law, which will be capable of exempting the defendant from criminal liability in accordance with s. 34S of the Penal Law?

Now that we have accepted the argument that in certain circumstances the defence provided by the legislature allows the advice of a lawyer to be recognized for the purpose of a defence of a mistake of law, we need to take into account the need to interpret the scope of the defence narrowly, both because the defence is an exception to the fundamental rule that ignorance of the law is no defence and because it involves considerable risks of harm to the public interest that is protected by the Penal Law. Therefore, while we recognize the existence of a mistake of law as a new defence against criminal liability, we should take into account the risks and the pitfalls and we should determine criteria that will outline, in so far as possible, the limits of the defence, or at the very least provide tools for limiting the defence to the true purpose for which the exemption from liability was determined in the absence of an element of fault.

C. The disadvantages or risks that the defence of a mistake of law presents to the public's enforcement interest

35. In principle we accept the state's argument that granting an exemption from criminal liability because a defendant relied on the erroneous legal advice of his lawyer involves several dangers. The main dangers that this presents, in our opinion, are the concern that the defence will be abused by buying legal opinions 'to order' for the purpose of obtaining immunity or a defence against criminal liability, and the concern that the norms laid down by the criminal law will not become accepted practice (see Gur-Arye, 'Reliance on a Lawyer's Mistaken Advice — Should it be a Defence against Criminal Liability?' *supra*, at pp. 47-49).

The concern that legal opinions will be bought 'to order' is especially relevant in cases of complex 'economic' offences (such as restrictive arrangement offences and tax offences), which are mostly offences of the *mala prohibita* type, where no 'natural' moral and social intuition necessarily exists. In a significant number of cases involving these offences, and especially when the relevant provisions of the law have not yet been given an authoritative interpretation of the court, a skilled lawyer will be able to give a legal opinion on the legality of his client's actions that will be consistent with the interests of that client. The respondents' claim that there are ways of minimizing this concern, including the possibility of bringing criminal and disciplinary proceedings against lawyers and thus compelling them to defend their opinion before the court, is an approach that makes the defence of reliance on legal advice too broad and is likely to hinder the realization of the purpose of enforcing criminal norms. This approach is also likely to impose a heavy burden on the person giving the legal advice, a lawyer who is not a party to the criminal proceedings, rather than the person who committed the offence. In any case, even if the methods proposed by counsel for the respondents may be implemented in certain cases, in many other cases they will not be capable of effectively allaying the concern raised by the state that legal opinions will be bought 'to order.' In this respect the learned B. Lahav said in his aforementioned article:

> 'There are many cases in which it is possible to write two comprehensive and learned opinions that will be highly respected by the court and will have

> conflicting conclusions… since a defendant can almost always obtain a learned and comprehensive opinion whose conclusions will suit his expectations. Consultations with a lawyer will thereby become a fiction that is intended to prove that the defendant supposedly tried to ascertain the law. As we have said, proving that the opinion was written with criminal intent is almost impossible, and in any case a lawyer is not obliged to write an opinion that is consistent with the conclusion of the court provided that the opinion is well-founded, and a good lawyer will have no difficulty in doing this' (see Lahav, at p. 205).

We should also not ignore the fact that allowing legal advice to be used as a defence raises additional concerns, of which the most significant one is the concern that an unfair disparity will be created between defendants with ample means who can rely on the advice or reputable lawyers and defendants who do not have the means to consult lawyers with recognized levels of expertise and professionalism. I incline towards the opinion that the main solution to this is to develop alternative mechanisms of prior opinions given by official professional authorities — a mechanism that was introduced with regard to restrictive arrangements in the provisions of s. 43A of the Restrictive Trade Practices Law, after the offences in this proceeding were committed; a prior opinion of a competent official authority will naturally be of greater weight than a private legal opinion. A prior official opinion with regard to economic and other offences concerning regulation and supervision, where there are authorities responsible for enforcement, may resolve a large number of the difficulties that are likely to arise with regard to private legal advice. We should point out that the concerns involved in granting defendants an exemption from criminal liability in cases where they erred with regard to the criminal law as a result of reliance on the erroneous legal advice of their lawyers does not justify a total rejection of such a defence. Such an outcome is inconsistent with the language of s. 34S of the Penal Law and its purpose, which is to prevent the conviction of persons who are not at fault, and even the state does not argue that this is the desirable outcome. But we accept the state's argument that the aforesaid concerns justify a strict approach and great caution when we consider whether to acquit a defendant on the basis of a defence of reliance on the erroneous legal advice of his lawyer.

It therefore follows that even though there is no reason in principle why the defence of a mistake of law under s. 34S of the Penal Law should not be applicable in circumstances where the mistake arises from the defendant's reliance upon the advice of a lawyer, it would appear that the criteria that should be adopted when examining whether a defence of a reasonably unavoidable mistake should succeed are naturally stricter than those that should be adopted when a defendant seeks to base his defence on the opinion or legal position of a competent official authority.

D. Criteria for examining the defence

36. It should be stated at the outset that for a defence of a mistake of law to succeed in a specific case, the claim that the defendant relied on the opinion of a lawyer in that case should itself satisfy the test of reasonableness. This test is applied with a view to the specific circumstances relating to that person, the possibilities available to him for ascertaining the legal position and the legal question that arose in his case. The more complex the legal question and the more unclear and ambiguous the law, the more reasonable it is to rely on professional advice on that issue, including the advice of a lawyer. By contrast, where the question is less complex and the conduct under scrutiny lies closer to the heart of the relevant offence, it will be less reasonable to rely on the advice of a lawyer as a justification for that conduct. The reasonableness of the reliance, which concerns the subjective opinion of the defendant, also depends to a large extent on the status and professional experience of the person who seeks to rely on his lawyer's advice. Obviously the defendant's subjective attributes are capable of shedding light on the question of the reasonableness of the reliance on the advice that was given. The more senior the position held by a person and the greater his professional experience, the more he is expected to be familiar with the laws concerning his fields of endeavour and the problematic issues that they involve; in such circumstances, a

'blind' reliance on the advice of a lawyer with regard to those laws will be less reasonable. Moreover, within the context of the defendant's good faith and subjective attributes, it is important to point out that the nature of the legal question under consideration and the position held by the person who seeks to rely on the legal advice of his lawyer are important not only for the claim of reliance on the legal advice, but also for the type of mistake that was made.

We should also point out that in view of the language and purpose of s. 34S of the Penal Law, the objective test provided therein and the difficulties inherent in too broad an interpretation of the defence of reliance on the advice of a lawyer, we should adopt stricter criteria for reliance on the advice of a lawyer for the purpose of the defence in s. 34S of the Penal Law, than those laid down in *Hurvitz v. State of Israel* [2] (in the opinion of Justice Or, at pp. 155-160).

37. The following factors and criteria should be taken into account, as some of the means of examining a defence of a mistake of law as a result of reliance on legal advice and deciding whether it can serve as a defence under s. 34S, in order to ascertain whether the mistake was unavoidable.

First, the legal advice should be based on all of the facts that are relevant to the specific case. In other words, a defendant who wishes to receive legal advice is required to reveal to the party giving the advice all of the facts that are relevant to the matter on which he wishes to receive the advice. It may be assumed that in most cases a client who wishes to receive legal advice with regard to the law that is applicable to the action that he intends to take is aware of the facts that are required for the legal advice, and therefore he should be obliged to reveal to the lawyer all the relevant circumstances and tell him all of the precise information that is needed for giving the advice. But sometimes, especially in the case of a lawyer who has a close knowledge of the client's affairs, the facts needed for the opinion may also be based on information that is personally known to the lawyer, provided that the person requesting the opinion is convinced that his lawyer is aware of the facts.

Second, someone who wishes to receive an opinion concerning the law on a certain question should approach a lawyer that has expertise in the field relevant to the legal opinion. As we have said, someone who seeks legal advice is obliged to disclose all the relevant facts to the expert. It need not be said that in view of the scope and variety of norms that govern the various fields of law, it will be difficult, at least in the great majority of cases, for a lawyer to have a thorough knowledge of all of those fields. Therefore, if a person genuinely and sincerely wishes to avoid committing an offence against the criminal prohibitions that apply in a certain field, such as economic offences, tax offences, restrictive trade practices and securities, and is interested in receiving a legal opinion on which he can rely in this respect, he should approach a lawyer who, to the best of his knowledge, has expertise in that field. We should point out in this context that although the fields of expertise of lawyers in Israel are not officially regulated, we are of the opinion that as a rule a reasonable person who acts in good faith and wishes to avoid committing an offence is capable of finding a lawyer with expertise in the field relevant to his case without any great difficulty. Notwithstanding, consulting a lawyer who *prima facie* does not have any special expertise will not in itself rule out the applicability of the defence; everything depends upon the good faith of the person seeking the advice.

Third, in order that legal advice may give a defendant the possibility of a defence of a mistake of law, it should be seen to be a serious legal opinion, and it should therefore usually be in writing. The importance of an opinion being in writing for the purpose of the defence prescribed in s. 34S of the Penal Law is mainly probative, but it also has a substantive value. From a substantive viewpoint, it is obvious that a written opinion concerning the legality of a certain act or transaction will be more precise and the content of the advice on which the defendant claims he relied will be clearer and of greater weight. In the probative sphere, a written opinion will give the court the possibility of examining the precise nature of the legal

advice that the lawyer gave his client, and thereby assessing more effectively the defence of a mistake of law and the reasonableness of the measures taken by the defendant to ascertain the law. Moreover, a written opinion can strengthen the seriousness of the claim that the defendant relied on legal advice that he received. With regard to the question of writing, a distinction should be made between the position that was examined in *Hurvitz v. State of Israel* [2], which considered the question of the *mens rea* required for an offence of special intent, which is subjective in nature, and a case in which a defence is raised within the context of s. 34S of the Penal Law, which provides that a mistake of law should be 'reasonably unavoidable.' It should be noted that we accept that there should be no absolute requirement of a written opinion, but it is clear that as a rule legal advice that is not given in writing will not satisfy the standards required to determine that the mistake was 'reasonably unavoidable.'

Fourth, a legal opinion that is capable of serving on its own as a defence against criminal liability only has significance and weight if the defendant chose this course of action to ascertain the law in the absence of other more appropriate courses of action, such as a prior opinion of a competent authority as to the interpretation of the law that it adopts in the circumstances of the type under discussion, the existence of a court judgment or any accepted procedures or guidelines on the matter in issue. We should add to this that if a person who relies on a mistake of law has in his possession specific information concerning the matter in issue, it will be taken into account when examining the sincerity of the mistake and the reliance on the methods adopted to avoid a mistake of law. If the defendant adopted such measures, he may succeed with the defence of a mistake of law, even if the court hearing his case ultimately decides to adopt a different legal position to the one that appears in the opinion that he received, provided that the court is persuaded that, despite the proper and clear steps taken by the defendant to ascertain the law, his mistake of law was unavoidable.

In concluding this part of the judgment, we should also point out that the criteria set out above do not constitute a closed list, and it may be assumed that additional criteria for examining the question of whether legal advice given to a defendant can entitle him to rely on a mistake of law will be developed in future case law on the subject of the interpretation of the exception in s. 34S of the Penal Law. It is also worth pointing out that in order to succeed in a defence of mistake of law, the client needs to rely on his lawyer's advice in good faith. As we explained in para. 31 above, when the client does not make a sincere subjective mistake with regard to the criminal law, or when the client suspects that what he is doing is prohibited, he has the necessary *mens rea* for the offence, and the opinion of his lawyer or of any other party that gives him advice will exempt him from criminal liability.

38. The additional issue that we are called upon to decide concerns the significance that should be attributed to the possibility of applying to the competent administrative authority in order to obtain its legal opinion, when the defendant chose not to take advantage of this possibility but to rely on the 'private' legal advice of his lawyer (assuming, of course, that the lawyer's advice was obtained in accordance with the conditions set out above). According to the state, the mere existence of a possibility that a defendant may apply to a competent authority and receive clarifications or guidelines with regard to the legality of his actions should constitute a decisive circumstance of great weight when the court decides whether the defendant did everything required of him in order to ascertain the law. The respondents, on the other hand, argue that official advice should not be given a higher status than the advice of a private lawyer, and that the defence provided in s. 34S of the Penal Law should not be limited in the manner suggested by the state.

Without determining any hard and fast rules, our position on this question inclines towards the position presented by the state. As we said in para. 32 above, a defendant's choice of the methods of ascertaining the criminal law that is relevant to his case should satisfy the test of reasonableness. Where there is a real possibility of obtaining the legal opinion of the competent authority, and especially where there is a statutory arrangement that allows this (such as the arrangement provided today in s. 43A of the Restrictive Trade Practices Law), a mistake of law by a defendant who preferred to rely on the legal advice of his lawyer rather

than applying to the competent authority would not appear to be a mistake that is reasonably unavoidable. In such circumstances, it may be assumed that the defendant will be required to explain why he or his lawyer did not apply to the competent authority to ascertain its legal opinion, before he can persuade the court that he did indeed make a reasonably unavoidable mistake. The defendant has the burden of explaining why in these circumstances he was satisfied with the legal advice of his lawyer and why this was a reasonable course of action, even though there was a possibility of ascertaining the legal viewpoint of the competent authority; *prima facie* there is no reason in principle why such a defendant should not make use of the defence provided in s. 34S of the Penal Law, but the burden of persuading the court that his mistake was indeed reasonably unavoidable will be greater. It need not be added that in a situation where there is no possibility of applying to the authorities, the fact that a defendant, who chose to rely on the legal advice of his lawyer, did not make an application to the authority does not make his mistake of law one that could reasonably have been avoided.

From general principles to the specific case

Did the respondents make a 'mistake' of law?

39. In the appeal before us, the state claims that the defence provided in s. 34S of the Penal Law does not apply in the respondents' case, since from a subjective viewpoint they did not make a sincere 'mistake' of criminal law in good faith, and from an objective viewpoint their mistake was not 'reasonably unavoidable.' It should be noted, however, that the state does not dispute that the respondents received legal advice from their lawyers with regard to the TME transaction and that according to the advice that they received there was no legal impediment to carrying out the transaction from the viewpoint of restrictive trade practices law. The respondents for their part do not claim that they were unaware of the existence of the Restrictive Trade Practices Law and the prohibition in that law of making restrictive arrangements, but they claim that in view of the legal advice that they received, they made a mistake of law with regard to the applicability of the prohibition to the restrictive arrangements in their case.

With regard to Tnuva and Landsman, the state bases its claims that their mistake was not made in good faith on the judgment in *Tnuva Ltd v. State of Israel* [14] and the decision of the director-general of the Antitrust Authority on the application to merge Tnuva and the Off HaNegev company. In *Tnuva Ltd v. State of Israel* [14] Tnuva and Landsman were convicted by the Magistrates Court of an offence of making a restrictive arrangement with regard to a partnership that Tnuva and other companies set up in order to sell various kinds of goods at the 'Lev HaNegev' shopping mall in Beer-Sheba, in which it was stated that each of the partners would have an exclusive right to market to the partnership the products that fell within its sphere of expertise. The Magistrates Court, which convicted Tnuva and Landsman, held that the mere existence of the partnership had no effect on whether a certain arrangement did or did not constitute a restrictive arrangement. In the judgment in *Tnuva Ltd v. State of Israel* [14], which was given on 1 September 1993 (a short time after TME was set up and before the meeting of the board of directors of TME that considered the marketing policy that had been agreed between Tnuva and Meir Ezra Marketing Ltd), the District Court upheld the determination of the Magistrates Court that the formation of the partnership did not exempt the partners from the application of restrictive trade practices law, even though it decided to acquit them for other reasons. In view of these facts, the state claims that when it decided to cooperate with Meir Ezra Marketing Ltd and TME was formed, Landsman and Tnuva had effectively been convicted of an offence of a restrictive arrangement in a case which the state claims involved similar circumstances to those in the present case. Despite this, the state claims that Tnuva and Landsman deliberately ignored the ramifications of the case on the legality of the cooperation between Tnuva and Meir Ezra Marketing Ltd. The state also raises similar claims with regard to the attitude of Tnuva and Landsman to the decision of the director-general of the Antitrust Authority on 6 July 1994 with regard to the merger between Tnuva and the Off HaNegev company, in which the director-general said with regard to TME that: 'this venture is being examined by us from the viewpoint of its compliance with

restrictive trade practices law.' According to the state, Tnuva and Landsman should have known that this decision raised questions with regard to the legality of the TME venture, and at the very least they should have reconsidered the legality of the venture.

Just as the state raises claims with regard to the lack of good faith on the part of Landsman and Tnuva, it also raises similar claims with regard to David Ezra and Meir Ezra Marketing Ltd. These claims are mainly based on several remarks made by the director-general with regard to the TME venture. In this respect the state refers to the meeting that took place in November 1993 between David Ezra, Advocate Brandwein and the director-general, in which the director-general expressed his reservations with regard to the cooperation between Tnuva and Meir Ezra Marketing Ltd. Another statement by the director-general on the subject of the cooperation between Tnuva and Meir Ezra Marketing Ltd appeared in his decision of 4 February 1994 concerning the merger between Meir Ezra Marketing Ltd and the Tohelet Ganz company and other companies, in which the director-general expressed his concerns regarding the cooperation between Tnuva and Meir Ezra Marketing Ltd. He said that *prima facie* the agreement between Tnuva and Meir Ezra Marketing Ltd might constitute a restrictive arrangement under s. 2 of the Restrictive Trade Practices Law, and he intended to examine the ramifications of the arrangements between Meir Ezra Marketing Ltd and Tnuva from the viewpoint of restrictive trade practices.

40. After considering the state's arguments, we do not see any reason to intervene in the factual finding of the District Court with regard to the respondents' subjective mistake of law, in view of its finding with regard to the objective element of the defence of a mistake of law. We should also point out that we are also giving weight to the fact that this finding is based on the impression that the court received from the testimonies that it heard from Landsman and David Ezra, as well as Advocates Yanovsky and Brandwein, who gave the legal advice to Tnuva and Meir Ezra Marketing Ltd, on which the respondents' claim of a mistake of law is based.

Nevertheless, it should be emphasized that from the evidence before us it can be seen that the respondents' mistake of law only concerned the question of the applicability of the prohibition of making restrictive arrangements in circumstances where the restrictive arrangement is made between competitors prior to setting up a joint venture, in which that arrangement is supposed to be put into operation. The respondents did not make any mistake — and in the circumstances of the case they also could not have made a mistake, sincerely and in good faith — with regard to the fact that the restrictions set out in the minutes were prohibited restrictive arrangements under the Restrictive Trade Practices Law. These restrictions, which relate, *inter alia*, to the minimum prices at which Tnuva and Meir Ezra Marketing Ltd would market the imported meat to their customers, and to the division of the meat marketing market between the two companies and between them and TME, are blatantly and unambiguously restrictive. As the state points out, this is a case of restrictions that lie at the very heart of the law of restrictive trade practices, and they even fall within the scope of the absolute presumptions provided in s. 2(b) of the Restrictive Trade Practices Law. When a case concerns restrictions of this kind, it will be very difficult for an experienced and knowledgeable businessman — and especially businessman such as Landsman and David Ezra, who do not deny that they were aware of the existence of the Restrictive Trade Practices Law and the prohibition provided therein against making restrictive arrangements — to discharge the burden imposed on them under s. 34S of the Penal Law and of showing a reasonable doubt that they made a mistake of law, sincerely and in good faith, with regard to the legality of restrictive arrangements of this kind. In view of the problematic nature of the arrangements that were made between Tnuva and Meir Ezra Marketing Ltd, of which the respondents were aware, the respondents satisfied themselves with the advice of their regular lawyers, according to which setting up the TME venture made the transaction permissible from the viewpoint of the law of restrictive trade practices. This was a vague question addressed to the lawyers without any explanation, and the reply was given orally, without a written legal opinion and without any satisfactory reasoning. Was it really reasonable to rely

on a reply that a joint venture, in which restrictive arrangements that were formulated before the venture was set up would be implemented, would legitimize the blatant illegality inherent in these arrangements?

Was the respondents' mistake 'reasonably unavoidable'?

41. Let us therefore examine whether the legal advice that was given to the respondents rendered their mistake concerning the law of restrictive trade practices, as explained above, reasonably unavoidable.

As we said above, the restrictive arrangements that are the subject of the present appeal, which were set out in the minutes of 25 November 1993, are arrangements that concern the very heart of the definition of a restrictive arrangement in the Restrictive Trade Practices Law, and they clearly fall within the scope of the absolute presumptions provided in s. 2(b) of the Restrictive Trade Practices Law, since they concern agreed prices and a division of the market. The respondents had a well-established business background in the field of fixing prices and marketing, and they even took part in the preliminary investigations in the case before us. Moreover, Tnuva and Landsman had previous experience as a result of their indictment in *Tnuva Ltd v. State of Israel* [14], whereas David Ezra applied in the course of the investigations to the director-general of the Antitrust Authority. Therefore, reliance on an oral legal opinion without details or reasoning, according to which it was possible to make agreements of the kind that they made, and that these did not constitute a prohibited restrictive arrangement simply because the competitors who make the agreement decided to adopt it within the framework of a third party that they set up, does not amount to a 'reasonably unavoidable' mistake.

The aforesaid arrangements were made shortly before TME was formed, as a solution that circumvented the law. The respondents were aware of the danger signals and in these circumstances it cannot be said that all of the reasonable steps were taken to prevent the mistake with regard to the legality of the arrangements.

The respondents relied on advice that was given orally and without a written opinion; they did not consider the distinction made in *Tnuva Ltd v. State of Israel* [14], of which Tnuva and Landsman were aware at that time, and they had no answer to the express concerns that the director-general of the Antitrust Authority raised with David Ezra. These circumstances are relevant to the question whether the legal mistake, on which they sought to rely, was 'reasonably unavoidable.' The respondents, who admitted that they were aware of the existence of the law of restrictive trade practices and even sought to examine the legality of the TME venture in accordance with this field of law, satisfied themselves with a vague and oral reply to the legal question that they asked their lawyers.

42. Furthermore, as senior directors in their corporations and persons with considerable business experience, Landsman and David Ezra should have been personally aware of the problems presented by the TME venture and the arrangements made in it from the viewpoint of the law of restrictive trade practices. Admittedly the mistake of law made by the two of them was a sincere mistake, as the District Court held; but in view of the nature of the arrangements between Tnuva and Meir Ezra Marketing Ltd, which were clearly restrictive arrangements, the reliance by Landsman and David Ezra on the legal advice given to them, without examining the matter in depth and without at least asking their lawyers for a reasoned and argued opinion, was unreasonable. The respondents' unreasonableness in relying on the legal advice, as it was given to them in this case, is especially manifest in view of the concrete indications that the TME venture was problematic.

Thus, Landsman's conduct was particularly unreasonable in view of the express finding in *Tnuva Ltd v. State of Israel* [14] that the formation of a partnership between competitors was incapable of facilitating the circumvention of restrictive trade practices law. Even if the legal question that arose in that case was not identical to the one that was examined in the case before us, the similarity between the two cases was sufficient to require Landsman to act in order to receive clear and reasoned clarifications concerning the distinction between the two

situations. Even if we assume in Landsman's favour, as the District Court held, that he made a sincere mistake with regard to the question of the effect of the joint venture on the legality of the restrictive arrangement, this certainly was not a mistake of law that satisfies the high objective standard laid down in s. 34S of the Penal Law, namely that the mistake should be 'reasonably unavoidable.' Similarly, David Ezra, who met with the director-general of the Antitrust Authority and was aware of his reservations with regard to the legality of the TME venture, should have taken action to obtain a reasoned and detailed legal opinion, which would clarify why despite the reservations of the director-general the TME venture did not contravene the law of restrictive trade practices. By failing to do this or anything else that might properly clarify the legal position, David Ezra's mistake of law — even if we assume that from a subjective viewpoint it was a sincere mistake — was not a 'reasonably unavoidable' one.

Therefore it cannot be said in the circumstances of the case that the respondents' legal mistake, even if it was made in good faith, was 'reasonably unavoidable.'

In this context, it is important to point out further that in the case before us the specific criminal liability of Landsman and David Ezra for the restrictive arrangement that was concluded between Tnuva and Meir Ezra Marketing Ltd is based on the provisions of s. 48 of the Restrictive Trade Practices Law, which provides that in the case of an offence under the Restrictive Trade Practices Law that is committed by a corporation, anyone who is an active director in the corporation at the time when the offence is committed is also criminally liable (see CrimA 4148/03 *Cohen v. State of Israel* [11]; *State of Israel v. Borovitz* [4], at pp. 928-929). Since no one disputes that Landsman and David Ezra were aware of the restrictive arrangement in our case, and since their reliance on the legal advice given to them, in the manner in which it was given, was unreasonable, it follows that the defence in the last part of s. 48 of the Restrictive Trade Practices Law, which applies to an active director in a corporation who proves that 'the offence was committed without his knowledge and that every reasonable measure was taken to ensure compliance with this law,' does not apply to them. In conclusion it should be noted that in view of the direct involvement of Landsman and David Ezra in the restrictive arrangement under discussion in our case, there was no reason *prima facie* why they should not have been found in this case to have direct criminal liability for this restrictive arrangement, as officers of Tnuva and Meir Ezra Marketing Ltd (see *Nechushtan Elevator Industries Ltd v. State of Israel* [6], at p. 121; *State of Israel v. Borovitz* [4], at pp. 858-859). But since the indictment only charges Landsman and David Ezra with an offence under s. 48 the Restrictive Trade Practices Law, and since we have found that they do bear criminal liability under that section, we do not see any reason why we should make a firm ruling on the question of the direct criminal liability of Landsman and David Ezra for the restrictive arrangement under discussion in this case.

We should also point out that our finding that in the circumstances of the case the respondents' reliance on the legal advice that was given to them by their lawyers was unreasonable makes it unnecessary to make a ruling on the pleadings of the parties with regard to whether the respondents were able or unable to ascertain the legal position of the Antitrust Authority on the subject of their mistake of law.

Summary

43. Since we have found that the respondents made a restrictive arrangement, within the meaning of this term in the Restrictive Trade Practices Law, and that they are not entitled to succeed in the defence of a mistake of law under s. 34S of the Penal Law, because we have determined that their mistake was not 'reasonably unavoidable,' we are led to the conclusion that the appeal should be allowed. The result is therefore that Tnuva and Meir Ezra Marketing Ltd are convicted of being parties to a restrictive arrangement under s. 2 and s. 47(a)(1) of the Restrictive Trade Practices Law, whereas Landsman and David Ezra are convicted of the same offence under the same sections together with s. 48 of the Restrictive Trade Practices Law. In our finding that the respondents should be convicted of committing an offence under

the Restrictive Trade Practices Law we have not ignored the difficulty raised by the passage of time. Many years have passed since the offence was committed and approximately eleven years have passed since the indictment was filed. This difficulty troubled us very much, but we have reached the conclusion that we have no alternative but to convict the respondents.

From the pleadings of the state before us it was clear that the main purpose of filing this appeal — more than eight years after the offence was committed — was to establish the correct interpretation of s. 34S of the Penal Law and the scope of the defence provided therein. The state was concerned that the judgment of the trial court gave too broad an interpretation to this defence, in a manner that was likely to have an effect on other 'white collar' crimes. The passage of time since the offence in the indictment was committed will be taken into account when we consider the sentence (for the passage of time since the offence was committed as a ground for leniency in sentencing, see CrimA 2848/90 *Asa v. State of Israel* [12]; CrimA 3632/92 *Gabbai v. State of Israel* [12]). Even the fact that the District Court held that the respondents' mistake of law was a sincere mistake should be taken into consideration by the prosecution in the sentence that it seeks. We shall take all of this into account after we hear the arguments of the parties on sentencing.

The appeal is therefore allowed and the respondents are hereby convicted of the offence with which they were charged in the indictment.

Justice E.E. Levy

I agree.

Justice S. Joubran

I agree.

Appeal allowed.

28 Tishrei 5768.

10 October 2007.