

## Client Update | Antitrust & Competition Towards a Reform in Competition Law

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November 2018

Dear Clients and Friends,

This update concerns two significant and inter-related steps recently taken by the Israeli Antitrust Commissioner intended to reduce the regulatory burden and allow parties to move forward towards a regime based on self-assessment rather than regulatory permits.

**The first** is the amendment of two block exemptions – Restrictive Trade Practices Rules (block exemption for Joint Ventures) (Temporary Order), 2006; and Restrictive Trade Practices Rules (Block Exemption for ancillary restraints in mergers), 2009. The amendment enables parties to benefit from these block exemptions even if they do not meet strict criteria of market share, number of competitors and the like, if the parties can indicate that the agreement does not harm competition and that restrictions are necessary and have legitimate economic basis..

**The Second** is the publishing of guidelines relevant to all block exemptions, as well as to the analysis of specific exemption requests by the Israeli Antitrust Commissioner, concerning the analysis of the economic reasoning and necessity requirements for the application of such block exemptions.

### **Amendment to Block Exemptions for Joint Ventures and Restraints Ancillary to Mergers**

The Israeli Restrictive Trade Practices Law 5748-1988 ("RTPL") prescribes several methods by which "restrictive arrangements", i.e. arrangements or agreements with potential to harm competition, can be permitted. The methods include judicial approval by the specialist Antitrust Tribunal, exemption from such approval by the



Antitrust Commissioner ("**Commissioner**"), statutory exemptions set by the RTPL and block exemptions issued by the Commissioner.

Block exemptions under the RTPL detail the type of arrangements exempt from the need for a specific permit granted by the Antitrust Tribunal Commissioner. Until recently, most block exemptions had extensive requirements for their application, including conditions regarding the parties' market shares, the existence of a certain number of other competitors and their market shares, the content of the specific agreement and other requirements.

In 2013, the first step towards self-assessment was made when a self-assessment block exemption was established for non-horizontal agreements, namely agreements unconnected to the field of the competing parties. The block exemption exempted such agreements, if the parties could indicate that the agreement did not harm competition and that it met certain requirements of necessity and legitimate economic reasoning. However, this block exemption, which is still in force, is rather limited, since it only applies to non-horizontal agreements, and uses a broad definition to horizontal agreements and competitors. It has also been rendered somewhat less useful by the Israeli Supreme Court's *Shufersal* ruling in 2015, which determined that non-horizontal agreements without the potential to harm competition will generally not be restrictive arrangements, regardless of their form.

On November 13, 2018, for the first time, the Commissioner amended two block exemptions to allow self-assessment of *horizontal* restrictive arrangements, which clearly concern competitors, even within fields where they compete.

The Commissioner amended the Restrictive Trade Practices Rules (block exemption for Joint Ventures) (Temporary Order), 2006 and to the Restrictive Trade Practices Rules (Block Exemption for ancillary restraints in mergers), 2009 ("**the Amendment**"), to include a general clause permitting joint ventures and restrictions in merger agreements, if said arrangements do not harm competition, are necessary for achieving the main objective of the cooperation between the parties ("**the Essential Requirement**"), and have legitimate economic reasoning other than limiting or preventing competition ("**the Incidental Requirement**").



The amendment is a part of the Israeli Antitrust Authority's broader policy to minimise the cases where parties need to contact the Commissioner and instead allow them to perform a self-assessment of arrangements with the help of legal and economic advisors.

Conversely, the Commissioner is authorised to impose considerable administrative fines, as well as possible criminal sanctions, if the parties erred in their assessment, and were in fact party to a restrictive arrangement.

### **Opinion 1/18 – Substantive Assessment of the Essential and Incidental Requirement in Restrictive Arrangements**

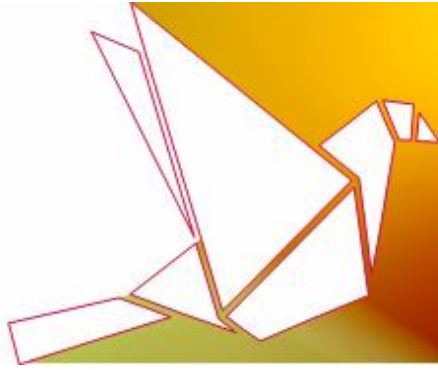
Parallel to the amendment, the Commissioner published *Opinion 1/18 concerning the interpretation of clause 14(a)(2) and 15a(a)(2) to the RTPL and other clauses in the Block Exemption rules ("the Opinion")*. The Opinion sets out guidelines to assist parties in assessing the Essential and Incidental requirements, which are mandatory criteria in most block exemptions.

The Incidental Requirement is relatively straightforward; the restriction must support an agreement which is legitimate and has economic reasoning beyond mere harm to competition. The Opinion sets out a lengthy list of legitimate agreements, from distribution agreements to joint R&D, but this list is not exhaustive; any venture with a legitimate end that does not impede or harm competition may meet this requirement.

The Essential Requirement, according to the Opinion, means that the restriction must be reasonably required to further the legitimate end of the agreement, that it must not be broader than necessary and that the restraints will be secondary to the main legitimate objective of the agreement.

### **To summarise**

For the first time, The Israeli Antitrust Authority allows self-assessment of the competitive effects of horizontal agreements. The Opinion, on the other hand, serves to warn parties, when undergoing such self-assessment, to carefully consider the



legitimacy of their cooperation and how any restrictions are required to support it. The Commissioner's power to impose considerable administrative fines balances out incentives to abuse the self-assessment procedure.

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