HERZOG FOX & NEEMAN
LAW OFFICE

Client Update – Antitrust and Competition
Financing Consortia and International Financial Institutions

Recent Israeli Antitrust Commissioner's (the "*Commissioner*") decision regarding a financing consortium involving Israeli and non-Israeli banks [Hebrew] (the "*Decision*"), raised questions concerning non-Israeli financial Institutions' participation in financing consortia related to Israel and reporting duties applying thereto.

In this update we will try to answer some of these questions – mainly, under what circumstances and to what extent the policy of the Israeli Antitrust Authority's ("*IAA*") regarding financing consortia applies towards non-Israeli financial institutions.

Financing Consortia under the Restrictive Trade Practices Law, 1988

Consortia are a common phenomenon in the financing world. Nonetheless, financing consortia bring together entities that typically compete with each other in the financial markets.

Due to the involvement of competing entities in the consortium and due to the IAA's position regarding concentration in the Israeli financial sector, the IAA's position is that such consortium usually amounts to a "restrictive arrangement" as defined in section 2 of the Restrictive Trade Practices Law, 1988 (the "*RTPL*").

According to the RTPL, a restrictive arrangement is prohibited unless permitted through one of the mechanisms provided by the RTPL, including (1) approval by the specialized Antitrust Tribunal, (2) specific exemption by the Antitrust Commissioner, or (3) falling under one of several existing "block exemptions," issued by the Antitrust Commissioner, which exempt an entire class or category of agreements from the need for approval by the Antitrust Tribunal.

Since 2002, the issue is regulated by several successive no-action letters, whereby the Commissioner announced that the IAA will not enforce the RTPL on consortia arrangements which comply with certain conditions.

The most recent version of such letter [Hebrew] was issued on December 30th, 2014 (the "*IAA Letter*"). The current conditions are:

- The borrower granted written approval for the financial institutions involved to join the consortium.
- The borrower is able to negotiate the terms of the potential financing transaction directly with each future consortium member.

- The two major Israeli banks must not be parties to the same consortium unless a specific exemption was received from the Commissioner.
- The financial institutions will not exchange any information not required for the specific consortium.
- The financial institutions will document details such as the main communications between them relating to the consortium, the name of the borrower, the purpose, the consortium organizer and its members and additional information.
- The above documentation will be delivered to the IAA upon its request as well as annually, 30 days following the end of each calendar year.

Questions regarding the application of the IAA Letter to international entities active in Israel have been raised recently, *inter alia* due to the Decision. We shall describe the Decision, and then try to answer some of these questions.

The Commissioner's Recent Decision

In the Decision the Commissioner actively and explicitly applied for the first time the policy described in the IAA Letter to a consortium organized by a non-Israeli banking corporation.

The arranger of this consortium was an international bank (the "*Arranger*"), and the consortium was meant to provide financing for an Israeli-based international company (the "*Borrower*"), in its acquisition of another international Israeli-based company.

Under the agreement between the Borrower and the Arranger, the latter was supposed to organize and provide the entire financing for the acquisition and was permitted to syndicate to additional entities under the same conditions. The Arranger allowed the Borrower to add additional co-arrangers. Two of the banks that entered into the consortium as co-arrangers were the two major Israeli banks.

In that case, a specific exemption from the Commissioner was required in accordance with the IAA Letter due to the close nexus to Israel, and the joint participation of the two major Israeli banks.
The Commissioner granted the exemption, under conditions similar to those in the IAA Letter:

- The financial institutions, including the Arranger, will not exchange any information not required for the specific consortium.
- The financial institutions, including the Arranger, will maintain certain documentation as detailed therein.
- The above documentation will be delivered to the IAA upon its request as well as annually, 30 days following the end of each calendar year.

Some interesting points should be noted regarding the Decision:

- For the first time, the Commissioner expressly applies the policy in the IAA Letter to non-Israeli entities.
- Additionally, for the first time, the Commissioner notes that there is no distinction between joint financing by way of consortium (described by the Commissioner as several entities acting together to provide a loan to the borrower) and joint financing by way of syndication (described by the Commissioner as a loan organized and operated by one entity, which then brings in additional lenders). For convenience, we will refer to both as "Consortium."
- Furthermore, reporting duties under the Decision, apply to the Arranger, which is not an Israeli entity.

Naturally, the Decision raised questions as to when a non-Israeli entity would be considered a party to a restrictive arrangement in Israel, and in such cases, to the applicability of the IAA Letter to such entity.
While each case should be considered on its merits and taking into account the specific circumstances, we set forth below some practical tools to analyze such cases and decide whether the IAA Letter, along with its reporting requirements, applies.

Practical Tools for Analysis

When will a consortium be considered a "restrictive arrangement" under the RTPL?

Before checking the application of the IAA Letter, we must determine that a certain consortium is a "restrictive arrangement." If a certain consortium is not a "restrictive arrangement" then the RTPL does not apply, and there is no need to address the IAA Letter.

The RTPL is territorial legislation. It only applies to economic phenomena (such as restrictive arrangements, mergers or monopolies) *in Israel* or ` *Israel (the "Effects Doctrine")*.

In general, in order to conclude that an international consortium occurs in Israel or influences Israel, significant nexus to Israel is required. Among other things, such interpretation stems from the fact that, generally speaking, the entry of international entities into the Israeli finance market is by its nature pro-competition as it introduces additional competitors to the market.

To assess whether the consortium's nexus to Israel is sufficient to create a "restrictive arrangement," the following factors may be considered:

- *To what extent the consortium is marketed in Israel, or is designated to be marketed to Israeli financial institutions.* For example, in case the borrower is specifically interested in the participation of Israeli financial institutions.
- *Whether a considerable number of lenders are Israeli.* Even if the consortium is not marketed in Israel and is not targeted to Israeli financial institutions, but it transpires that all or most of the parties to the consortium are Israeli financial institutions, it is likely that a consortium will

be deemed as a "restrictive arrangement" (and that the IAA Letter will apply), especially if the borrower is Israeli.

- *The purpose of the loan - whether the relevant project or transaction will take place in Israel.* The Commissioner would likely have greater interest in the financing of Israeli projects than non-Israeli ones. However, if, for example, an Israeli company is acquired by an international corporation, with financing organized outside Israel and extended mostly by non-Israeli lenders, the mere fact that the acquisition target is Israeli will likely not lead to the conclusion that the consortium has sufficient Israeli nexus to Israel.
- *Whether the borrower is Israeli* - this should not be a decisive factor. If an Israeli borrower seeks financing outside Israel for an acquisition or project outside Israel, this certainly does not, in itself, create sufficient nexus to Israel as to merit a "restrictive arrangement" status.

It should be noted that none of the above criteria, in and of itself, is decisive. The question whether a consortium agreement is a restrictive arrangement is answered by a combination of the above and other circumstance-based factors applicable to each case.

Does the IAA Letter apply to international parties to a "restrictive arrangement"?

To the extent that a specific consortium is considered a "restrictive arrangement," the IAA Letter can apply if all the conditions therein are met.

The reporting duties under the IAA Letter apply to "Parties" defined therein as "banking corporations" under the Banking (Licensing) Law, 1981 or "institutional bodies" under the Control of financial services (Insurance) Law, 1981. Both laws extend to international entities licensed in Israel, as defined therein.

This raises a question regarding the applicability of the IAA Letter - which serves as a *safe Harbor* to consortium arrangements - to entities that do not fall under these definitions.

In light of the Decision, it seems that the IAA's position is that the IAA Letter should benefit also international entities, even if they do not fall under the specific definitions included in the letter. That means that according to the IAA's position, the conditions of the IAA Letter (including the reporting duty) may apply equally to non-Israeli financial institutions that are party to a "restrictive arrangement."

Finally, we note that there can be a difference in the applicability of the IAA Letter between Israeli and non-Israeli participants. In other words, and notwithstanding the application of the Israeli rules to the non-Israeli participants in a consortium, Israeli parties to such consortium will still be required to examine their own position and the necessity to obtain a specific exemption or act in compliance with the IAA Letter.

Concluding Note

The IAA Letter was originally issued for a period of one year and therefore expires at the end of 2015.

It is anticipated that a new letter will be issued, which may address specifically international entities in light of the issues raised in the Decision.

Kind regards,

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* For sake of completeness and appropriate disclosure, we note that HFN represented the borrower and Israeli banks vis-à-vis the IAA with regard to the Decision.