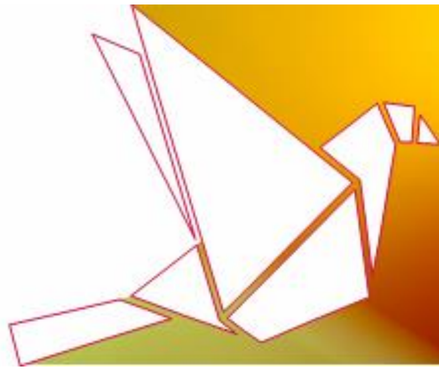

Client Update

Major Competition Law Reform in Israel Passed by Fast-Track Legislation

January 2019

In a fast-track legislation procedure, taken in light of the coming elections, the Israeli parliament (the *Knesset*), passed a major reform to Israeli competition law (the "*New Legislation*").

The reform includes a long-awaited relaxation of merger filing thresholds, a major change in abuse of dominance provisions, enhancement of enforcement, including with regard to company officers, and significant semantic changes in the names of the law and the Israeli competition watchdog:

From Restrictive Trade Practices Authority to Competition Authority

The Israeli Antitrust Authority (the "*Authority*") will change its name to The Competition Authority. Likewise, the Restrictive Trade Practices Law, 1988 (the "*Law*") will be renamed The Economic Competition Law, The Antitrust Tribunal will be the Competition Tribunal, and The Antitrust Commissioner (the "*Commissioner*") will be The Competition Commissioner.

These changes signify far more than mere semantics; they reflect a trend in recent years whereby the Commissioner and the Authority have been involved in far more than the mere enforcement of the Law. The Authority has been involved in the legislative process of reforms led by other regulators, where the subject matter was the introduction of further competition; the Commissioner has enforcement powers under specific laws to enhance competition, such as the *Law to Reduce Concentration and Promote Competitiveness, 2013*, and the *Law to Promote Competition in the Food Sector, 2014*. The Authority also established a research division, which issues reports on competition in selected sectors, with suggestions for reform and improvement. In a nutshell, it would seem that the name "Competition Authority" is appropriate indeed.

Expected Changes in Israeli Merger-Control System

Filing Thresholds: Currently, Israel has three alternative filing thresholds:

- The parties' combined share in production, sale, marketing or purchase exceeds 50%
- The parties' combined sales turnover in the financial year preceding the merger exceeds NIS 150 million (for 2018, approximately €35 million / $42 million) ("*Combined Turnover Threshold*"), and at least each of the merging parties' sales turnover exceeds NIS 10 million (for 2018, approximately €2 million / $2.8 million) ("*Individual Turnover Threshold*"). Turnover thresholds are measured on a group basis.
- One of the merging parties holds over 50% of the market share.

The New Legislation increases the Combined Turnover Threshold from NIS 150 million to NIS 360 million (for 2018, approximately €85 million / $101 million)). The Individual Turnover Threshold, which is set by regulations, currently remains unchanged.

In addition, the first threshold will be changed to “the parties will become a monopolist as defined by section 26(a)(1)”, namely – the joint entity will have over 50% of the market share in the supply of purchase of products or services. This clearly removes the 50% threshold for local production.

With regard to the third monopoly threshold, it is important to note that the change in the definition of monopoly discussed below (adding a market-power test to the existing market-share test) will not apply to mergers. Thus, the third filing threshold will remain as having over 50% of the market-share in any market in Israel.

Commentary: Increasing the annual turnover threshold is an important step that will reduce the regulatory burden for many mergers with no impact on competition. Unlike former reform proposals, the New Legislation does not include a general prohibition on mergers which harm competition. Mergers below the threshold will remain legal *per se*; they will not require any further assessment and will not be subject to ex-post challenges.

However, one of the implications is that parties that do not meet the turnover thresholds will have to carefully evaluate the market definition and their market shares before deciding whether to file merger notifications.

Review Timeline – Introducing a “Phase II” Review Period: Prior to the reform, the Commissioner was required to reach a decision regarding a merger within 30 days of filing. This period could only be extended by the Antitrust Tribunal or by voluntary agreement of the parties to the merger. An extension by the tribunal is rare, and generally avoided by the Authority. On the other hand, the Authority has been concerned about

being dependent on the goodwill of the parties, and in the past, has frequently stressed the need for an easier mechanism to enable extension of the review time.

According to the New Legislation, the Commissioner is allowed to extend the review period by up to 120 days. In parallel, the New Legislation changes the timeframe for reviewing exemption requests for restrictive arrangements (to date - 90 days, which may be extended by 60 days), and aligns it with the merger review timelines. Not only is this relevant to mergers with restraints that do not meet block exemption requirements (now a more rare occurrence in light of the changes in the relevant block exemption – see below), but also to agreements that do not amount to mergers, such as joint ventures between competitors.

Commentary: The New Legislation may appear to establish a phase I–phase II review system. Nonetheless, in order to extend the deadline the Commissioner is only required to demonstrate that the review of a merger notification "justifies" the extension of the period. There is no specific requirement of transaction complexity or competitive impact. There is also no procedural change with regard to the measures the Authority is allowed to take within the framework of the merger review. However, the Commissioner must provide the merging parties with a reasoned notice of extension, in writing. No appeal mechanism has been introduced for a decision to extend the review period, and it can only be challenged by approaching the Israeli Supreme Court, sitting as the High Court of Justice, which has very strict review standards, and will only overrule the Commissioner's decision under extreme circumstances, e.g. a severe breach of due process rights.

Scope of Application - Definition of "Company": Israeli merger-control only applies to "companies". The definition of a "company" is broad and includes partnerships, cooperatives and certain non-Israeli entities. Nonetheless, to date, the definition of a "company" has not included non-profit entities, although such entities may sometimes generate significant economic activity, and changes in their holding structure may affect competition.

The New Legislation expands the definition of "company" by incorporating non-profits and certain unregistered partnerships. This definition is broad enough to include almost any corporate entity in Israel.

The New Legislation will bring the scope of the Israeli merger-control application much closer to the application of the monopoly chapter of the Law, which applies to "persons" (including corporations) and to the restrictive arrangements chapter of the RTPL, which applies to "persons conducting business" (again, including corporations).

Changes in Monopoly Law

The New Legislation has changed the definition of "monopoly" from merely a technical one, based on market share, to a substantive one, based on market power.

To date, a "monopoly" has been defined as having over 50% of the supply or purchase of a product or service. According to the New Legislation, this definition will remain but the following alternative definition has been added: "A person who holds significant market power with regard to the supply or purchase of assets, or with regard to the supply or purchase of services".

Commentary: The new additional definition is more ambiguous than the current one. It contains no guidance as to what will be considered "market power" and is likely to cause some uncertainty until the dust settles and the Authority and the Courts have had time to apply it. Nonetheless, since the monopoly provisions of the RTPL were fashioned almost entirely after article 102 of the Treaty on the Functioning of the European Union (which, at the time, was still the 'EEC Treaty of Rome'), it is reasonable to assume that the IAA will follow the example of the interpretation of "dominant position" in European Union law.

Restraints of Trade: A Major Reform in Block Exemptions, Moving Towards Self-Assessment

A few weeks prior to the New Legislation, the Authority issued two amended block exemptions for restraints ancillary to mergers and for joint ventures. These constituted a major reform in Israeli block exemptions, making a significant step towards self-assessment of horizontal agreements (between competitors).

See our update here about the new block exemptions.

On the other hand, the New Legislation shortens the timeline for reviewing restrictive arrangements (trade restrictions) to match that of merger review (30 days), which may be extended with reasoned notice to the parties by up to 120 additional days.

Overall, the changes in the block exemptions and the change in review timelines for agreements requiring specific exemptions truly mean a reduction in the regulatory burden for restrictive arrangements, including agreements between competitors. The IAA takes the new block exemptions very seriously, even returning some ongoing, individual exemption applications to the parties for self-assessment.

Enhancement of Enforcement Powers

Finally, the New Legislation increases the IAA's enforcement powers, which are already quite formidable:

- The maximum fine will be increased considerably; currently, the maximum fine has a cap of approximately NIS 24.5 million per offence (approximately €6 million / $7 million). According to the New Legislation, this maximum fine ceiling will be increased to NIS 100 million (for 2018, approximately €24 million / $28 million), and the maximum fine will be 8% of the offender's annual turnover. This turnover will continue to be calculated for the offender's entire group of companies, namely all entities in control relations with the offender.

- Conversely, criminal sanctions will be revised rather than increased, such that the maximum penalties will be reserved for restrictive arrangements (cartels), a five year custodial sentence. Currently, there is a maximum penalty of a custodial sentence of three years for any offence under the Restrictive Trade Practices Law, and a custodial sentence of five years for offences under "aggravating circumstances".

- Increased officers' liability: The New Legislation imposes a duty on officers of companies and other corporate entities to take active measures to ensure compliance with the law by their corporations. Any breach of these obligations is punishable by up to a year's imprisonment, in addition to a fine. If an offence is found to have taken place, the officers will be presumed to have breached their duty.

  Prior to the New Legislation, the Law's officers' liability system was a strict liability, meaning no prison sentence could be imposed on officers in the absence of proof of negligence on their part.

- Enhanced investigative powers: by law the Authority's investigators will now be allowed to investigate obstruction of justice offences with regard to competition law offences that occurred *prior* to the opening of the investigation, which, to date, could have been considered impossible according to the existing language of the law.

In summary, we are witnessing a major reform, which complements former developments and reflects the Authority's aspiration to focus more on the subject matter of competition and competitive analysis and less on form and technical matters. From an aerial view, and while we may disagree on the details of its implementation, this is a welcome trend.

We are at your service for any questions you may have on this major reform in Israeli Competition Law.

KEY CONTACTS

Talya Solomon | Partner
Head of Antitrust and Competition Department
+972 3 692 5960
solomonta@hfn.co.il

Iris Achmon | Partner
Antitrust and Competition Department
+972 3 692 5960
achmoni@hfn.co.il