Client Update

Major Competition Law Reform in Israel

Israeli Antitrust Authority (*the Authority*) announced last week a Memorandum of Law to promote a major overhaul of Israeli competition laws (the *Proposed Amendment*).

The Proposed Amendment will have several components. It will reform merger control and monopoly law, change and align timelines and augment the Authority's enforcement powers. Finally, the law and the Authority will be renamed, which is far more than mere semantics.

Expected Changes in Israeli Merger Control System

The Proposed Amendment will make some major changes to the Israeli merger control system, in terms of its scope of application, the filing thresholds and the timelines:

- **Scope of Application – Definition of "Company":** Israeli merger control only applies to "companies". The definition of "company" is broad and includes partnerships, cooperatives and certain non-Israeli entities. Nonetheless, to date, the definition of "company" did not include certain entities such as non-Israeli partnerships and companies not registered in Israel. In many cases, the Authority applied the merger control system to such entities by using broad interpretation and referring to group affiliation. Nonetheless, the law with regard to the application of Israeli merger control to non-Israeli parties is still, in many cases, complex and unclear.
- The Proposed Amendment therefore broadens the definition of "company", by incorporating the definition of "foreign company" from Israeli Companies Law, 1999. This definition is broad enough to include practically any corporate entity outside Israel. The revised definition of "company" will

also include non-Israeli partnerships as well as non-profit organizations, which, to date, were not included in the definition.

The Proposed Amendment will bring the scope of the Israeli merger control application much closer to the application of the monopoly chapter of the Restrictive Trade Practices Law, 1988 ("RTPL"), which applies to "persons"; and to the restrictive arrangements chapter of the RTPL, which applies to "persons conducting business".

To date, the "nexus to Israel" component of the merger control system was regulated through the definition of "company" which did not include foreign entities. To explain, Israeli merger control currently applies only to transactions involving companies which are registered in Israel or which should have been registered in Israel according to rules detailed in Commissioner Guidelines. Under the proposed amendment, the regulation of Israeli nexus will have to be done through the thresholds of turnover and market share in Israel. The Proposed Amendment may therefore introduce a new dimension of uncertainty with regard to entities which do not operate directly in Israel. Should indirect sales into Israel be considered when estimating market shares and turnovers? If the Proposed Amendment becomes law, the Authority shall have to provide some clarity in this regard.

- **Filing Thresholds:** Currently, Israel has three alternative filing thresholds:
  - The parties' combined market share exceeds 50%.
  - The parties' combined sales turnover in the financial year preceding the merger exceeds NIS 150 million (for 2016, approximately US$39 million, EUR 35 million) ("Joint Revenue Test") and at least each of the merging parties' sales turnover exceeds NIS 10 million (for 2016, approximately US$2.6 million, EUR 2.35 million) ("Minimum Revenue Test"). Turnover thresholds are measured on a group basis.
  - One of the merging companies is a "monopoly", defined as having over 50% market share.

The Proposed amendment suggests an increase in the turnover threshold from NIS 150 million to NIS 360 million (approximately US$ 93 million, EUR 84 million, true to the 2016 rates). It will also set an automatic update mechanism based on consumer price index. Market share thresholds will remain unchanged.

- Increasing the annual turnover threshold is an important step that will reduce the regulatory burden for many mergers which have no impact on competition. Unlike former reform proposals, the Authority does not aim to impose 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.

One of the implications is that, for small markets, parties which do not meet the turnover thersholds will have to carefully evaluate the market definition and their market shares before deciding whether or not to file merger notifications.

It is important to note, with regard to the third monopoly threshold, that the change in the definition of monopoly discussed below (adding the competitive-impact based definition to the existing market-share based one) will not apply to mergers. Thus, the third filing threshold will remain as having over 50% market share in any market in Israel.

- **Review Timeline:** Currently, the Antitrust Commissioner ("*Commissioner*") must reach a decision regarding a merger within 30 days of filing. This period may only be extended by the Antitrust Tribunal or by voluntary agreement of the parties to the merger. An extension by the tribunal is a very rare procedure, from which the Authority tends to refrain. On the other hand, the Authority is concerned about being dependent on the goodwill of the parties, and has many times in the past stressed the need for an easier mechanism for the Authority to extend the review time.

  The Proposed Amendment suggests that the Commissioner be allowed to extend the review period by up to 120 days. We note that in parallel, the Proposed Amendment will change the timeline for reviewing restrictive arrangements (currently 90 days and may be extended by 60 days), and will align it with the merger review timelines. This is relevant not only to mergers which contain restraints that do not meet block exemption requirements, but also to agreements that do not amount to mergers, such as joint ventures between competitors.

- The Proposed Amendment may seem 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. The Commissioner must, however, provide the merging parties with a reasoned notice of extension, in writing.

Changes in Monopoly Law

As contemplated before, the IAA wishes to change the definition of "monopoly" from a merely technical one, based on market share, to a substantive one, based on market power.

Currently, a "monopoly" is defined as having over 50% of the supply or purchase of a product or service. According to the Proposed Amendment, this definition will remain, but the following alternative definition will be 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".

The new additional definition is vaguer 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 has 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 (then 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

Within a day after publishing the Proposed Amendment, the Authority issued drafts of amended block exemptions for restraints ancillary to mergers, R&D and joint ventures. These drafts constitute a major reform in Israeli block exemptions.

Unlike former versions of the same block exemptions for horizontal agreements, which contained a series of specific, detailed and elaborate conditions, the Authority added to each of these draft exemptions a provision which exempts that kind of agreements if they (i) contain no "naked" restraints which have no other purpose except harming competition, and (ii) do not significantly harm competition in the market.

In recent years, vertical agreements were subject to a "rule of reason" assessment, under both the Restrictive Trade Practices Rules (Block Exemption for Agreements which Do Not Contain Certain Price Restrictions), 2013, and the Israeli Supreme Court decision in the matter of Shufersal. At the same time, horizontal agreements could only enjoy very limited block exemptions, confined by both market shares and other conditions. On the other hand, the Authority's view in recent years seemed to be that nearly any agreement between competitors is potentially restrictive. Coupled together, and considering the very long timelines for review of restrictive agreements, all this meant significant impediments for competitors wishing to achieve agreements among them, including pro-competitive agreements.

The new draft block exemptions remove these impediments: the elaborate conditions of the former versions of the block exemptions now become a safe harbor, but other agreements which do not meet these elaborate conditions may still be exempt if harmless to competition.

On the other hand, the Proposed Amendment suggests that the timelines for reviewing restrictive arrangements be trimmed, so as to match the timelines for merger review – 30 days, which may be extended by a reasoned notice to the parties, by up to 120 days.

Taken together, the changes in the block exemptions and the change in review timelines for agreements which require a specific exemption, truly mean a reduction in regulatory burden for restrictive arrangements, including agreements between competitors.

Enhancement of Enforcement Powers

Finally, the Proposed Amendment will increase the IAA's enforcement powers, which are already quite formidable:

- The Authority's investigators will be allowed by law (and not by General Attorney authorization) to investigate obstruction of justice offences with regard to competition law offences.
- The maximum fine will be increased considerably. Currently, the maximum fine has a ceiling of NIS ~24.5 million per offence (approximately US$7 million). According to the Proposed Amendment, this maximum fine ceiling will be removed, and the maximum fine will be 8% of the offender's annual turnover. Like today, this turnover is calculated for the offender's entire group of companies, namely all entities in control relations with the offender.
- Criminal sanctions, on the other hand, will not be increased, but revised, such that the highest penalties will be reserved for restrictive arrangements. Currently, there is a maximum penalty of three year imprisonment for any offence under the Restrictive Trade Practices Law, and a five year imprisonment for offences under "aggravating circumstances".

  It should be noted that, in a recent Israeli Bar Association Antitrust Committee seminar, the IAA's Chief Legal Counsel, Mr. Ori Schwartz, noted that vertical agreements and monopoly practices will usually be enforced by way of administrative fines, while criminal sanctions should be reserved for cartels and bid rigging offences. The Proposed Amendment, in this regard, seems to be generally in line with this declared policy.

The (Not So) Semantic Component: from Restrictive Trade Practices Authority to Competition Authority

Finally, the Israeli Antitrust Authority will change its name to the Competition Authority. Likewise, the Law will be renamed the Competition Law, the Antitrust Tribunal will be the Competition Tribunal, and the Antitrust Commissioner will be the Competition Commissioner.

This is far more than a mere semantic change. It reflects a trend in recent years whereby the Commissioner and the Authority have been involved in far more than enforcement of the Restrictive Trade Practices Law: the Authority has been involved in the legislation process and reforms by other regulators, where the subject-matter was the introduction of more competition; it 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 department, which issues reports on competition in selected sectors, with suggestions for reform. For all these – it would seem that the name "Competition Authority" is indeed befitting.

To summarize this update, we are looking at 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 a bird's eye view, and while we may disagree on the details of its implementation, this is a welcome trend.

We are at your service for any question you may have in preparation for this major reform in Israeli competition law.

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