FBC Antitrust Department

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To our clients and friends:

On May 14, 2012, the Israeli Parliament amended the Restrictive Trade Practices Law, 1988 (the **"Antitrust Law"**) in a manner that is expected to change significantly the way the Antitrust Law is enforced.

The Amendment affords the General Director of the Israel Antitrust Authority (**"General Director"**) a meaningful enforcement tool -- the authority to impose substantial administrative fines in response to violations of many provisions of the Antitrust Law, by a rapid administrative procedure. This Amendment also creates significant risk for potential violators, both corporations and individuals, who are prohibited from securing indemnification and insurance arrangements with respect to the sanctions.

The General Director has stated that he views the financial sanctions mechanism as a tool that complements existing enforcement powers, and in particular criminal enforcement tools. The General Director also stressed that he intends to implement the new sanctions in regard to provisions of the Antitrust Law that were rarely enforced in the past, because of their incompatibility with criminal proceedings (for example, because of their "technical" nature, the complexity of evidence required in proving a criminal offence in court, or because the potential damage to commercial competition is not sufficiently obvious). The conduct that the General Director intends to regulate through the new enforcement mechanism includes abuse of monopolistic market positions and exchange of information between competitors.

The broad application of the sanction mechanism created by the Amendment, and the relative simplicity of its implementation, are likely to have a material effect on the daily conduct of Israeli businesspersons. The Amendment heightens the risk of enforcement of Antitrust Law violations, especially violations that are outside of the Law's "core" provisions, that are not self-explanatory, or that were not regularly enforced in the past.

Shortly after the Amendment was approved, the General Director published draft instructions in regard to the use of financial sanction enforcement measures (**"Draft Instructions"**). The Draft Instructions have been promulgated for public review and comments.

We describe below the Amendment's principal provisions, methods for facilitating preparation for the new era in Antitrust Law enforcement, and several key aspects of the Draft Instructions.

The Amendment – Main Points

Application of Financial Sanctions - The Amendment vests in the General Director the power to impose financial sanctions on an individual or corporate entity that violates any of the Law's operative provisions, including the following:

- Being a party to an unlawful restrictive arrangement, or violating any of the conditions upon which certification of a restrictive arrangement was granted;
- Effecting a merger of companies in a manner contrary to the Law, including the violation of conditions set forth by the Antitrust Tribunal or by the General Director in regard to the merger;
- A monopoly engaging in any act constituting an unreasonable refusal to provide or purchase an asset or a service over which a monopoly exists, or constituting abuse of monopoly position;
- Violating any instruction of the General Director in regard to monopolies;
- Violating any instruction of the General Director concerning concentration groups;
- Violating a consent decree;
- Violating any obligation to provide information, documents, ledgers and other certificates to the Israel Antitrust Authority ("IAA").

The Amendment applies, at least theoretically, to a broad spectrum of violations of varying degrees of severity: from substantial violations such as harmful cartels, or an unreasonable refusal by a monopoly to provide goods or services because of anti-competitive motives, to the violation of "technical" or less severe provisions, such as erroneous or incomplete compliance with information provision requirements, or the non-compliance with procedural conditions applicable to a merger of companies, or participating in an effective vertical exclusivity arrangement that does not harm competition even though it constituties a restrictive agreement under the Law.

Extent of Financial Sanctions - The Amendment provides a maximum sanction set at eight percent (8%) of a company's total sales turnover in the year prior to the violation. Sanctions on a company will not exceed NIS 24,000,000 in total per event.

For individuals or companies that, in the year prior to the violation, had a sales turnover of less than NIS 10,000,000, the Amendment provides a maximum sanction of NIS 1,000,000.

In regard to a single violation - concerning failure to relay information, documents, ledgers and other certifications to the IAA - the Amendment restricts the maximum sanction enforceable to three percent (3%) of the company's sales turnover during the year prior to the violation, and in any event not more than NIS 8,000,000. For individuals or companies that, in the year prior to the violation, maintained a sales turnover of less than NIS 10,000,000, the maximum sanction is NIS 300,000.

Clearly, the maximum enforceable financial sanction is exceedingly high and is largely unprecedented in Israeli legislation. Moreover, the Amendment also prohibits arrangements for indemnification and insurance of potential violators (other than for expenses associated with the sanction proceedings themselves).

Circumstances and Considerations for Determining the Maximum Financial Sanctions - The Amendment sets out the circumstances and considerations that the General Director should take into account when determining sanction levels, including:

- the duration of the violation;
- the extent to which the violation may harm competition or the public;
- the violator's portion of the violation, and the extent of its influence on the violation;
- the existence or absence of previous violations;
- measures taken by the violator for preventing the recurrence or termination of violations;
- for individual violators - their financial capacity as well as severe personal circumstances that justify a lesser sanctions level; and

- for corporate violators - the existence of a significant concern that, as a result of the financial sanction, the company would be unable to repay its debts, and hence would be forced to discontinue its business activities.

The breadth and flexibility of these considerations afford the General Director broad discretion in setting the amount of the sanction.

Criminal and Financial Sanctions - The payment of financial sanctions does not necessarily prevent the filing of an indictment with respect to the same event. If new evidence or facts that justify filing of indictments arise after imposition of the sanction, the payment of the sanction will not prevent the filing of indictments.

If an indictment is filed following the payment of financial sanctions, the violator receives reimbursement of the amount of sanctions that it paid. Filing an indictment first, however, prevents the imposition of financial sanctions. We would stress, however, that the decision whether to impose financial sanctions or to file an indictment in the first instance is made at the General Director's sole discretion, and the Amendment does not provide criteria for this determination.

Right of Review, Hearing and Appeal - Before imposing sanctions, the General Director is required to notify the violating parties of his intention to impose the sanction. The violator is entitled to a right of review and right of hearing in a relatively quick procedure. If the General Director decides to impose sanctions, the violators may then submit an appeal to the Antitrust Tribunal. The submission of an appeal does not defer payment of the sanction.

Sanctioning Authority - According to the Amendment, the General Director must consult with the Exemptions and Mergers Advisory Committee before any imposition of sanctions. Notably, the General Director is obligated only to **consult** with the Committee, but the authority to impose sanctions and to determine their extent is vested exclusively in the General Director.

Time Restrictions on Financial Sanctioning - Unusually, the Amendment did not set an explicit time restriction on the imposition of financial sanctions. Seemingly, then, it would be possible to impose sanctions a considerable period of time after the event that gave rise to their imposition.

Retroactive Application - The Amendment does not specifically address the matter of retroactive application. However, during deliberations of the Israeli Parliament's Economic Affairs Committee, the IAA and the Ministry of Justice officials stressed that the Amendment does not apply to violations committed prior to its enactment.

Preparations for a New Era in Antitrust Law Enforcement

Financial sanctions can be an effective and useful enforcement tool, and can facilitate the enforcement of the Antitrust Law, while reducing the expenditure of public resources.

However, the financial sanctions mechanism introduced into the Law is exceptionally powerful and extensive: it enables the imposition of very large sanctions, in response both to severe and harmful violations of the Law as well as to insignificant violations, and prohibits insurance and indemnification arrangements. An indiscriminate use of this mechanism can cause more damage than benefit. Moreover, the sanctions mechanism can be exercised with respect to violations not previously enforced. While in many cases the Antitrust Law is applied to prevent practices that undoubtedly are adverse to competition, it is not self-evident that other types of conduct that fall within the scope of the Antitrust Law and could be subject to sanctions are

necessarily anti-competitive. Indeed, in some cases, the letter of the Antitrust Law would seem to prohibit practices that actually enhance competition.

In our view, the imposition of sanctions in response to violations of provisions of the Antitrust Law whose scope is unclear or that go beyond the "core" provisions of the Law will not facilitate appropriate and constructive enforcement.

In the current state of affairs, directors and corporations operating in the Israeli market should be proactive in preparing to reduce their exposure to the risks generated by the Amendment. To this end, we would recommend **preventative measures** against violations, particularly by way of **increased awareness** by directors and employees through periodic training sessions and the adoption of Antitrust Law enforcement plans. We would note in this regard that a violator's maintenance of an enforcement plan may also be taken into account by the General Director in mitigating the level of financial sanctions that are imposed when a violation does take place.

A Few Words Concerning the Draft Instructions

The public may review the Draft Instructions promulgated by the General Director regarding the proposed use of financial sanctions. A careful inspection of the Draft Instructions, and the submission of comments regarding the Draft Instructions, are critical for effective, proportionate and efficient implementation of the sanctions mechanism.

The Draft Instructions are designed to clarify which violations are to be addressed through financial sanctions, rather than criminal proceedings. In their current form, however, the Draft Instructions are not adequate, in our view, in limiting the broad application and potential severity of the financial sanctions mechanism. In fact, the General Director has stressed that he reserves the right to deviate from Draft Instructions, in accordance with the particular facts and circumstances at issue. In addition, although the Draft Instructions detail a broad spectrum of cases that in the IAA's view necessitate financial sanctions, the Draft Instructions do not restrict the General Director's authority to impose sanctions with respect to practices that do not give rise to limitations on competition or that are not related to the core of the Antitrust Law.

This state of affairs is particularly relevant concerning vertical arrangements. According to the Draft Instructions, any non-horizontal arrangement (including vertical arrangements) exposes parties to such arrangements to financial sanctions, unless the IAA has information indicating an intention to impede competition, in which cases the Draft Instructions would provide for criminal proceedings. This provision is inadequate, however; in our view, the Draft Instructions should provide expressly that the imposition of sanctions in response to any non-horizontal arrangement should be conditional upon the arrangement's giving rise to impediments to competition. The absence of such a limitation leaves open the possibility of the imposition of sanctions on an exceedingly broad spectrum of violations, including violations that relate only loosely to the core of the Antitrust Law.

Moreover, the Draft Instructions, in their current version, may exacerbate the risk of undesirable shifts from criminal to administrative proceedings. This concern arises particularly in light of the IAA's statement that it does not consider itself obligated to select **in advance** the enforcement measures that it intends to take - administrative or criminal - or to adopt enforcement measures it had selected in similar cases. The Draft Instructions also include statements that are likely to influence the interpretation of the substantive provisions of the Antitrust Law, and, consequently, the everyday conduct of business in Israel.

For these reasons among others, comments on the contents of the Draft Instructions prior to finalization are of the highest import.

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We would be happy to assist you with any questions.

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