Legal Update: Competition & Antitrust Department May 2015

The Israeli Antitrust Authority Proposes a Reform of the Merger Control Regime

The Israeli Antitrust Authority (the "IAA") published its suggested amendments to the Restrictive Trade Practices Law, 5748-1988 (the "Law") with respect to the Israeli Merger Control Regime. The amendments, *inter alia*, suggest changing several of the Law's definitions to include different types of entities - including foreign corporations and individuals, raising the thresholds for filing merger notifications and prohibiting mergers which raise competitive concerns, but do not meet the statutory thresholds. Another amendment suggests imposing specific prohibitions on official importers, in order to prevent them from harming competition arising from parallel import.

I. Introduction

On March 31, 2015, the IAA published two Memorandums (the "**Memorandums**") detailing suggested revisions of the Law. The first Memorandum proposes **a reform of the Merger Control Regime under the Law** (the "**Merger Reform**"), while the second Memorandum relates to **parallel importers** (the "**Import Reform**").

In brief, the Merger Reform proposes extensive reforms to the Israeli Merger Control Regime, which has not been substantially amended since the Law's enactment in 1988. The Merger Reform is consistent with recent statements promulgated by the IAA expressing its intention to broaden the application of the Merger Control Regime in order to strengthen competition in Israel, whilst claiming to increase the thresholds for mandatory filing.

These substantial changes in the Merger Reform include, *inter alia*:

- Amending the definition of "Company" under the Law to include various types of foreign corporations and other entities;
- amending the definition of "Merger of Companies" to include mergers with an individual;
- amending the thresholds for merger filing under the Law, *inter alia*, to include foreign corporations that have no sales in Israel, in certain cases;
- prohibiting mergers that do not meet the filing thresholds, but are anti-competitive (*i.e.* likely to harm competition or the public);
- extending the IAA's timeline to review mergers (up to 150 days).

The Import Reform proposes to impose limitations on official importers in Israel, *inter alia*, by prohibiting an official importer from abusing its position in the market, even if such an importer is not considered a monopoly under the Law, in order to prevent them from harming competition arising from parallel import.

The IAA is welcoming comments to the Memorandums until the end of May 2015. Following the comments, the final versions of the Memorandums will likely become a legislative bill and may be brought before the Israeli Parliament (the "**Knesset**").

II. The Merger Reform

Current Merger Control Regime in Israel

Current Israeli merger control provides that a transaction may not be consummated without notification and prior approval from the IAA in the case that the transaction meets all of the following conditions:

(i) It constitutes a "Merger of Companies" within the meaning of the Law

The Law defines a "Merger of Companies" very broadly and includes, *inter alia*, the acquisition of most of the assets of a company by another company or the acquisition of shares in a company by another company by which the acquiring company is accorded more than a quarter of one of the following: the nominal value of the issued share capital; the voting power; the power to appoint more than a quarter of the directors; or the participation in more than a quarter of the profits of the company.

(ii) The merging companies have a nexus to the Israeli market (the "Nexus Test")

Pursuant to the Law, a "Company" is defined very narrowly and applies to corporations incorporated in Israel. However, the IAA interprets this definition broadly by using the Nexus Test. Pursuant to the Nexus Test, a foreign party to a merger transaction will be considered a "Company" if it is registered in Israel, has a "merger affiliation" with an Israeli company, or if the foreign company maintains a place of business in Israel.

(iii) The transaction meets certain statutory thresholds

The Law requires all merging companies to file a merger notification with the IAA when (at least) one of the following thresholds set under the Law is met: (a) As a result of the merger, the combined market share (in any market) of the merging companies in the total production, sales, marketing or acquisition of particular goods or similar goods, or the provision of a particular service or a similar service, exceeds 50% of the market; (b) one of the merging companies is a monopoly (i.e. possesses a market share exceeding 50% of any market); or (c) the combined sales turnover of the merging companies in Israel in the fiscal year preceding the merger exceeds NIS 150 million (approximately USD 38.8 million or € 34.7 million) and each of the merging companies' sales turnover exceeds NIS 10 million (approximately USD 2.6 million or € 2.3 million). Moreover, pursuant to the Law, it is important to note that in the case of a transaction involving a company that conducts business both in Israel and abroad, the requirements set forth above, apply solely with respect to the company's turnover and market share in Israel.

Timeline: the Law provides that the General Director of the IAA (the "**General Director**") is required to notify the merging companies of its decision with respect to the merger within 30 days from the date in which

the completed notification forms were received by the IAA from all the merging parties. Nonetheless, the General Director may approach the parties or the Antitrust Tribunal with a request to extend the deadline. If the General Director does not render a decision within the 30 day notification period and no extension was granted, the merger is deemed cleared.

An Overview of the Proposed Amendments to the Law

(i) Amendment to the Definition of "Company" to Include, *inter alia*, Foreign Corporations

The Merger Reform suggests broadening the definition of "Company" to include all associations and partnerships (including foreign and unregistered partnerships).

The Merger Reform also suggests broadening the definition of "Company" to expressly include foreign corporations. This suggested change would render the "Nexus Test" unnecessary and the Merger Control Regime would then, in practice, be applicable to "foreign-to-foreign" mergers, as well as mergers between Israeli and foreign corporations with no "Nexus" to Israel, whether or not the parties to the relevant mergers meet one or more of the criteria set under the Law.

(ii) Amendment to the Definition of "Merger of Companies" in Relation to Mergers with Individuals

The current definition of "Merger of Companies" does not reference the acquisition of a corporation made by a private individual. The Merger Reform suggests broadening the definition to include both merger transactions made by a corporation and by a private individual as well.

(iii) Amendments to the Thresholds for Filing Merger Notification

The Merger Reform suggests several changes to the thresholds for merger notifications set under the Law:

Suggested Reform to the Sales Turnover Threshold - it is suggested that the combined[1] sales turnover of the merging companies in the financial year preceding the merger will only be relevant if it exceeds NIS 250 million (in Israel) (approx. USD 64.7 million or € 57.9 million) and, in addition, if one of the following applies in the financial year preceding the merger: (a) each of at least two of the merging companies' sales turnover exceed NIS 10 million (in Israel) (approximately USD 2.6 million or € 2.3 million); or (b) the global sales of one of the parties to the merger exceeds NIS 1 billion (approximately USD 259 million or € 231 million).

According to this suggested amendment, any global entity (with no ties to Israel) which has a global turnover that exceeds NIS 1 billion will be required to file with the IAA in case it purchases stakes or invests in a company which exceeds NIS 250 million Israeli turnover, even if such global entities did not have any affiliation to the Israeli market prior to the said investment.

For example, according to the Merger Reform, if a global company, *e.g.* Nestlé Global, which has worldwide sales turnover of more than USD 1 billion and sales turnover in Israel exceeding NIS 250 million through its subsidiaries, wishes to acquire minority shares or rights in a foreign company in Vietnam which has no affiliation to Israel - then the Israeli Merger Control regime would still apply to such a merger.

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[1] We note that it is unclear from the language the Memorandum if both merging companies' must have sales turnover in Israel or if sales of one party which exceeds NIS 250 are sufficient in order to meet the threshold.

Moreover, Israeli corporations with global sales exceeding NIS 1 billion that have sales in Israel exceeding NIS 250 million (*e.g*., major banks), may be required to file with the IAA for every merger, with any foreign entity, however insignificant they might be, to which they are a party.

Suggested Reform to the Market Share Thresholds – The Merger Reform suggests adding a sales turnover condition to both market share thresholds. Pursuant to the suggested condition, the market share thresholds will only be triggered if the combined turnover of the merging companies in the financial year preceding the merger exceeds NIS 100 million (in Israel) (approximately USD 25.9 million or € 23.1 million).

(iv) Prohibition of Anti-Competitive Transactions Which Do Not Meet the Filing Thresholds

The Merger Reform suggests a new amendment according to which, mergers that raise a reasonable concern of significant harm to competition or to the public would be prohibited even when the transactions do not meet the statutory thresholds for filing under the Law. This amendment basically subjects the merging parties to a "self-assessment" mechanism in cases where the parties had no duty to file with the IAA. This amendment is not trivial since a violation of the Merger Control Regime in Israel can expose the merging parties, *inter alia*, to criminal liability and administrative fines. Also, the Antitrust Tribunal has the authority, at the request of the General Director, to separate merged companies.

Nonetheless, for the sake of business certainty, the Merger Reform proposes that parties to a merger which does not meet the thresholds for filing will be permitted to file a voluntary merger notification and the General Director will have 15 days to notify the parties whether the IAA intends to review the transaction. In order to examine the efficacy of this proposed amendment, it will remain in force for a period of three years from the date of its commencement. The Minister of Economy, with the approval of the Knesset's Economic Affairs Committee, will be entitled to extend it for an additional period of three years each time.

It is important to note - the proposed changes to the statutory thresholds, as described above, will not substantially raise the threshold for filing with the IAA due to the "self-assessment" mechanism. For example, to the extent that one or more of the merging parties is deemed a monopoly, but do not meet the suggested statutory market share threshold of NIS 100 million, such a merging party might still file a voluntary merger notification with the IAA, due to its dominant position - in order to ensure legal and business certainty.

It appears that according to the Merger Reform, any foreign company would be subjected to the Israeli merger control regime, even those companies which do not operate in Israel and do not meet the statutory notification thresholds, Therefore, the self-assessment requirement poses an undue burden on foreign companies.

(v) Amendments to the Timetable for Reviewing a Merger

The Merger Reform also proposed that the deadline extension for the General Director to render his decision in a merger be permitted, without the need for approval from the parties or the Antitrust Tribunal, should the General Director find it necessary. According to the Merger Reform, the General Director may unilaterally extend the deadline several times if there are "special reasoning" for the extension. Also, the General Director will have to provide a reasonable time limit, under the circumstances, for each extension, provided that the cumulative time limit may not exceed 120 days (150 days in total, including the initial 30-day period set under the Law for the review of the merger).

The Import Reform

The Import Reform aims to prevent harm to competition caused by the un-competitive behavior of an official importer. The Import Reform proposes to prohibit the abuse of dominant position by an official importer in a manner which is likely to reduce competition arising from parallel import, even in the case where such an importer is not considered a monopoly under the Law (the Law defines a "monopoly" as the concentration of more than half of the total supply or acquisition of an asset or more than half of the total provision or acquisition of a service, in one person).

Furthermore, the Import Reform suggests that the General Director should have the authority to impose instructions on official importers if the General Director believes that such an imposition may prevent harm to competition, specifically harm to the parallel importers' ability to compete. In addition, according to the Import Reform, the General Director would have the authority to impose administrative fines and criminal penalties on official importers that violate the proposed changes in the Law. According to the memorandum, these amendments stem from the rationale that an official importer may possess market power with respect to the products imported by him, even though he is not considered a monopoly under the Law.

We would be happy to answer any questions that you might have.

Sincerely,

Competition & Antitrust Department

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