



Legal Update: Competition & Antitrust Department

24 June 2015

The Israeli Antitrust Authority Proposes a Reform of the Monopoly 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 Monopoly Regime. The amendments propose, *inter alia*, to extend the application of the Monopoly Regime to an entity that possesses market power in a relevant market - even if that entity's market share does not exceed 50%.

• Introduction

On April 30, 2015, the IAA published a Memorandum detailing suggested revisions of the Law with respect to the Israeli Monopoly Regime (the "**Reform**" or the "**Memorandum**"). In brief, the Reform suggests, *inter alia*, to extend the application of the Monopoly Regime to an entity who possesses market power, even if said entity does not possess market share 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, as required under current Monopoly Regime. The Reform, should it enter into force, may extend the Israeli Monopoly Regime to apply to entities which do not meet the current definition of a "Monopoly" in accordance with the Law, and expose such entities to the limitations and obligations relevant to a monopoly holder under the Law.

The substantial changes in the Reform include, *inter alia*:

- Setting an additional-alternative definition of a Monopoly based on market power, as opposed to only market share;
- Suggesting that the declaration of the General Director of the IAA ("**General Director**") of a Monopoly based on market power shall have constitutional validity;
- Setting conditions for the re-examination of the declaration of a Monopoly based on market power.

The IAA is accepting comments on the Memorandum until July 1, 2015. Following consideration of the comments, the final version of the Memorandum will likely become a legislative bill and may be brought before the Israeli Parliament (the "**Knesset**").

The Reform

Current Monopoly Control Regime in Israel

The current Israeli Monopoly Control regime provides that "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 the hands of one entity shall be deemed a Monopoly". The requirement that an entity holds a market share of more than 50% in a relevant market is currently the only threshold for applying the Israeli Monopoly Control regime, and accordingly, it is unnecessary to examine the entity's market power in order for it to be subjected to the Monopoly Control regime.

In addition, under the current regime, the declaration of a Monopoly by the General Director is of declaratory validity only, meaning that a Monopoly is a matter of "status". Therefore, the obligations and limitations applied to monopolists exist regardless of a declaration or lack thereof.

It should be noted that, theoretically, Section 26(c) of the Law permits the application of the monopoly laws also to market share of less than 50%, pursuant to a ruling by the Minister of Economy and with the recommendation of the General Director, where an entity has "decisive influence" in a relevant market. However, in practice, this section is rarely used.

An Overview of the Proposed Amendments to the Law

(i) Setting an Additional-Alternative Definition of a Monopoly Based on Market Power, as Opposed to Market Share

The Reform suggests setting a substantive additional-alternative definition of the term "Monopoly", according to which an entity that holds a concentration of market power in relation to the supply or acquisition of an asset, or in relation to the provision or acquisition of a service, even where the concentration is not more than half of the assets or more than half of the services, will be deemed to be a Monopoly holder if the General Director makes such a declaration.

This substantive definition would be an additional-alternative to the quantitative definition of Monopoly, and would not replace it. The IAA, in its Memorandum, states that a significant market share, of over 50%, indeed indicates the existence of market power which justifies, under certain circumstances, the imposition of special obligations and prohibitions in order to prevent harm to competition or to the public. However, it is possible that a situation could arise whereby an entity enjoys a market power of less than 50% and can also harm competition or the public. Accordingly, the IAA wishes to expand the Israeli Monopoly Control regime to include the additional-alternative definition of Monopoly based on market power. It should be noted that the Memorandum does not refer to a possible scenario under which an entity has a market share exceeding 50%, but do not possess market power in a relevant market, although one can assume that it would have been appropriate to address this issue under the suggested Reform.

The Memorandum also notes, that market power may be indicated by the existence of barriers to entry or to significant expansion of competitors; by other structural elements reducing competition; and from behavioral

practices which oppress competitors and reduce competition in the market. However, it is important to note that, presently under the Law or in the Memorandum, there is no definition of the term "market power" and there are no thresholds or conditions for the purpose of determining market power.

(ii) Constitutional Validity of The Declaration of a Monopoly Based on Market Power

The Reform suggests that in the case of a Monopoly based on market power, the declaration of the General Director, which will not be limited in time, will have constitutional validity. As such, it will be valid prospectively.

According to the Memorandum, it would be possible to appeal to the Antitrust Tribunal regarding the declaration of the General Director within 30 days of the date the declaration has been provided to the relevant entity.

(iii) Conditions for the Re-Examination of the Declaration of a Monopoly Based on Market Power

The Reform proposes a "re-examination" mechanism that would enable an entity deemed to be a Monopoly holder who was declared as such on the basis of market power to approach the General Director with a request to re-examine the declaration, provided that the entity can show that, since the date of the declaration, circumstances have changed in a manner justifying the re-examination of the declaration.

The General Director will have sole discretion to determine whether to conduct such a re-examination and is not limited to a specific duration of time for the process of the re-examination. To the extent that a re-examination is conducted, the General Director has the authority to decide whether to uphold the declaration, cancel or amend it.

According to the Memorandum, it would be possible to appeal to the Antitrust Tribunal regarding the General Director's decision in the re-examination process, within 30 days of the date the said decision has been provided to the relevant entity.

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

Sincerely,

**Competition & Antitrust Department
Fischer Behar Chen Well Orion & Co.**

For further information please feel free to contact:

Adv. Tal Eyal-Boger teyal@fbclawyers.com +972.3.6944141

Adv. Ziv Schwartz zschwartz@fbclawyers.com +972.3.6944141

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