Legal Update: Antitrust Law **January 2019**

A Major reform of the Israeli Competition Law -

The Knesset (the Israeli parliament) approved the Restrictive Trade Practices Legislative Bill (Amendment 21), 5779-2019

On January 1, 2019, the Knesset approved a significant amendment to the Restrictive Trade Practices Law (Amendment 21), 5779-2019 (the "Amended Law").

The Amended Law creates material and comprehensive revisions to the current language of the Restrictive Trade Practices Law, 5748-1988 (the "**Restrictive Trade Practices Law**" or the **"Law"**), including to key provisions of the Law, related to the Israeli monopoly control regime, the Israeli merger control regime, the enforcement mechanisms of the Law, and more.

The Amended Law constitutes one of the most comprehensive revisions made to Israeli competition law in more than three decades, and we expect it to have significant implications to companies acting in the Israeli market.

According to the Israeli Antitrust Authority (the "**IAA**"), the objective of the Amended Law is twofold: first, the Amended Law aims to intensify and focus the IAA's resources on activities which have the potential to cause damage to competition and to the public, as well as to strengthen the IAA's ability to act with all of its powers and with maximum efficiency in order to promote competition and decrease the cost of living. At the same time, the Amended Law aims to decrease the bureaucratic and regulatory burdens under the existing Law with respect to commercial activities which do not raise harm to competition concerns.

Following are the main elements of the Amendment:

- An increase in the combined sales turnover threshold for the submission of notices of merger to NIS 360 million (approx. USD 96.1 m / Euro 84 m);
- An increase to the maximum administrative fines imposed on a company - up to NIS 100 million per violation (approx. USD 26.69 m / Euro 23.33 m);
- A new additional definition for a "Monopolist", based on market power (in addition to the current definition based on market share);
- Increased criminal penalties for restrictive arrangements - up to five years imprisonment (with no requirement for aggravating circumstances);
- A stricter obligation is imposed on officers in a company to supervise and to prevent competition-related violations;

Below we further describe, in detail, the main elements of the Amended Law:

A. <u>The Increase of the Sales Turnover Threshold which Necessitates the Submission of Notices of Merger to the IAA (section 17(a)(2) of the Law) - to NIS 360 M (approx. USD 96.1 M / Euro 84 M)</u>

Summary of the amendment - **the aggregated sales turnover threshold which necessitates the submission of notices of merger to the IAA was updated, so that if the aggregated sales turnover of the parties to the merger is greater than NIS 360 million (and not NIS 150 million - the aggregated sales turnover under the pre-amended Law) the parties will be required to receive the Director General's advance approval**.

In detail - The amendment provides certain relief with respect to the Israeli merger control regime. The Restrictive Trade Practices Law in its pre-amended form establishes three alternative conditions and it is sufficient for one of the three to be satisfied in order to require the parties to the merger transaction to provide notices of merger to the Director General in order to receive its approval for the merger in advance.

One of the alternative conditions is a case where the combined sales turnover of the parties to the merger transaction is greater than NIS 150 million (approx. USD 40.08 M / Euro 35.29 M). The Amended Law increases the minimum threshold to NIS 360 M, beyond which the parties are required to submit notices of merger to the Director General (in addition, a mechanism linked to the consumer price index will apply in order to update the threshold amount).

Consequently, this amendment provides relief by decreasing the number of mergers which require the Director General's approval due to the increase in the aggregated sales turnover threshold.

The Amended Law establishes other amendments to the merger control regime:

(1) An extension of time given to the Director General for the review of mergers without the need to request the consent of the parties to the merger and/or without the need to approach the Antitrust Tribunal. Under the Amended Law, the Director General will be permitted to extend the period of time for the evaluation of a merger transaction (currently, 30 days) by two additional 30 day periods, and also to extend the evaluation period by an additional 60 day period after consulting with the Exemptions and Mergers Advisory Committee. Thus, cumulatively, the Director General has up to 150 days to review a merger transaction.

(2) The definition of the term "company" is broadened, to also include non-profit organizations under the Non-Profit Organizations Law, 5740-1980, as well as partnerships under the Partnerships Ordinance [New Version], 5735 – 1975.

B. <u>An Increase to the Administrative Fine Ceiling (Section 50D(a) of the Law) to NIS 100 M</u> (<u>Approx. USD 26.69 M / Euro 23.33 M)</u>

Summary of the amendment - **under the Amended Law, the Director General of the IAA (the "Director General") can impose an administrative fine up to an amount of 8% of the company's sales turnover, provided that the fine is not greater than NIS 100 M (for each violation)**.

In detail - A central matter that the Amended Law deals with is the maximum administrative fine that the Director General can impose on violators of the Law. The Restrictive Trade Practices Law, in its version

before the passage of the Amended Law, established that the Director General was permitted to impose on a breaching entity an administrative fine up to a rate equaling 8% of its sales turnover, "provided that the fine is not greater than NIS 24,563,540 M"[1] (subject to an updating mechanism). In other words, the Law established a ceiling of approximately NIS 24.5 M, which the Director General could not exceed when imposing an administrative fine on a company which breached the Restrictive Trade Practices Law (this, for each violation).

The original proposed amendment of the Law sought to cancel the administrative fine ceiling altogether - *i.e.,* it would permit the Director General to impose administrative fines in amounts much higher than the above stated figures, even reaching amounts in the hundreds of millions of shekels, with the only restriction being that the fine (for each violation) would not exceed 8% of the company's sales turnover.

Following an intense discussion at the Knesset's Economic Affairs Committee on this section, it was decided that the administrative fine ceiling would not be cancelled completely, but rather it would be significantly increased to NIS 100 M. Thus, under the Amended Law the Director General may impose an administrative fine of up to 8% of an entity's sales turnover provided that this figure is not greater than NIS 100 M (per violation).

C. <u>Amendment of the term "Monopolist" (section 26(a) of the Amended Law) - An Additional Definition Based on Significant Market Power</u>

Summary of the amendment - an additional definition will be added to the existing definition of the term "monopolist" that is based on the criterion of market power. Thus, under the Amended Law, an entity which has "significant market power", even if it does not hold market share that is greater than 50%, shall be deemed to be a monopolist under the Law.

In detail - The pre-amendment definition of "monopolist" (section 26(a) of the Law) establishes that a monopolist is an entity which holds market share that is greater than 50%; and conversely an entity which holds less than the 50% market share threshold will not be deemed to be a monopolist. Thus, the pre-amendment definition of monopolist is only concerned with market share.

The IAA expressed, in the framework of the memorandum that preceded the Amended Law, that the legal reality that existed before the Amended Law precluded the Authority from acting against an entity which had significant market power and which abused its power but which held less than 50% market share. Therefore, it was proposed to expand the definition of monopolist to include an entity which has significant market power, as was ultimately established in the Amended Law.

Due to the challenge of defining "significant market power", the IAA is expected to release a public statement that includes parameters and guidelines on how to assess market power for the purpose of defining a monopolist.

[1] Approx. USD 6.5 M / Euro 5.7 M; this on condition that the sales turnover of the entity in breach of the Law was greater than NIS 10 M (approx. USD 2.67 M / Euro 2.3 M) in the fiscal year that preceded the year in which the violation was carried out.

It should also be noted, that according to the Amended Law, market power will not be a trigger for the submission of notices of merger to the IAA (while market share is).

D. <u>The Increase of the Criminal Penalty for the Offense of a Restrictive Arrangement (section 47(a1) of the Law) - Up To Five Years Imprisonment</u>

Summary of the amendment - **The increase of the maximum criminal penalty for the offense of a restrictive arrangement from three years of imprisonment to <u>five</u> years of imprisonment, without the need to establish aggravating circumstances**.

In detail - Section 47(a) of the pre-amended Law established a maximum prison sentence of three years for all of the criminal offenses specified in it. Among such offenses are prohibited restrictive arrangements; non-compliance with the conditions of an approval given by the Director-General; the failure to report a merger; a monopoly abusing its position, and others as specified in the Law.

Under the Amended Law the IAA sought to **differentiate the violation of a prohibited restrictive arrangement** and establish a significant maximum punishment for it of up **five years imprisonment** without the need to establish aggravating circumstances. *Inter alia*, this amendment is the consequence of the IAA's position that a prohibited restrictive arrangement is the most severe offense among the offenses found in the Law.

E. <u>Amendment Regarding the Liability of Managers (section 48 of the Amended Law) - Duty of Supervision</u>

Summary of the amendment - an independent duty was imposed on officers[2] in a company to supervise and to do everything possible to prevent a violation of the Law by the company or its employees, and the violation of the duty to supervise may result in the imposition of a criminal sanction of up to one year imprisonment and a fine.

In detail - Section 48 of the pre-amended Law establishes that if a company violates the Law, each active manager in the company (as well as a partner and a senior managerial employee responsible for the relevant field) can be indicted for such violation, unless the manager can prove that the violation was committed without his/her knowledge and that he/she took all reasonable measures to ensure compliance with the Law.

Under the Amended Law **an independent duty** was imposed on officers in a company to supervise and do everything possible to prevent any violation of the Restrictive Trade Practices Law by the company or its employees (the "**Supervision Duty**"), and the violation of the Supervision Duty may result in the imposition of a criminal sanction of up to one year imprisonment and a fine.

It was also established that if the company or a company employee carried out an offense, then there will be a **presumption** that the officer breached the Supervision Duty, except if the officer proved that he/she

[2] The definition of "officers" in the Amended Law: "an active manager in the company, a partner excluding a limited partner, or a worker who is responsible on behalf of the company for the area in which the violation was carried out".

did everything in his/her power to fulfill the Supervision Duty.

This amendment increases the burden imposed on officers in a company under the Law in certain respects. Thus, *inter alia*, under the Amended Law, officers in a company are required to do "everything possible" in order to prevent the company's violation and not only to take reasonable measures. Further, the Supervision Duty also applies to offenses of **employees** of the company and not only to offenses of the company itself. In addition, this amendment raises questions, as *prima facie*, it appears that the breach of the Supervision Duty will be sufficient to establish the criminal liability of an officer of the company, even if the company itself in practice did not violate the Law.

On the other hand, this amendment also provides certain relief in that the offense which is attributed to the officer is an offense of non-compliance with the Supervision Duty, which results in a punishment of up to one year imprisonment and a fine, and not the antitrust violation committed by the company and/or its employees (such as: being a party to a restrictive arrangement, carrying out a merger without receiving approval, a monopoly abusing its position, etc.), which can result in more severe sanctions.

F. Renaming of the Law - "Competition" instead of "Restrictive Trade Practices"

An overall terminological change in the Amended Law is the replacement of the term "restrictive trade practices" with the term "competition". Thus, the Amended Law will no longer be called the Restrictive Trade Practices Law but rather the "Economic Competition Law". Among other terminological changes, the Director General of the IAA will be renamed the "Director General of Competition" and the Antitrust Tribunal will be renamed the "Competition Tribunal".

We are available for any questions which may arise.

Sincerely,

Fischer Behar Chen Well Orion & Co

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