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GORNITZKY&CO

Gornitzky & Co. is happy to bring to your attention an important update regarding developments in the field of competition and antitrust in Israel.

The Reform in the Restrictive Trades Practices Law

On October 30, 2017, the Israel Antitrust Authority published a legislative memorandum titled "Strengthening of Enforcement and Reduction of Regulatory Burden" (the "**Memorandum**"). In this client update, we briefly discuss the main amendments to the Restrictive Trade Practices Law, 5748-1988 (the "**Law**") proposed in the Memorandum as well as the possible implications of those amendments, if adopted and implemented, on the business sector.

From the Antitrust Authority to the Competition Authority

First and foremost, the Memorandum seeks to change the Israel Antitrust Authority's name to the Competition Authority, and accordingly, the name of the Antitrust Tribunal to the Competition Tribunal and of the Antitrust Commissioner to the Commissioner of Competition.

Strengthening Regulatory Enforcement

The memorandum also seeks to increase the level of criminal punishment for restrictive arrangements (such as price fixing among competitors), to enhance scrutiny over monopolies and to allow the Antitrust (Competition) Authority to impose financial sanctions without the limitation of a maximum amount.

Severe Punishments for Restrictive Arrangements and Their Classification as a Criminal Offense

In its current form, the Law sets a maximum sentence of three years' imprisonment for all criminal offenses under the Law and a five-year imprisonment for an offense committed under "aggravated circumstances". Aggravated circumstances are defined under the Law as circumstances, in which a significant damage to competition may be caused, among other things, by the position of the offending parties in the relevant market, the period of time during which the offense took place or the damage caused to the public as a result of that offense.

The Memorandum seeks to establish a unified five-year term for restrictive arrangement related offenses without the need to prove the existence of aggravating circumstances. Other offenses defined in the Law will be punishable and may entail incarceration for a period of up to three years.

The cancellation of the different degrees of punishment for offenses relating to restrictive arrangements is expected to have far-reaching consequences, given that the actual prison sentences imposed so far in these offenses amount to only a few months:

- It will allow the Antitrust Authority to demand maximum punishment even in minor cases that have not yet been recognized in court as being done under aggravated circumstances (as occurred in the water meter cartel case, the meteorological service bid case and the laundromat cartel charges).
- In light of the new classification of the offense as a criminal offense rather than a misdemeanor:
  - It will allow the Antitrust Authority to request the court's approval for wiretapping in any case of suspicion of a restrictive arrangement, not subject to the existence of aggravated circumstances;
  - A potentially longer imprisonment, up to five years, is now offered (as opposed to three years under the current Law);
  - The statute of limitations will be extended to ten years (compared to five years today).
  - In certain cases, a conviction and punishment of the responsible office holder in the company will become possible by virtue of being an active officer in the company (even if she/he was not a party to the arrangement). It should be noted that this comes in contradiction to the district court's ruling in the water-meter cartel case, in which the district court articulated that the Law does not allow the imposition of liability or the punishment on an active officer for a "crime" where such officer's liability is based on mere negligence.
  - Officers will be required to take particularly effective measures to prevent the commission of such offenses in the company. It should be mentioned that a legitimate defense for an active officer who was not a party to the offense could be proving that the offense was committed without her/his knowledge and that he/she took all reasonable steps to ensure compliance with the Law.

Cancellation of the Financial Sanction Cap

The Law allows the Antitrust Commissioner to impose financial sanctions at an amount equal to up to NIS 1 for breaches of the Law. In the case of a corporation which annual sales turnover exceeds NIS 10 million, the Law allows the Commissioner to impose financial sanctions of up to 8% of the annual sales turnover of such corporation, provided that such sanctions are not in excess of NIS 24 million.

It should be mentioned that in recent years, the Antitrust Authority increased both the use of financial sanctions and their respective sums, especially in connection with violations committed by monopolies (such as the case of the central beverage distribution company). The Memorandum now seeks to cancel the cap on financial sanctions such that in the case of a corporation with an annual sales turnover in excess of NIS 10 million, it will be possible to impose a financial sanction at an amount equal to 8% of the annual sales turnover, not subject to any cap.

Expanding the Definition of a Monopoly under the Law

The Law defines a monopoly as an entity holding over 50% of any market share (the "**Market Share Alternative**"). The Memorandum proposes an additional definition to the term monopoly that will include any entity holding a "significant non-temporary market power", even if that entity does not possess legally-required market share (the "**Market Power Alternative**"). It should be noted that the proposed amendment does not interpret the term "significant market power" and does not give any method for assessing market power.

The practical meaning of the proposed amendment is the application of the prohibitions appearing in Chapter 29 of Law, applicable only to monopolies (such as a prohibition on the refusal to supply, exploitation of dominant position, charging of excessive or discriminatory prices, etc.) as well as the relevant enforcement powers granted to the Antitrust Commissioner against monopolies. It should be emphasized that the definition of a company as a monopoly, both according to the Market Share Alternative and the Market Power Alternative, is not dependent on the decision of the Antitrust Commissioner, but rather on the prevailing factual situation in the market. In view of the foregoing, the new definition will require many business entities that until the proposed amendment were not considered monopolies pursuant to the Market Share Alternative to examine whether they may be deemed as such pursuant to the Market Power Alternative.

Applicability of the Mergers and Monopolies Chapters on Foundations

The Memorandum specifically addresses foundations (amutot) (as defined by the Law). The definition of the term "Company" in the Law does not include foundations, and accordingly, the chapters relating to mergers and to monopolies in the Law do not apply. The Memorandum seeks to change the definition of the term "Company" such that it will include foundations, thus making additional parts of the Law applicable thereto. Assuming the adoption of the Memorandum, foundations will be required to report, in the relevant circumstances, on mergers to which they are a party of, like any "ordinary" company.

Reducing the Regulatory Burden

Mergers - Increasing the Reporting Threshold According to the Sales Turnover Alternative

One of the conditions that require the reporting of a merger to the Antitrust Commissioner is that the aggregate annual sales turnover of the parties to the merger in the year preceding the merger was in excess of NIS 150 million (the "**Aggregate Sales Turnover**"). The Memorandum proposes to raise this minimum threshold to NIS 360 million (linked to the Israeli CPI). This proposed amendment will naturally exempt many mergers from the need to report to the Antitrust Commissioner and wait for her/his approval prior to consummating the merger, and can also significantly reduce the regulatory burden.

Conversely, the proposed amendment does not change the threshold prescribed in the regulations, which requires, in addition to the Aggregate Sales Turnover, a minimum sales turnover of at least NIS 10 million from at least two parties to the merger. This threshold exempts transactions in which one of the parties has an annual sales turnover of less than NIS 10 million (despite the Aggregate Sales Turnover being in excess of NIS 150 million) from reporting to the commissioner, but this is insufficient. It was expected that as part of the memorandum, there would also be a raise in the threshold prescribed in the regulations at a rate similar to that of the statutory threshold (twice as much), so that transactions with a party holding a revenue rate as low as NIS 20 million, will not require reporting even if the aggregate turnover exceeds NIS 360 million.

This welcomed change is consistent with the Antitrust Authority's desire to reduce the regulatory burden.

It should be emphasized, however, that the Memorandum does not deal with the other instances in which merger notices are required: the monopoly and market share alternatives, which remain unchanged. It should be mentioned that the monopoly alternative requires a monopoly owner to report any merger transaction that it or another party under its control is a party to, regardless of its Aggregate Sales Turnover.

This alternative requires special attention from entities that have not thus far been classified as a monopoly (according to the Market Share Alternative), but will be defined as such after the Memorandum's recommendations are adopted (according to the Market Power Alternative). Upon the effectiveness

of the proposed amendment, these entities will be required to report any merger transaction they or entities which they control are parties to, regardless of their Aggregate Sales Turnover.

Restrictive Agreements - Expansion of Block Exemptions

The explanatory notes to the Memorandum articulate that the Antitrust Authority will act to expand the block exemptions to additional types of restrictive arrangements, without providing any further details.

In addition, the Memorandum discusses the limitation of the timeframe allowed for the review of applications for exemptions of restrictive arrangements and suggests the allowed timeframe should be lowered to 30 days (the allowed period is currently 90 days), while allowing the Antitrust Commissioner to extend the review period by an additional 120 days' period (subject to providing notice to the parties applying for the exemption).

We will, of course, be happy to assist you with any questions you may have.

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