# MEMO

**To:** The Firm's Clients **Date:** October 31, 2017

## Client Update - Amendment to the Restrictive Trade Practices Law, 5748-1988

Yesterday, on October 30, 2017, the Israeli Antitrust Authority ("**IAA**") published a draft amendment which includes several significant amendments to the Restrictive Trade Practices Law, 5748-1988 (the "**Law**"), including changing the Law's name to the "Competition Law."

This is the most comprehensive amendment to the Law since it was first adopted nearly 30 years ago. In this update, we will review the main proposed amendments, and their practical implications on businesses.

**Adv. Boaz Golan, the head of Goldfarb-Seligman's Antitrust and Competition Practice, served as a special outside advisor to the IAA's General Director for the purpose of the draft amendment.**

### Mergers

- **Broadening the extraterritorial application of the Law, to include foreign companies and partnerships even if they lack "a place of business" in Israel, or an existing holding in an Israeli entity**

Currently, the application of the Israeli merger regime depends on the fact that the term "Company" in Section 1 of the Law, applies to at least two companies which are parties to a merger. Regarding foreign companies, this definition requires linkage of the company to Israel by the existence of "a place of business" in Israel, or by holding an interest of more than 25% in an Israeli Company.

According to the proposed amendment, the definition of the term "Company" in Section 1 will include foreign companies, without any requirement of a linkage to Israel in the form of a "place of business in Israel," or an existing interest in an Israeli entity.

Thus, the application of the mergers chapter of the Law will be identical for a company or a partnership incorporated outside of Israel and Israeli entities, and the requirement to file a merger notification and

receive clearance from the IAA's General Director, will be based upon the turnover or market share thresholds, as are set forth in Section 17(a) of the Law.

- **Applying the Mergers Chapter to include non-profit organizations**

According to the suggested amendment, the term "Company" will be amended to also include non-profit organizations. Thus, the mergers chapter of the Law will now also apply to non-profit organizations.

- **Merger notification filing requirements – Updating the sum to NIS 360 Million**

Section 17(a) of the Law sets forth the thresholds for filing a merger notification in Israel. Parties in a transaction are required to file a merger notification and await clearance of the General Director as long as at least one of the thresholds is triggered.

This section includes definitions of the turnover threshold in Subsection 17(a)(2), and two market share thresholds, in Subsections 17(a)(1) and 17(a)(3).

After many years in which the turnover threshold has not been updated, the current amendment suggests that the turnover threshold for filing merger notifications in Israel, calculated by the combined turnover of the parties to the merger, in Israel, in the year prior to the transaction, will be increased to NIS 360 million instead of the current NIS 150 million.

Notwithstanding the proposed increase of the turnover threshold, the Restrictive Trade Practices Ordinance includes an additional requirement to the turnover threshold test. Namely, that at least two of the parties to the merger each have a sales turnover in Israel exceeding NIS 10 million. The suggested amendment does not indicate any intention to amend this sum. Thus, even if the amendment passes in the Parliament, as long as the Restrictive Trade Practices Ordinance is not amended, the turnover threshold will be still be subject to the fulfillment of both of the following: (a) the combined sales turnover of all the merging parties, in Israel, in the year prior to the merger, exceeds NIS 360 million; and (b) the sales turnover of at least two parties to the merger, in Israel, in the year prior to the merger exceeds NIS 10 million each.

In addition, the amendment will include a mechanism to update the turnover threshold sum (as defined by Section 17(a)(2) of the Law) automatically, according to the Consumer Price Index published by the Central Bureau of Statistics. In this manner, each year the sum will be updated according to the index change.

- **Merger notification filing requirements – Clarification that Section 17(a)(1) applies to a monopoly in a relevant market, and not to the activity ratio in specifics segments**

Section 17(a)(1) applies the merger notification filing requirement (and the General Director clearance requirement) in the event that due to the merger the parties' collective activity ratio will exceed 50%. In the Law's current version, this section differentiates between different types of activities (i.e. production, sales, marketing), and the examination is not based on the parties' market shares in supply or acquisition in a relevant market but rather on their share exceeding 50% in the activities mentioned.

Nevertheless, in practice, and in court judgments, it is widely accepted to view this section to be referring to the parties' market share in the market, and not their share in any one particular activity. The amendment codifies this widely-accepted point of view, and formally turns the examination to be in respect of the question of combined market share exceeding 50% of either supply or acquisition.

- **Granting the General Director authority to extend the examination period up to 150 days**

In its current version, the Law requires the General Director to render a decision regarding a proposed merger within 30 days commencing on the day of the filing. In order to extend this time period, the General Director must request such an extension from the Antitrust Tribunal.

In practice, a very high rate of the mergers is decided within the 30-day time period. Nevertheless, in other cases, the General Director requests that the parties agree to an extension (often – with no real ability to object), and requests to the Tribunal for extensions are very rare. The proposed amendment enables the General Director to extend the evaluation period, by issuing a justified decision, without requiring the parties' consent or the Tribunal's approval, up to a total of 150 days (a total maximum extension of 120 days).

The IAA, led by the current General Director, is committed to shortening the evaluation period, whenever possible. However, previous General Directors did not necessarily have this same approach and there is concern that given the authority to easily extend the evaluation period, mergers which were ruled on quickly previously, will not receive the same priority in the allocation of the IAA's resources.

**<u>Monopolies</u>**

- **Amendment to the term "Monopoly", to include entities which possess significant market power**

In the current version of the Law, the definition of the term "Monopoly" is determined solely by the market share test – any entity which supplies or acquires more than half of a relevant market is a monopoly.

The proposed amendment adds to this definition, which will now include firms that possess significant market power. Namely, a firm can be deemed a monopoly even if its market share does not exceed 50%.

Despite the fact that the proposed amendment will broaden the scope of entities considered monopolies, it is possible that the amended definition of monopoly will have an indirect affect and actually provide the Monopoly Chapter with a more firm economic foundation. The Monopoly Chapter's aim is to address a single firm which possesses market power, not to deal with a high market share as an independent issue.

The current definition provides that a high market share is the sole test used to determine the Monopoly's existence, when in reality is only one of the characteristics of a firm that evidences market power. Using market share as the sole test for the existence of a monopoly damaged the ability to assess the fundamental provisions of this Chapter (i.e. unreasonable refusal to supply and abuse of dominant position). We anticipate that the amendment to the definition of Monopoly will in turn lead to a better analysis of the fundamental provisions of the Monopoly Chapter.

**Enforcement**

- **Raising the cap of the maximum punishment for the cartel offence to 5 years of actual imprisonment, regardless of the circumstances**
- **Annulment of the possibility to sentence 5 years of actual imprisonment time for all other offences in the law, even if they were committed in aggravated circumstances**

According to the current version of the Law, the maximum punishment for core offences of the Law is three years of imprisonment, unless the offence was made in aggravated circumstances, in which case, the maximum imprisonment time is five years.

The proposed amendment will distinguish the cartel offence from all other offences in the Law, and set the maximum punishment for the cartel offence to five years, regardless of its circumstances. On the other hand, the proposed amendment will eliminate the possibility for the punishment of five years to all other offences in the law, thus lowering the cap to three years.

This amendment has an indirect effect in a practical sense: all cartel offences will now be regarded as a "Crime," thus the statute of limitations for prosecuting such acts will be 10 years. In addition, the IAA could request wire-tapping warrants to investigate any suspicion of a cartel.

- **Annulment of the cap on monetary penalties**

According to the Law's provisions, for various violations, including some merely technical violations, the IAA's General Director has the authority to fine violating companies up to a maximum of 8% of the violator's total consolidated turnover. In addition, the Law sets a fixed "ceiling" of NIS 24 million.

The amendment proposes to annul this fixed ceiling, such that the only cap would be that of 8% of the company's turnover. For large companies, this amendment significantly increases the economic exposure for violation of the Law. For instance, Clalit Health Services, which possesses the highest turnover in Israel, will now be exposed to a maximum fine of over NIS 2 billion for any violation of the Law.

If this amendment is adopted into the Law, we expect that it will come hand in hand with additional changes, such as linking the cap on the fine to the sales turnover of the specific violating activity, rather than the company's total consolidated turnover. In addition, to date the IAA has not presented a clear line to define when a certain practice qualifies as more than one violation of the Law. Bearing in mind the significant economic implications of this question, the IAA will need to announce clear guidelines on this subject.

**Restrictive Practices**

- **Reducing the timeframe for rendering a decision of the General Director**

According to the amendment, the General Director will be required to deliver decisions for a request for an exemption within 30 days. The General Director may extend this period up to a maximum of 120 additional days, by a written reasoned notice to the requesting parties.

This amendment significantly shortens the timeframe from the current 90-day period which can be extended by additional 60 days. Furthermore, the amendment does not include the current wording which states that time period will be frozen while the IAA waits to receive responses to requests for information that it sent regarding the exemption.

**Miscellaneous**

- Amendment to the Law's name

The amendment will replace the Law's current name to be the "Competition Law," and in turn the Antitrust Authority will be renamed the Competition Authority and the Antitrust Tribunal – the Competition Tribunal.

* * *

**Should you have any questions or need additional information regarding this matter, please feel free to contact Adv. Boaz Golan, Partner, Head of the Antitrust and Competition Department:** boaz.golan@goldfarb.com**, or Adv. Nimrod Prawer, Partner, Antitrust and Competition Department:** nimrod.prawer@goldfarb.com, **or at: 03-6089850.**

* * *