



**Goldfarb Seligman**  
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## MEMO

To: **The Firm's Clients**

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### **Client Update - Upcoming Reform of Block Exemptions for Restrictive Arrangements**

Pursuant to publishing a draft amendment to the Restrictive Trade Practices Law, 5748-1988, the Israeli Antitrust Authority (“IAA”) published Public Review Drafts for the amendment of three block exemptions - the Block Exemption for Joint Ventures, the Block Exemption for Restraints Ancillary to Mergers and the Block Exemption for Agreements for the Execution of Research and Development.

These three drafts significantly amend the tests which are currently in place for block exemptions regarding the legality of a restrictive arrangement by adapting a substantive test - if the arrangement does not pose a competitive concern, and possesses an underlying business justification, it is legal.

For the first time, even with regard to agreements between competitors (all aforementioned block exemptions apply to agreements between competitors as well) the parties are allowed to perform a self-assessment analysis of the restrictive arrangement’s predicted impact on competition, enabling the parties to determine the legality of the arrangement accordingly.

This is a significant reform of the restrictive arrangement regime, as it allows the parties to refrain from approaching the IAA in cases which previously mandated filing a motion for exemption to the IAA (resulting in many parties abandoning cooperation attempts before they even begun).

Past experience proves that permitting the parties to perform a self-assessment of the restrictive arrangement’s legality allowed the implementation of many commercial agreements, which otherwise would have not been carried out.

### **Block Exemption for Restraints Ancillary to Mergers**

The Antitrust Rules (Block Exemption for Restraints Ancillary to Mergers) (Temporary Provision) - 2009 permit the parties to a merger to undertake restrictions as part of the merger related to one of the four following topics: (1) A non-compete restriction; (2) A supply guarantee restriction between the seller and the company acquired in a merger with regard to continuing the purchase or supply of goods under the

same or better conditions than those under which they had prior to the merger transaction; (3) An undertaking by the seller not to transfer to another party information which has come to the seller by virtue of the seller's holding of rights in the company acquired in a merger; (4) Any other restriction which is required in order to maintain the economic value of the company sold in the merger, provided that it is limited to a reasonable period of time.

Strict tests were set under the block exemption as prerequisites for the application of two of the aforementioned restrictions - the non-compete and supply guarantee restrictions. To illustrate, the block exemption states that a non-compete restriction may legally apply only to mergers which include the transfer of reputation or knowledge, and the non-compete period is limited to four years from the date the seller's share in the acquired company is less than 20% or the date it no longer holds the right to nominate a director in the acquired company (the earlier of the two).

The draft of the block exemption suggests adding a substantive test which would apply to all restraints ancillary to mergers:

"The restraints do not limit the competition in a considerable share of a market affected by the arrangement, or they are liable to limit the competition in a considerable share of such market but are not sufficient to substantially harm the competition in that market."

This test relies on the competitive analysis of the restriction, and it permits all restraints ancillary to mergers which do not raise a substantial concern for restricting competition.

The aforementioned test applies also to non-compete and supply guarantee restrictions which the block exemption sets specific regulations for. The result is that the proposed block exemption allows for deviations from the strict tests for non-compete and supply guarantee restrictions (such as extending the non-compete or supply guarantee period) in cases in which the competitive analysis allows it. In other cases, the restriction must meet the specific terms set forth in the block exemption.

### **Block Exemption for Joint Ventures**

The Antitrust Rules (Block Exemption for Joint Ventures) (Temporary Provision) - 2006 allows parties to a joint venture to set certain restrictions on their relationship with the joint venture, such as a non-compete restriction between the parent companies of the venture within the framework of the venture, or arrangements related to the supply of goods by either party as part of the joint venture's activity.

The Block Exemption for Joint Ventures is of great importance in the practical sense, considering the IAA's position which in many cases views the existence of a joint venture as a restrictive arrangement between competitors in and of itself. In other words, the IAA's position is that the mere structure of the joint venture creates an inherent restriction, regardless of any other restrictions between the venture and its parent companies, or between the parent companies themselves.

The modular block exemption distinguishes between three variations of joint ventures: a joint venture between parties who are not competitors; a joint venture between competitors in a field other than the field in which they compete; and a joint venture between competitors in the field in which they compete. The block exemption sets different tests for each variation. Naturally, the tests for joint venture between competitors are relatively strict, and include various technical tests. Among others, they deal with the combined market share of the parties and the nature of the competition in the field (the number of competitors and their market shares).

The suggested amendment to the block exemption adds a substantive test which will be applied to all joint ventures, including joint venture between competitors, alongside the technical tests. The substantive test includes two cumulative conditions:

"A. The objective of the arrangement is not to reduce or eliminate competition, and the arrangement does not include any restraints which are not necessary to fulfill its objective.

B. The restraints in the restrictive arrangement do not limit the competition in a considerable share of a market affected by the arrangement, or they are liable to limit the competition in a considerable share of such market but are not sufficient to substantially harm the competition in that market."

The suggested amendment to the block exemption constitutes an essential change in the regulation of cooperation between competitors. For the first time, competing parties may perform a competitive analysis and, according to its findings, determine whether their cooperation is legal, without the prerequisite of meeting (extremely strict) technical tests or contacting the IAA.

The suggested amendment limits the substantive test when it comes to joint marketing of competing products. In such cases, joint marketing will be permitted only if the parties completely merge their manufacture or import activity in the relevant field as part of the joint venture. In other words, a joint venture between competitors which is essentially a joint marketing of competing products is not

permissible, and requires the parties to actually merge their activity (while still meeting the conditions of the substantive test).

As mentioned above regarding the Block Exemption for Restraints Ancillary to Mergers, the substantive test may be applied alongside the technical tests set by the block exemption, and the parties of the joint venture may also exempt the venture by meeting the tests previously prescribed by the law.

### **Block Exemption for Agreements for the Execution of Research and Development**

The Antitrust Rules (Block Exemption for Agreements for the Execution of Research and Development) (Temporary Provision) - 2006 permit the parties to agreements for the execution of R&D to undertake various restrictions upon themselves or the joint development. To illustrate, the block exemption allows the restriction of independent development of either party, joint development with a third party, and more.

As with the Block Exemption for Joint Ventures, the Block Exemption for Agreements for the Execution of Research and Development is modular. The block exemption distinguishes between R&D agreements between parties who are not competitors; R&D agreements between competitors in a field other than the field in which they compete; and R&D agreements between competitors in the field in which they compete. This block exemption also sets different tests for each variation, with relatively strict tests for R&D agreements between competitors, including various technical tests. Among others, the tests deal with the combined market share of the parties and the nature of the competition in the field (the number of competitors and their market shares).

The suggested amendment to the block exemption adds a substantive test which will be applied to all R&D agreements, including R&D agreements between competitors, alongside the technical tests. The substantive test includes two cumulative conditions:

"A. The objective of the arrangement is not to reduce or eliminate competition, and the arrangement does not include any restraints which are not necessary to fulfill its objective.

B. The restraints in the restrictive arrangement do not limit the competition in a considerable share of a market affected by the arrangement, or they are liable to limit the competition in a considerable share of such market but are not sufficient to substantially harm the competition in that market."

As detailed above regarding the other two block exemptions, the substantive test may be applied alongside the technical tests set by the block exemption, and the parties to the R&D agreement may also exempt the agreement by the power of the tests previously prescribed by the law.

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

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