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Significant and Extensive Amendment to the Antitrust Law

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Last week (January 1, 2019), the Knesset approved the Antitrust (Amendment No. 21) Bill, 5779-2019, in second and third reading, for the amendment of the Antitrust Law, 5748-1988 (the "**Antitrust Law**" and the "**Amendment**", respectively). **This is the most significant amendment that has been made to the Antitrust Law in recent years, both in terms of scope and in terms of substance**, and it substantially alters a large portion of the provisions that form the basis of the Law, including provisions relating to the supervision of monopolies, supervision of mergers, supervision of restrictive arrangements and measures for enforcement of the Law. The purpose of the Law, as presented by the Antitrust Authority (the "**Authority**") is a dual purpose: on the one hand, reinforcement of the enforcement in respect of the core offenses in the Law, and on the other hand, reduction of the regulatory onus when it is possible to do so.

The main points of the Amendment are as follows:

1. Changes in the field of monopolies (dominant firms) – one of the most significant changes in the current Amendment relates to the definition of a monopolist firm, which appears in section 26 of the existing Antitrust Law, which provides that a monopolist is an entity holding a share of more than 50% of a particular market. The Amendment expands the existing definition, and provides, alongside it, an additional and alternative definition to the effect that a monopolist is also an entity holding **significant market power** with respect to the supply or purchase of goods, or with respect to the provision or purchase of services.

   This Amendment is of considerable significance for large firms whose market shares are significant, albeit not greater than 50%. These firms, if they have market power, will be subject to the duties of fairness that apply to monopolists (and in particular, the prohibition against unreasonable refusal to supply goods or services and the prohibition

against abuse of dominant position including a prohibition against discrimination between customers, a prohibition against product tying or bundling and a prohibition against unfair pricing). Breach of these duties of fairness will expose the firm to enforcement by the Antitrust Authority (whether criminal or administrative) and private enforcement in civil proceedings (for instance, class actions for excessive pricing).

While the use of the term "market power" to define a monopolist, or a "dominant firm" is common in many jurisdictions. Usually in such jurisdictions there is no alternative definition based on the existence of market share alone. In this regard, the Amendment expands the definition of a monopoly beyond what is usual and necessary and enables the Antitrust Authority to have their cake and eat it, too: to act against entities with market power, even if their market share is less than 50%, and to act against entities with a market share of more than 50%, but which do not have significant market power.

The Authority gave notice that it intends to publish Guidelines to the public setting out relevant indicators to the identification of the existence of market power, and undertook that until the publication of such Guidelines, the provisions of the Law will not be enforced vis-à-vis monopolists by virtue of the definition of "market power".

2. Changes in the field of mergers – the Amendment significantly increases the threshold conditions in section 17(a) of the Law regarding the requirement for the prior approval of the Antitrust Commissioner (the "**Commissioner**") for implementing a merger transaction. Prior to the Amendment, it was necessary to obtain approval of a merger of parties to a transaction whose joint sales turnover during the previous financial year amounted to more than NIS 150 million (and where two of the parties had a sales turnover of more than NIS 10 million each). Following the Amendment, the **joint sales turnover** that is required for reporting was updated to **NIS 360 million (approx. $ 94 million)**. In addition, section 17(b) of the Law was also amended so as to prescribe an automatic mechanism for updating the sum in the Law in accordance with changes in the CPI.

   It is clarified that mergers between smaller firms, in terms of sales turnover, might still require the approval of the Commissioner if one of the other two threshold conditions applies to them: the joint market share of the parties to the merger is greater than 50%; or where one of the parties to the merger is a monopolist. It should be noted in this context that the existence of a monopoly for the purposes of the duty to report a merger transaction to the Commissioner will only be examined in light of "market share" and not "market power".

   The Amendment also affects the dates of the Antitrust Commissioner's examinations regarding the supervision of merger transactions. Up till now, the Commissioner had a 30-day time limit to examine merger transactions, and was required to apply to the Antitrust Tribunal for an extension or to obtain the parties' consent to such. The Amendment grants the Commissioner the power to **extend the examination period for complex mergers by an additional 120 days**.

3. Changes in the field of restrictive arrangements – the Amendment provides that **the upper limit for a penalty of imprisonment for a restrictive arrangement offense will amount to 5 years**, thereby according with the severity of the offense, which is, in the view of the Authority and the Knesset, the most serious of the antitrust offenses. Prior to the Amendment, the maximum penalty for a restrictive arrangement offense amounted to 3 years, whilst the maximum penalty for a restrictive arrangement under aggravating circumstances was 5 years. This change has a number of significant consequences. Firstly, if, up until now, the restrictive arrangement offense was classified as a misdemeanor, the restrictive arrangement offense is now classified as a felony. Thus, the prescription period for such offenses will also increase from 5 years to 10 years. Secondly, this makes it easier for the Authority to obtain a wiretapping order due to a concern of the existence of a restrictive arrangement, and it does not have to point

to aggravating circumstances for that purpose.

On the other hand, **the Amendment significantly reduces the period of time that is available to the Commissioner for examining requests for an exemption from certification of a restrictive arrangement.** Prior to the Amendment, the Commissioner had 90 days for the examination whilst following the Amendment, that period is reduced to 30 days, similar to the examination of mergers. However, the Amendment grants the Commissioner the power to extend the examination period by an additional 120 days.

4. Changes in the scope of liability of office bearers – the Amendment replaces the wording of section 48 of the Antitrust Law, which deals with the liability of corporate officers. This is a "last minute" amendment that did not appear in the Explanatory Memorandum to the Bill, however it appears that the purpose of the amendment is to adjust the wording of section 48 to the wording of corresponding provisions dealing with corporate officers liability in many economic laws.

   According to the wording of section 48 prior to the Amendment of the Law, a corporate officer which committed an offense under the Antitrust Law will be charged with the offense as well, unless it is proven that the offense was committed without his knowledge and that he took all reasonable measures to ensure observance of the Law. The Amendment provides that "a corporate officers **must supervise and do all that is possible** in order to prevent an offense under this Law by the corporation or by any of its employees". Despite the fact that the language of the Law is, prima facie, broader ("all that is possible") than the old wording ("reasonable measures") and is, prima facie, stricter, we are of the opinion that in light of the interpretation that has been given in case law to the term "all that is possible" which appears in similar provisions in many other pieces of legislation, this term in fact relates to reasonable measures that the corporate officers might take and in this regard the Amendment does not intensify corporate officers' exposure . It will be necessary to follow up the Antitrust Authority's enforcement policy and to examine whether indictments are filed against corporate officers who indisputably took reasonable measures to prevent an offense, but did not do "all that was possible" to prevent it, and whether indictments are filed against lack of adequate supervision by corporate officers, in cases where no indictment is filed against the corporation with respect to an infringement of the Antitrust Law.

   In addition, pursuant to the Amendment, **the penalty for breach of an office bearer's liability will be limited to one year's imprisonment**, at the most, as distinct from the maximum penalty for breaches of the Antitrust Law, which amounts to 3 years, or even 5 years, given aggravated circumstances.

5. Changes in the field of monetary sanctions – prior to the Amendment of the Law, the Law prescribed a maximum sanction of 8 percent of the sales turnover of the infringing party, provided that the sanction shall not be greater than NIS 24,490,070 with respect to substantial breaches of the Law. In the Amendment, section 50D of the Law was amended so that the maximum sum that can be imposed as a sanction on a corporation **was updated to NIS 100 million**.

6. Additional amendments – the name of the Law was amended from the Antitrust Law to the "**Economic Competition Law**" and accordingly – the Competition Commissioner, the Competition Authority and the Competition Tribunal.

We shall be of service to answer any questions or provide any clarifications.

The full wording of the Amendment [in Hebrew] can be found here.

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