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**Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note  
from Israel**

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## Israel

### Preface

1. In the past, the Israeli antitrust regime – particularly regarding restrictive arrangements – was based on very rigid rules, and often required parties to an arrangement to receive pre-approval from the antitrust supervisory system. This rigid interpretation of the law, based on *per se* rules, eliminated the need to establish in every case that the arrangement is liable to harm competition. That made criminal enforcement of the antitrust laws in Israel significantly easier, which has helped deter potential violations of the Law. Although a more rigid regime has benefits in terms of deterrence, it also raises concerns of classifying arrangements that do not harm competition as prohibited if did not receive approval from the Director General or from the Antitrust Tribunal. For that reason, the tendency today is to move towards a self-assessment regime and focus the enforcement efforts on practices that have a substantial impact on competition and on the public. Along with this desire to ease the regulatory burden and to focus enforcement efforts, it is important to preserve the deterrent effect of criminal enforcement of antitrust laws in Israel.

2. In this paper we will review the absolute presumptions and safe harbors included in the Israeli Antitrust Law today. Also, we will describe trends in the case law and in the Antitrust Director General's papers relating to the desire to focus the antitrust enforcement and ease the regulatory burden. In the conclusion, we will discuss future developments in the law, aimed at balancing between the considerations mentioned above.

### 1. Presumptions and Safe Harbours in the Israeli Antitrust Law: Overview

3. The antitrust laws in Israel include several presumptions. Presumptions are established in the Restrictive Trade Practices Law, 1988-5748 ("**the Law**") itself: For example, while section 2(a) of the Law provides a broad definition of restrictive arrangements, focusing on whether the arrangement is liable to eliminate or reduce competition, section 2(b) of the Law states that "an arrangement involving a restraint relating to one of the following issues shall be deemed to be a harming competition:

1. The price to be demanded, offered or paid;
  2. The profit to be obtained;
  3. Division of all or part of the market, according to the location of the business or according to the persons or type of persons with whom business is to be conducted;
  4. The quantity, quality or type of assets or services in the business."
4. The Israeli Supreme Court has ruled<sup>1</sup> that the presumptions in section 2(b) are absolute presumptions and that any arrangement falling under this section is deemed a

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<sup>1</sup> See Additional Civil Discussion 4465/98 Tivol (1993) Ltd. v. Shef Hayam (1994) Ltd. (19.8.2001) Antitrust Pub. No. 3003022 ("*Tivall*") and Criminal Appeal 4855/02 State of Israel v. Borowitz (31.3.2005) Antitrust Pub. No. 5000783 ("*Borowitz*").

restrictive arrangement, so that it is not necessary to prove that the arrangement is liable to prevent or reduce competition in business, and the parties to the arrangement cannot demonstrate that the arrangement did not harm competition. Therefore, the practical meaning of section 2(b) is that any agreement falling under it is prohibited, unless the arrangement meets the conditions of a block exemption or has been granted an exemption from the Antitrust Director General or approval from the Antitrust Tribunal.

5. In the following chapters we will elaborate regarding the benefits and disadvantages of the absolute presumptions regime and about changes which the IAA has considered in this regard.

6. One can find an additional presumption in section 26 of the Law regarding the definition of a monopoly. This is a factual presumption that rules that a person holding more than half of the total supply (or purchase) of the assets or services in a given market is regarded as a monopolist, and therefore must obey the rules applying monopolists. This presumption is absolute and cannot be contested.

7. Among the rules applying to monopolists is the prohibition against abusing its position. While section 29A(a) sets a general prohibition on the abuse of monopoly position in the market, section 29A(b) of the Law specifies a list of behaviors which will be regarded as an abuse of monopoly position in the market. Such behaviors include: establishing an unfair buying or selling price for the asset or service over which the monopoly exists; reducing or increasing the quantity of the assets or the scope of the services offered by the monopolist, not within the context of fair competitive activity; setting discriminatory conditions for customers or suppliers which grant them an unfair advantage vis-à-vis their competitors; and setting contractual conditions that by their nature are unrelated to the subject matter of the contract, such as tying. Section 29A(b) is based *mutatis mutandis* on Article 102 of the TFEU. The Antitrust Tribunal, in a decision granted in 1999, interpreted the section as prescribing absolute presumptions that, when met, will mean that the monopolist will be deemed to have abused its position in a manner liable to reduce market competition or harm the public.<sup>2</sup> Nevertheless it should be noted that each of the practices listed in section 29A(b) includes broad terms relating to fairness or the competitive effect of the action, so that in any case a certain examination of the practice's potential impact on the market is required before a decision is made.

8. Safe harbors exist in the Israeli antitrust supervision regime through the mechanism of Block Exemptions. Section 15A of the Law authorizes the Director General to set rules for block exemptions; arrangements meeting the conditions will be deemed not to raise the risk of significant harm to competition. The block exemptions are set by the Director General and approved by the Minister of Economy.

9. The block exemptions set different thresholds which must be met in order to fall under the safe harbor. The primary thresholds relate to the market share of the parties and to the competitive situation of the market (such as the number and size of the competitors). Failure to meet the terms of block exemption does not mean that the arrangement is necessarily prohibited, but rather that the arrangement must be filed with either the Director General or the Antitrust Tribunal for the purpose of obtaining an exemption or permit. While most of the exemptions set a series of technical rules for eligibility for the block exemption, the Block Exemption for Non-horizontal

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<sup>2</sup> See Antitrust Case 2/96 (partial verdict) Antitrust Director General v. Yedioth Aharonoth Ltd. (4.11.1999) Antitrust Pub. No. 3006366.

Arrangements That Do Not Include Certain Price Restrictions, which was enacted in 2013, requires the parties to carry out a competitive self-assessment to determine if the Block Exemption will apply. The same rationale was implemented in the Block Exemption for Operational Arrangements Dealing with International Maritime Transport (enacted in 2013) and in the Block Exemption for Joint Ventures for the Marketing and Supply of Military Equipment Abroad (enacted in 2015).

10. Another set of safe harbors comes from the Antitrust Director General's public statements. Public statements issued by the Antitrust Director General include certain provisions regarding various types of arrangements. Some of the guidelines contain criteria that, when met, will mean that the Antitrust Authority will not take enforcement measures against the arrangement. Thus, for example, Public Statement 1/00 sets the safe harbor criteria regarding co-operation between competitors while interacting with government authorities and Public Statement 1/08 sets the safe harbor criteria for institutional investors that co-operate in order to change the terms of the corporate bonds that they hold. A special case is the public statement regarding an excessive price charged by a monopolist. A Public Statement that was published in 2014 set a safe harbor under which the Authority would not take enforcement measures in this regard as long as the difference between the cost of the product and its price did not exceed 20%. The aim of the safe harbor was to create certainty for dominant firms in pricing their products. However, soon after the publication of the Public Statement, concerns were raised that the safe harbor gradually becomes a binding normative standard, so that any larger price differential would be regarded as excessive. In light of this concern, the Authority decided to cancel the safe harbor and expressed this position decisively in a public statement issued in 2017 (Public Statement 1/17).<sup>3</sup>

## **2. Absolute presumptions regarding restrictive arrangements in Israeli law - developments and future trends and challenges**

### **2.1. The restrictive arrangements supervision regime in Israel**

11. Section 4 of the Law prohibits a person from being a party to a restrictive arrangement unless it has been granted a waiver of some kind as will be elaborated below.

12. A restrictive arrangement is defined in the Law as an arrangement between persons conducting business in which one of the parties restricts itself in a manner that may prevent or reduce competition in business. Parties wishing to make such an arrangement may choose several mechanisms to legalize it:

13. First, the parties to the arrangement may apply to the Antitrust Tribunal for approval. The Antitrust Tribunal's decision regarding the application may depend on a broad range of considerations that must not necessarily relate to competition. Such considerations may be protecting a sector which is important to the national economy; protecting the continued existence of factories as a source of employment; or improving

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<sup>3</sup> Together with the cancelation of the safe harbor the IAA has adopted a more restrained policy on enforcement of excessive pricing in which the IAA will use its enforcement tools on excessive pricing only in cases that there is no competitive relief available, and that the price that is being charged is both high and unfair.

the balance of payments of the State of Israel. If the arrangement is in the public interest and the restraint is essential for the realization of the arrangement, the Tribunal may approve the arrangement even if it harms competition. In practice, the Tribunal balances the public benefits and harm to competition deriving from the arrangement in order to decide whether to approve the arrangement or not. The Antitrust Tribunal usually decides in such request according to competitive considerations only.<sup>4</sup>

14. Because of the complexity of the judicial process and the time and resources it requires, in most cases the parties refer to another mechanism – filing an application to the Antitrust Director General to exempt the restrictive arrangement from the need to be approved by the Antitrust Tribunal. In order to obtain an exemption, the arrangement must meet two conditions: First, that the restraints in the restrictive arrangement do not limit the competition in a considerable share of a market affected by the arrangement, or else that 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; and second, that 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.<sup>5</sup>

15. In addition, as noted above, parties to a restrictive arrangement can rely on block exemption rules set by the Director General. Section 15A of the Law authorizes the Director General to establish rules regarding types of restrictive arrangements the parties to which will be exempt from applying for the Tribunal's approval.

## **2.2. Examination of restrictive arrangements – transition from relying on presumptions towards a substantive examination**

16. As mentioned above, Section 2(b) of the Law provides that arrangements in which a party restricts itself in relation to one of the subjects listed in the section constitute a restrictive arrangement, without the need to demonstrate that the arrangement may prevent or reduce competition in business.

17. The Supreme Court interpreted the presumptions of Section 2(b) as absolute presumptions in *Tivall* case.<sup>6</sup> The court explained that once the arrangement falls under the boundaries of Section 2(b), one cannot argue that the arrangement does not meet the condition of being liable to harm competition. The court explained why the Israeli lawmaker decided to establish a regime of absolute presumptions: First, an arrangement that contains such a restriction harms competition by its nature. Therefore, there is no need to explicitly prove the claims of harm to competition. In addition, setting these presumptions as absolute guides the business community regarding what is prohibited and permitted. Another advantage of an absolute presumptions regime is that it avoids the need for complex market examinations which depend on various expert opinions and require lengthy litigation.

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<sup>4</sup> The Tribunal may also grant a temporary permit while considering the application.

<sup>5</sup> The exemption mechanism imposes a significant bureaucratic burden on the work of the IAA. For example, in 2016, 85 requests for an exemption were submitted to the Antitrust Director General. In 2017, as of August 31<sup>st</sup>, 59 requests were submitted.

<sup>6</sup> See fn. 1

18. In the *Borowitz* case, the Supreme Court referred to section 2(b) and again affirmed that the presumptions in section 2(b) are absolute. Furthermore, the court held that the absolute presumptions promote clarity in the judicial process and save judicial time, as well as advancing legal certainty and deterrence. On the basis of these considerations, the court decided that the absolute presumptions should also apply in the criminal aspect of the definition of restrictive arrangement.

19. However, the Supreme Court and the Antitrust Director General were concerned that the broad definition of a restrictive arrangement based on rules of thumb may lead to acceptable and desirable business arrangements being prohibited, preventing arrangements benefitting competition and the public or efficient transactions. Indeed it became evident that the broad prohibition on arrangements is used by parties as a tool to be released from contractual obligations due to the argument that the contract is an illegal restrictive arrangement and therefore is null and void. In the first stage, the case law tried to deal with this difficulty by interpreting section 2 of the Law in a way that is consistent with the purpose of the Law. In several cases, the courts determined that the elements enumerated in section 2 should not be assessed purely technically, but rather that they should be analyzed in view of the purpose of the law, which is intended to apply to arrangements that indeed have the potential to harm competition.<sup>7</sup> In the *A.M. Parking* case, the court suggested excluding arrangements that do not create real harm to the public, whether by way of a purposive interpretation of the Law or by a broad interpretation of the *de minimis* doctrine. The judicial goal was to narrow the definition of restrictive arrangement so that innocent and proper arrangements would not be deemed illegal. According to the court, the definition of a "restrictive arrangement" should be read according to its purpose, which is not to prohibit legitimate arrangements. However, the purposive approach to Section 2(b) of the Law mainly helped settle *ad hoc* issues before the court but did not provide a structural solution to the complexities entailed by the absolute presumptions regime. In the academic legal literature in Israel, voices began to promote the idea that the absolute presumptions should only be applied in cases of horizontal arrangements, in which the likelihood of harm to competition is clear. In contrast, vertical arrangements should be examined in accordance with section 2(a) of the Law.<sup>8</sup>

20. Parallel to the developments in the case law, the Director General published block exemptions rules for certain arrangements in accordance with his authority under section 15A of the Law. The explanatory notes to the law explain the motives behind the block exemptions regime: *inter alia*, creating business certainty, reducing transaction costs, streamlining the work of the administrative authority and guiding the private market with regard to factors that must be taken into account in order to avoid harm or risk of harm to competition.

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<sup>7</sup> See Civil Appeal 3700/98 A. M. Parking (Jerusalem) 1993 Ltd. v. Jerusalem Municipality (17.2.2003) Antitrust Pub. No. 5000789 ("*A.M. Parking*") and Administrative Petition Appeal 6464/03 Real Estate Appraisers Office in Israel v. Ministry of Justice (Published on Nevo 16.2.2004).

<sup>8</sup>See David Gilo, "Is it appropriate to break through the dam of restrictive arrangements and block the flood with ad hoc fences? Divide between horizontal and vertical arrangements" 27 *Iyunei Mishpat* (2004) 786-751 and Michal S. Gal, "Separating the Wheat from the Chaff: Restrictive Agreement in Light of the Supreme Court's Recent Decisions" (2004) 1 *University of Haifa Law Review* (Din Udvarim) 533 (both articles are in Hebrew).

21. Until 2013, the block exemptions rules instructed the parties to examine technical requirements of the arrangement in order to reach to a conclusion regarding their eligibility for an exemption. Parameters listed in block exemptions related, *inter alia*, to the state of competition in the market (the number and size of competitors), the competitive relations between the parties to the arrangement and their market share. However, a specific competitive analysis of a particular arrangement was left to the examination of the Director General in individual exemption requests.

22. In 2004, the dispute regarding the applicability of the absolute presumptions to vertical arrangements reached the Supreme Court. However, the court refrained from ruling on the matter.<sup>9</sup>

23. In 2013, in light of the understanding that a more lenient regime should apply to vertical arrangements, the Antitrust Director General published the Block Exemption for Non-Horizontal Arrangements That Do Not Include Certain Price Restraints. The application of this block exemption was not based on rules of thumb but on a substantive analysis according to which the parties should assess the extent of the arrangement's harm to competition, and as long as the arrangement (i) does not create a risk of significant harm to competition and (ii) does not include naked restraints, the parties are entitled to rely on the block exemption.

24. Another significant mile stone in the transition from relying on rules of thumb to a material examination came in the *Shufersal* judgment.<sup>10</sup> In this judgment, the court put an end to most of the doubts regarding the applicability of section 2(b) to vertical arrangements. The court ruled that in a vast majority of cases, section 2(b) would not apply to vertical arrangements. The court left open a narrow question over the applicability of the section to certain exceptional vertical arrangements that do not require economic analysis to determine the extent to which they are harmful to competition.

### 2.3. Criminal law in restrictive arrangements and the evidentiary period

25. The antitrust laws in Israel are enforced through number of tools. Israel belongs to a group of competition regimes in which the violation of the Law is a criminal violation. Among other countries with similar competition regimes one can include the US, Canada, Australia and Brazil which impose criminal sanctions on cartels and bid ridding. Criminal prosecution constitutes a significant element in deterring potential violators of the law.

26. Section 47(a)(1) of the Law provides that a person who was a party to a restrictive arrangement which was not granted an exemption or legal approval is liable to an imprisonment of up to three years and a maximum fine in the amount of 2.26 million NIS (~540,000 EURO). Section 47A further expands the scope and determines that the violation of the law in aggravating circumstances is punishable by up to five years of imprisonment or a maximum fine of 2.26 million NIS.

27. However, since the burden of proof in criminal law provides that the elements of the offense must be proved beyond any reasonable doubt, the existence of absolute presumptions greatly reduces the burden of criminal enforcement of antitrust offenses.

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<sup>9</sup> See Request for a Civil Appeal 6233/02 Extel Ltd. v. Kalma Y Industries, Aluminum Glass and Affixing Marketing Ltd. (4.2.2004) Antitrust Pub. No. 5000847.

<sup>10</sup> Criminal Appeal 5823/14 Shufersal Ltd. v. State of Israel (10.8.2015) Antitrust Pub. No. 500841.

#### **2.4. Conclusion: The challenge to maintain criminal deterrence alongside effective enforcement that does not prevent efficient transactions**

28. The development of antitrust laws by the Antitrust Authority and the legislator is currently in tension. On the one hand, there is a desire to deepen and focus the activity of the Antitrust Authority on those activities that are liable to harm competition and the public and to reduce the bureaucratic burden created by the existing regulatory mechanisms in the law which requires specific exemption or approval for each arrangement. In addition, Israeli law seeks to develop an approach towards competition law that is in line with developed economies around the world.

29. On the other hand, there is some concern that the focus of enforcement, which may be expressed, among other things, in avoiding blanket presumptions and progressing towards in-depth examination of the impact of different practices on competition, may impose an excessive burden for evidence in criminal prosecution. The Israel Antitrust Authority and the Israeli legislator are striving to find the "golden mean" for this matter.

30. Drafts for new block exemptions, which were recently published by the Antitrust Director General, aim to find that golden mean. The drafts preserve the absolute presumptions regime regarding horizontal restraints while expanding the block exemptions in a way that allows parties to a horizontal arrangement to self-assess the level of harm to competition that derives from their arrangement. The expanded block exemptions will relate to those arrangements that in many cases, even when between competitors, do not entail a significant risk of harm to competition, such as joint ventures, R&D arrangements and ancillary restraints to mergers.

31. The Israel Antitrust Authority believes that this modern approach will strengthen the ability of the Antitrust Authority to act with full force and effectiveness in order to promote competition. At the same time, an unnecessary regulatory and bureaucratic burden will be removed from business activity that is not liable to harm to competition, thus enabling businesses competing on the merits to promote economic growth.