

## LEGAL UPDATE – ANTITRUST LAW

### Antitrust Rules (Block Exemption for Non-Horizontal Arrangements which do not Contain Certain Price Restraints), 5773-2013

#### Background

On July 25, 2013 the Israeli Antitrust Authority published the Antitrust Rules (Block Exemption for Non-Horizontal Arrangements which do not Contain Certain Price Restraints), 5773-2013 (the “Block Exemption”). This Block Exemption follows the draft Block Exemption published on August 22, 2012 for public scrutiny. The Block Exemption took effect on June 18, 2013 and is valid for a period of five years. This legal update is intended to provide general overview as well as a critique of the Block Exemption.

#### What is a Restrictive Arrangement?

A restrictive arrangement is defined in Sub-Section 2(a) of the Restrictive Trade Practices Law, 5748-1988 (the “**Law**”) as an arrangement entered into by persons conducting business, pursuant to which at least one of the parties restricts itself in a manner likely to prevent or reduce competition in the marketplace between it and the other parties to the arrangement, or any of them, or between it and a person not party to the arrangement. In addition to this broad definition, the legislator established in Sub-Section 2(b) of the Law certain conclusive presumptions which, if met, will result in the arrangement (whether horizontal or vertical) being deemed restrictive (per-se).

#### What is a Block Exemption?

Section 15a of the Law grants the General Director of the Israeli Antitrust Authority (the “**General Director**”) the power to establish block exemptions that will be published as rules issued under his name, following a notification process which includes receipt of comments from the general public on the proposed rules. By establishing various block exemptions, the General Director exempts parties to a restrictive arrangement from seeking an exemption from the General Director or the approval of the Antitrust Tribunal, subject to the terms of the various block exemptions.

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Below are the key aspects of the Block Exemption:

#### Definitions

“**Horizontal Arrangement**” is defined in the Block Exemption as (i) a restrictive arrangement (as defined above) in which at least two of the parties to the arrangement are competitors in the area of competition, or (ii) a restrictive arrangement which reflects an investment of a company in its competitor which does not reach the level of a merger between companies, namely, an acquisition by which the acquiring company is not accorded more than a quarter of the nominal value of the issued share capital, or of the voting power, or the power to appoint more than a quarter of the directors, or participation in more than a quarter of the profits of such company.

“**Price Restraint**” is defined in the block exemption as a restraint in an arrangement between a supplier of goods and the purchaser of the goods (including their distributor), that relates to the

purchase price at which the purchaser may resell the goods, except for a restraint that limits the ability to raise the price at which the purchaser will resell the goods, namely, except for the establishment of a maximum price (maximum RPM), under which the supplier instructs the purchaser of the goods to refrain from selling the goods at a price higher than the specific price set by the supplier.

“Competitors” are defined in the block exemption in a very broad manner as anyone regarding whom during the period in which an arrangement exists, or in the three years preceding the arrangement, there is an overlap (or similarity) between the goods which one of them supplies and any of the goods which the other supplies, and both supply the goods to the same or similar purchasers (or distributors), and the reverse – there is an overlap between the goods that one of them purchases and any of the goods that the other purchases, and both purchase the goods from the same or similar suppliers. In addition, competitors are also those that are liable to be potential competitors, meaning, parties who would likely be competitors were it not for the restrictive arrangement, and this arrangement is intended to limit their becoming competitors.

## Conditions for the Application of the Block Exemption

The arrangement is not a horizontal restrictive arrangement and the arrangement does not contain Price Restraints, as defined above, except for the establishment of a maximum price, and in addition:

- The restraints in the arrangement do not reduce competition in a considerable share of the market affected by the arrangement, or that they may reduce competition in a considerable share of the market, but do not result in a substantial harm to competition in such market;
- The objective of the arrangements is not the reduction or elimination of competition and that the arrangements do not include any restraints which are not necessary in order to fulfill their objectives.

## Critique of the Block Exemption

Pursuant to the explanatory notes in relation to the Block Exemption, the main purpose of the Block Exemption was to grant certainty to the various players in the market, as well as to their legal and economic advisors, as relates to non-horizontal restrictive arrangements. Until now, these arrangements were subject absolutely to the limitations set forth in the relevant clause in the Law, which made no distinction between horizontal and non-horizontal arrangements. Today, according to the General Director and pursuant to the Block Exemption, the various companies can reach a decision with the aid of their legal and economic advisors and can view themselves as exempt from the obligation to request an individual exemption in certain cases in which the conditions set forth in the Block Exemption are met.

However, this Block Exemption raises a significant number of issues, which in practice leads to uncertainty for the players and their advisors regarding the implementation of the Block Exemption. We will explain.

*Firstly*, the definition of the term “Competitors” in the Block Exemption is extremely broad, even as compared to the customary definition in the field of antitrust law, and its interpretation is liable to render the Block Exemption devoid of content and, in practice, superfluous.

*Secondly*, as opposed to other block exemptions that were published by the General Director and set forth clear criteria that are not subject to interpretation, the criteria set forth in this Block Exemption are not absolute and do not contribute to the level of certainty. For example, there is no explicit assertion regarding the market share of the parties, pursuant to which should the parties hold less

than said market share, there will be no harm to competition.

*Thirdly*, the Block Exemption essentially quotes the criteria set forth in Section 15a of the Law, which gave the General Director the authority to establish block exemptions. Instead of utilizing the criteria and establishing clear guidelines, thereby contributing to the certainty of the matter, the General Director copied these criteria to the Block Exemption, thereby – de facto – the General Director is instructing each company to conduct a comprehensive market study and determine, by way of its legal and economic advisors, if a certain restraint harms or is liable to harm competition.

*Fourthly*, the literature and the case law have in the past utilized the interpretation that any limitation, restraint, collaboration or coordination, whether direct or indirect, which will harm or limit competition and which do not fall into one or more of the block exemptions or the exemptions listed in Section 3 of the Law shall be deemed as harming competition. Therefore, in practice, nearly any arrangement will be viewed as meeting the criterion of “liable to harm competition”. This interpretation stems from the interpretation of Sub-Section 2(a) of the Law and its broad definition of restrictive arrangements, and leaves us in a situation in which we must wait to see how the Antitrust Tribunal will interpret this criterion as it relates to the Block Exemption.

*Fifthly*, the conditions for the application of the Block Exemption were worded as broad basket clauses that obligate the parties to the arrangement to determine for themselves whether the arrangement which they entered into harms competition. The analysis of the General Director will take place in retrospect and will enable the General Director to impose sanctions on the parties that were mistaken in their interpretation of the Block Exemption or in their analysis of the market and the competition. In this regard, it is worthy to note that in light of the amendment to the Law in May 2012, which gave the General Director the authority to impose significant monetary sanctions for a variety of violations of the Law, and in light of the guidelines of the General Director which were published regarding this matter, it seems that in the case of a non-horizontal arrangement where the parties did not intend to harm competition, the General Director will utilize these monetary sanctions and refrain from criminal enforcement. However, in light of the lack of certainty regarding the Block Exemption, the parties will not have a high level of certainty that in a situation in which they are mistaken in their application of the Block Exemption, criminal penalties will not be imposed.

## Innovations in the Block Exemption

The definition of the term “Horizontal Arrangement” in the Block Exemption establishes that the investment of a company in its competitor, which does not result in the purchase of more than 25% of the rights in the company, will be judged as a restrictive arrangement, whereas the purchase of more than 25% of the rights will be judged as a merger between the companies. Until now, there was a debate as to how to treat the investment of a company in its competitor by way of a purchase of less than 25% of the rights in the company, and the case law had yet to make a determination in the matter. Today, the General Director has now clarified through the definition of “Horizontal Arrangement” in the Block Exemption that such a purchase will be judged on the basis of an examination as to whether the parties entered into a horizontal restrictive arrangement.

Another innovation relates to the attempt to adopt the approach common in the USA and Europe regarding the setting of maximum prices for the distributor. Until now, it was customary in Israel to view the establishment of maximum prices as an illegal restrictive arrangement, excluding certain exceptions (see for example Sub-Section 3(4)(e) of the Antitrust Rules (Block Exemption for Exclusive Distribution Agreements), 5761-2001), this as opposed to the commonly accepted view in the USA and Europe, wherein the dictating of prices for the distributor and the establishment of minimum prices are considered illegal restrictive arrangements and the establishment of maximum prices is

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permissible. The definition of the term “Price Restraint” attempts to match the Israeli law to the commonly accepted practice in comparable legal systems.

The aforementioned innovations are liable to be useful and efficient, however for the purposes of implementing the Block Exemption, the parties to the arrangement are required to check whether the conditions for the application of the Block Exemption (as described above) are met, such that in any case they cannot avoid conducting an intensive legal and economic analysis in order to determine whether the Block Exemption may be utilized, and they certainly do not benefit from any significant degree of certainty regarding their arrangement.

We would like to emphasize that the Block Exemption entails many commercial and legal ramifications, from an antitrust law perspective. We therefore recommend that each transaction and arrangement be examined – inter alia – under this Block Exemption, with the assistance of professional advisors.

For any question or clarification, please contact Advocate Ronit Amir-Yaniv ([ronita@arnon.co.il](mailto:ronita@arnon.co.il)), of the antitrust department of Yigal Arnon & Co.

*This memorandum is intended to provide a general overview and does not constitute a substitute for legal advice regarding these matters.*