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Competition - Israel

Supervision of restrictive arrangements is reformed

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Introduction

In most antitrust regimes, a fundamental distinction is made between horizontal arrangements (ie, those between competitors), which are treated with suspicion, and vertical arrangements (ie, customer-supplier relationships), which are regarded as legitimate and competitively benign, at least in most cases. However, in the past, the Antitrust Law applied the same legal regime (including a pre-licensing requirement) to both horizontal and vertical arrangements. This structure had a chilling effect on pro-competitive vertical arrangements.

In August 2013 the Antitrust Authority published the Antitrust Rules (Block Exemption for Non-horizontal Arrangements without Price Restrictions) 2013. The new block exemption offers a significant reform to the supervision of restrictive arrangements in Israel. Going forward, ancillary restraints in vertical arrangements (except for minimum or fixed resale price maintenance) no longer require the prior approval of the Antitrust Tribunal or the antitrust commissioner, provided that such arrangements do not significantly harm competition.

The new regime enables parties to implement an arrangement without bearing the costs and delays derived from the need to obtain a particular approval from the commissioner. Instead, parties can now rely on their own assessment of the arrangement's competitive impact (ie, self-assessment). The new regime thus replaces the cumbersome administrative process that previously existed with a more efficient process that can be performed by the parties themselves.

Moreover, as opposed to the previous block exemptions, which were based on technical market share thresholds, the current exemption applies a substantive legal standard, which exempts any arrangement that does not pose significant competitive concerns.

The commissioner retains the power to:

- examine *ex post* any restrictive arrangements that are executed on the basis of self-assessment; and
- impose penalties on parties that:
  - err in applying the new block exemption on agreements that are not subject to the new regime; or
  - do not properly assess the probable implications of the relevant arrangement.

Thus, given the legal and economic complexities of self-assessment, parties will often need to seek professional advice in performing the process.

Non-horizontal arrangements

The new block exemption and the self-assessment mechanism that it introduces apply to non-horizontal arrangements only. Self-assessment is not applicable if the parties are competitors, with the exception of horizontal arrangements that do not concern to the overlapping activities of the parties.

The term 'competitor' is defined broadly in the new block exemption. Parties are deemed competitors if:

- at the time of the agreement (or during the three years preceding the agreement), the parties to the agreement supply the same or similar products (or products that are used for the same or similar purpose), purchase the same or similar products from the same or similar sellers, or provide their products to the same or similar purchasers;
- the parties would compete were it not for the agreement (ie, potential competitors); or
- the arrangement is designed to prevent the parties from becoming competitors.

If any of the above cases applies, the parties are deemed competitors, regardless of whether they operate on the same relevant market. This broad concept of competition, which deviates form market definition methodology, means that the new block exemption may not apply to many arrangements between companies that clearly do not compete in any way.

The commissioner acknowledges this potential problem, but explains that the broad definition was chosen intentionally in order to facilitate the gradual transition to a self-assessment regime and to prevent abuse of the self-assessment process to horizontal agreements.

Exempt restrictions

Not all restrictions are subject to the new block exemption, even with regard to non-horizontal arrangements. In order for the new block exemption to apply, the restrictions in the arrangement must meet two cumulative conditions:

- The restrictions must be ancillary and not a naked restraint (ie, one whose main purpose is to reduce competition, such as price fixing).
- The restrictions must not set a resale price or prevent the reduction of a resale price (ie, the restriction must not constitute fixed or minimum resale price maintenance).

Thus, price restrictions such as maximum resale price maintenance and most-favoured customer clauses may now be subject to the new self-assessment regime. This is a fundamental change with far-reaching practical implications. The self-assessment regime will also be available for restrictions such as exclusive dealing and selective distribution arrangements.

Risks of self assessment

While there are obvious benefits to self-assessment, in comparison with an administrative licensing regime, the process presents real challenges for the business community. For example, competitive assessment often requires information that the parties do not possess and have no way of acquiring. Even in cases where the information is accessible, competitive analysis often requires economic expertise in order to process the information properly and draw valid conclusions. Legal expertise is also important in order to avoid possible errors in applying the legal requirements of the new block exemption.

The commentaries on the new block exemption imply that, in the commissioner's view, in many instances self-assessment cannot be done by the parties themselves, but will rather require the assistance of qualified professional consultants.

An erroneous application of the self-assessment regime may result in severe criminal, administrative and civil penalties. In particular, under a recent amendment to the Antitrust Law, the commissioner may impose monetary payments on the parties. The amendment empowers the commissioner to impose substantial monetary payments of up to 8% of the company's turnover (with a ceiling of roughly $7 million). The maximum penalty for individuals, including directors, is around $300,000; such monetary payments cannot be insured against or indemnified for.

Where the parties acted in good faith, but still erred in the competitive assessment of a vertical arrangement that was not intended to harm competition, monetary payments will be the likely penalty imposed by the Antitrust Authority. However, the use of criminal penalties cannot be ruled out, particularly in cases where the new block exemption is applied on the basis of a meritless legal interpretation, is applied to a horizontal arrangement or is regarded a naked restraint aimed at diminishing competition. It is therefore recommended that parties seek professional advice before making use of this new route.

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