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VIA EMAIL to david.gilo@aa.gov.il and FAX to +972.2.5458555

David Gilo
Director General
Israel Antitrust Authority
22 Kanfey Nesharim Street
Jerusalem, Israel

Dear Mr. Gilo:

Re: Proposed Amendments to the Restrictive Trade Practices Law, 1988

We write on behalf of the Merger Streamlining Group (the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Israel Antitrust Authority ("IAA") is an active member.

The Group's work projects to date have included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and to competition agencies in over twenty other jurisdictions (including the European Union, the United Kingdom, Germany, Spain, China, Japan, India, Brazil and Chile).

The Group commends the IAA's ongoing efforts to improve Israel's merger control regime and appreciates the opportunity to provide this submission in response to the

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[1] The current members of the MSG include BHP Billiton, Chevron, Cisco Systems, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> [*Recommended Practices*].

recently-proposed amendments to the *Restrictive Trade Practices Law, 5748-1988* (the "*Antitrust Law*") contained in Bill 5775-2015 (the "Proposed Amendments"). In particular, the Group supports the proposed increase to the aggregate turnover threshold from 150 million shekels to 250 million shekels. However, the Group believes that the revised jurisdictional thresholds will continue to be inconsistent with the ICN *Recommended Practices,* while the Proposed Amendments' alternative turnover threshold of 1 billion shekels is likely to create a further area of inconsistency. Additionally, the proposed criminal prohibition of mergers that fall below the jurisdictional thresholds but which may be deemed to cause substantial harm to competition may create legal uncertainty and inappropriately severe exposure for parties to a proposed transaction. The Group recommends, in line with the treatment that they receive in other developed economies, that such transactions be dealt with on a non-criminal basis with civil remedies to address any harm to competition. The Group is providing this letter in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions.

1. Material Local Nexus

(a) Notification Thresholds Should Be Based On Local Nexus

The ICN *Recommended Practices* clearly state that notification thresholds should incorporate a material local nexus, based on sales or asset levels within the jurisdiction concerned.[3] Moreover, local nexus should be based on at least two parties to a transaction having activities in the jurisdiction or, alternatively, the target business having a significant local presence in the jurisdiction:

> *Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.*[4]

The Group understands that the Proposed Amendments would change the current turnover thresholds as follows:

Current Turnover Threshold	Proposed Amendment
Pre-merger notification is required where, in the preceding year: (i) The combined turnover of the merging parties in Israel exceeded 150 million	Pre-merger notification is required where, in the preceding year: (i) The combined turnover of the merging parties in Israel exceeded **250 million**

[3] *See Recommended Practice* I-C, Comment 1.

[4] *See Recommended Practice* I-C (emphasis added).

shekels (approximately €35 million);<u>and</u> (ii) The turnover in Israel of at least two of the merging parties exceeded 10 million shekels (approximately €2.3 million).	shekels (approximately €58 million); <u>and</u> **<u>either</u>** (ii) (a) The turnover in Israel of at least two parties to a transaction exceeded 10 million shekels (approximately €2.3 million), **<u>or</u>** (b) **At least <u>one</u> of the parties had turnover exceeding 1 billion shekels (approximately €230 million), including any turnover from sales outside of Israel.**

While the current turnover threshold requires a modest nexus to Israel (*i.e.*, 10 million shekels, or approximately €2.3 million), the addition of the 1 billion shekel threshold as an alternative second branch of the turnover threshold effectively eliminates the local nexus requirement for any company with over 1 billion shekels (*i.e.* €230 million) of worldwide turnover. This is a very low threshold and, worldwide, a vast number of international companies would exceed this threshold with ease.

The Group also understands that the Proposed Amendments would expand the current definition of a "company"[5] to include foreign companies with no business activities in Israel. While it is not uncommon for competition/antitrust authorities to assert jurisdiction over foreign-to-foreign mergers, as a result of the combined effects of these two amendments, a transaction in which a company with over 250 million shekels in turnover in Israel and over 1 billion shekels in revenue globally purchases a foreign company with <u>no</u> turnover in Israel would be subject to pre-merger notification. There is no enforcement value in having the IAA review transactions where the company being acquired has no economic activity within Israel.

As the ICN *Recommended Practices* recognize, transactions lacking local nexus are not likely to have "*significant, direct and immediate economic effect[s] within the jurisdiction concerned*"[6] and "*[r]equiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources <u>without any corresponding enforcement benefit</u>*."[7]

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[5] The Group understands that, currently, entities that are not registered as foreign companies in Israel and that do not have a place of business in Israel, a business presence in Israel (such as through a subsidiary, branch, or agent), or an ownership interest of at least 25% in an Israeli entity, are not "companies" subject to the Israeli merger control regime. The merger control regime only applies where the merging parties are both "companies".

[6] *See Recommended Practice* I-C, Comment 1.

[7] *See Recommended Practice* I-B, Comment 1 (emphasis added).

The Group therefore respectfully submits that the proposed 1 billion shekel global turnover threshold should not be adopted. Alternatively, it could be adopted as an additional required threshold rather than an alternative to the local nexus threshold. In either case, the turnover thresholds should continue to require that at least two parties to the transaction have material turnover (or assets) in Israel.

(b) The Local Nexus Should Be Material

The Group believes the IAA's decision to increase the combined domestic turnover threshold from 150 million shekels to 250 million shekels is a directionally positive change. However, even 250 million shekels (approximately €58 million) is a fairly low aggregate turnover threshold for a jurisdiction of Israel's size. By comparison:

- Finland's aggregate turnover threshold requires that the parties have a combined aggregate worldwide turnover in excess of €350 million.
- Greece's aggregate turnover threshold requires that the parties have a combined worldwide turnover in excess of €150 million.
- Denmark's aggregate turnover threshold requires that the parties have a combined aggregate turnover in Denmark of approximately €120 million.
- The Czech Republic, with a much smaller economy than Israel, requires that the parties have a combined aggregate turnover in the Czech Republic in excess of approximately €55 million.
- Slovakia, another much smaller jurisdiction, requires that the parties have a combined turnover in Slovakia in excess of €46 million.

Regardless of whether the aggregate turnover threshold is set at 250 million shekels or a higher level, the Group believes that the individual party-size threshold of 10 million shekels (approximately €2.3 million) for each of two parties is too low to constitute a "material" local nexus. Other jurisdictions with similarly-sized or smaller economies have adopted substantially higher thresholds. For example:

- Finland — requires notification where each of two parties to the transaction has turnover in Finland in excess of €20 million.
- Greece — requires notification where each of two parties to the transaction has turnover in Greece in excess of €15 million.
- Denmark — requires notification where each of at least two parties to the transaction has turnover in Denmark in excess of approximately €13.5 million.

- The Czech Republic — requires notification where <u>each of two</u> parties to the transaction has turnover in the Czech Republic in excess of approximately €10 million.

- Slovakia — requires notification where <u>each of at least two</u> parties to the transaction has a turnover in Slovakia in excess of €14 million.

In order to achieve a "material" local nexus standard, the Group respectfully recommends that the IAA consider increasing the individual party-size threshold to at least 45-65 million shekels (approximately €10-€15 million) of turnover from sales in Israel. The Group also encourages the IAA to consider further increasing the aggregate turnover threshold.

(c) Thresholds Should Be Based On Objectively Quantifiable Criteria

Israel's merger control regime has two additional jurisdictional thresholds which are based on market shares. The Group understands that the Proposed Amendments will supplement these two thresholds with turnover requirements, but maintain the market share criteria. Under the Proposed Amendments, pre-merger notification will also be required where:

(i) At least one of the parties to the merger has a market share exceeding 50% of any market, and as a result of the merger, the combined turnover of the parties in Israel exceeds 100 million shekels; or

(ii) As a result of the merger, the combined share of the merging parties in the total production, sale, marketing or purchase of a particular asset or service, or of a similar asset or service, exceeds 50% and the combined turnover of the parties in Israel exceeds 100 million shekels.

The use of market share-based thresholds in Israel's merger notification regime is inconsistent with the *Recommended Practices*. Market share thresholds generate considerable uncertainty because the process of defining relevant markets and estimating shares is necessarily time-consuming, subjective, and fact- and economics-intensive. Precise market share estimates may often be difficult — if not impossible — to obtain. The second market share threshold listed above is particularly complex, as it also requires parties to assess their shares of purchases of inputs, production of outputs, and marketing of a product or service. Such information is not typically maintained or tracked by most companies.

The ICN's *Recommended Practices* clearly state that market share is a subjective criterion and should not be used in pre-merger notification thresholds. For example, *Recommended Practice* II-B states that "*notification thresholds should be based on objectively quantifiable criteria*". The commentary to this *Recommended Practice* explains that "*[e]xamples of criteria that are <u>not objectively quantifiable</u> are <u>market share</u> and potential transaction-related effects*" and that market share-based tests "*are <u>not appropriate</u> for use in making the*

initial determination as to whether a transaction is notifiable."[8] Accordingly, the Group encourages the IAA to eliminate the market share-based aspects of the notification thresholds.

2. Prohibited Mergers

The proposed amendments to section 19 of the *Antitrust Law* would prohibit mergers that raise concerns of substantial harm to competition, even where the notification thresholds are not met. The Group believes that this proposed amendment will create substantial burden and uncertainty in Israel's merger control regime, contrary to the goals of effective merger enforcement, which are to promote "consistency, predictability, and legal certainty."[9]

In particular, the Group believes that the proposed amendment to section 19 can create uncertainty and potential exposure to criminal sanctions for foreign companies. The Group understands that the combination of the proposed section 19 language and the expanded definition of a "company" could result in situations in which foreign-to-foreign mergers that are not subject to notification in Israel may nonetheless be prohibited where they are deemed to substantially harm competition in Israel.

While the proposed regime would allow parties to file a voluntary notification in such cases, merging parties would have to self-assess to determine if there is a reasonable prospect that the merger may be prohibited in Israel. Self-assessment would require a substantive evaluation of the transaction, definition of relevant markets, and estimation of market shares — criteria that, as noted above, are time-consuming, subjective, and fact- and economics-intensive. Moreover, the parties and the IAA may well have differing views as to the relevant market definition, market share estimates, and the potential effects on competition. It would also be unduly burdensome to require parties to self-assess in every transaction in order to eliminate risk of criminal liability.

The Group does recognize that, occasionally, a merger falling below the notification thresholds may give rise to competition concerns in a relevant market. In the Group's view, providing an antitrust agency with the ability to review potentially problematic mergers non-notifiable transactions, within a clearly-defined time period, may appropriately address such circumstances.[10] However, in any event, such transactions should be dealt with on a non-criminal basis, with civil merger remedies used to address any identifiable harm to competition (as is the case, for instance, in the United States, United Kingdom, Canada, Australia and many other countries). The Group is not aware of any jurisdiction in which non-notifiable mergers are subject to criminal sanctions.

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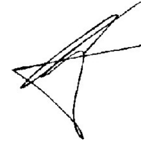
[8] *See Recommended Practice II-B*, Comment 1 (emphasis added).

[9] *See Recommended Practice XII-C,* Comment 1 (emphasis added).

[10] For example, in Canada the *Competition Act* allows the Canadian Competition Bureau to review non-notifiable mergers up to one year following the closing of the transaction: *see Competition Act*, R.S.C. 1985, c. C-34, section 97.

Thank you very much for considering the Group's views. We would be pleased to discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



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