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Our File No.	69459
Date	December 21, 2017

VIA FAX to + 97.22.651.5329 and EMAIL to david.gilo@aa.gov.il

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

Dear Mr. Gilo:

Re: Consultation on Proposed Amendments to the Restrictive Trade Practices Law, 5748-1988

We write on behalf of the Merger Streamlining Group ("MSG" or 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* of the International Competition Network ("ICN") of which, as you know, the Israel Antitrust Authority ("IAA") is a longstanding member.[2]

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (*e.g.*, the United Kingdom, Canada, Russia, Brazil, India, China, Japan, Korea, Spain, Italy, Argentina, Chile, Philippines and Portugal) to promote reforms consistent with the *Recommended Practices*. The Group previously provided comments to the IAA in May 2015 regarding the proposed legislative amendments in Bill 5775-2015.

The Group writes in connection with the IAA's current public consultation on

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[1] The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, 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*").

competition law amendments in Israel. We have reviewed an English-language translation of the "Explanatory Memorandum to Restrictive Trade Practices Law Amendment No. -- (Enhanced Enforcement and Reduction of Regulatory Burden) of 5777/2017" (the "*Consultation Paper*"). The Group applauds the IAA for its ongoing interest in improving the merger control process in Israel, and for its willingness to consult with stakeholders on these important issues.

As set out in greater detail below, the Group's particular interest is in the proposed changes to the existing merger control provisions, as discussed at section 3(4) of the *Consultation Paper*. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to you.

I. Amendment of the Combined Turnover Notification Threshold

The *Consultation Paper* proposes an increase to one of the two existing turnover-based merger notification thresholds in Israel, which requires a notification where the parties to a transaction jointly generate more than NIS 150 million (*i.e.*, approximately US$43 million) in annual revenues in Israel (the "Combined Turnover Threshold"). This threshold is to be increased to NIS 360 million (*i.e.*, approximately US$102 million). The stated intention of this amendment is to reduce the number of notifiable transactions to be reviewed by the IAA.

The Group is very supportive of this amendment, which will require greater Israeli turnover — and therefore a greater element of local nexus — for a transaction to require pre-notification in Israel. The International Competition Network's ("ICN") *Recommended Practices* counsel that merger control should address "*only [...] those transactions that have an appropriate nexus with the reviewing jurisdiction*",[3] and that notification thresholds should "*incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification*."[4]

In the analysis of local nexus issues, the *Recommended Practices* note the very same concern recognized by the IAA in the *Consultation Paper*: the impact on resources, and on review times, caused by notification thresholds that do not incorporate material levels of local nexus and thus generate a needlessly large volume of reportable transactions. The use of such thresholds will "*impose unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit*."[5]

The Group believes that increasing the Combined Turnover Threshold from NIS 150 million to NIS 360 million will result in the IAA being able to focus its enforcement resources on a smaller number of notifiable transactions that have larger amounts of commerce in markets in Israel. The Group notes that the Irish Competition Authority has recently proposed to raise its turnover thresholds to achieve a stronger local nexus to Ireland and to reduce the

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[3] *Recommended Practice* I.A, and Comment 1 to *Recommended Practice* I.A.

[4] *Recommended Practice* I.B.

[5] Comment 1 to *Recommended Practice* I-B.

resources devoted to transactions that do not result in enforcement action. Similarly, the French Autorité de la concurrence is also currently consulting on the possibility of increasing its notification thresholds. The proposal in the IAA's *Consultation Paper* is timely and sound.

II. Level of the Individual Turnover Threshold

Although this issue is not addressed in the *Consultation Paper*, the Group also believes that both the IAA and merging parties would benefit from the adoption of a greater element of local nexus in Israel's additional turnover threshold.

We understand that the additional turnover-based threshold requires that each of at least two of parties to a transaction generate turnover exceeding NIS 10 million (*i.e.*, approximately US$2.9 million) in Israel (the "Individual Turnover Threshold"). As described above, the *Recommended Practices* advise that merger control should be asserted only where there is an "*appropriate nexus*" to the reviewing jurisdiction,[6] and the "*local nexus*" threshold should be sufficiently high so that transactions which are unlikely to have a material effect on the domestic economy do not require notification.[7] In the Group's respectful submission, an individual turnover threshold of only NIS 10 million does not incorporate a material nexus to Israel, and is not consistent with the approach taken in similarly advanced economies.

For example, the gross national income per capita ("GNI") of Israel is approximately US$36,000. Similarly-situated countries include Italy (approximately US$37,000), South Korea (approximately US$35,000), France (approximately US$41,000) and Japan (approximately US$42,000). The individual turnover notification thresholds in these jurisdictions greatly exceed the Individual Turnover Threshold of approximately US$2.9 million in Israel:

- Italy: individual turnover threshold of €30 million (*i.e.*, approximately US$35 million);
- South Korea: individual turnover threshold of 200 billion won (*i.e.*, approximately US$18 million);
- France: individual turnover of €50 million (*i.e.*, approximately US$59 million); and
- Japan: depending on the type of transaction, individual turnover of either ¥5 billion (*i.e.*, approximately US$44 million) or ¥3 billion (*i.e.*, approximately US$27 million).

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[6] *Recommended Practice* I.A.

[7] *Recommended Practice* I.B, Comment 1 and *Recommended Practice* I.C, Comment 2.

Based on these figures, and the guidance from the ICN *Recommended Practices*, the Group respectfully suggests that the IAA use the opportunity of the current consultation and amendments process to revise the Individual Turnover Threshold to incorporate a material level of local nexus. The Group submits that an appropriate level for consideration could be at least US$10-20 million, or approximately NIS 35-70 million. Such an amount would still be low relative to the jurisdictions noted above, but would reduce burdens on both the IAA and merging parties in a meaningful way, while bringing Israeli merger control law into greater conformity with the *Recommended Practices*.

III. Use of Market Share-Based Notification Thresholds

Based on our review of the *Consultation Paper*, it appears that the IAA presently intends to maintain the existing market share-based merger notification thresholds following the current round of legislative amendments to the Restrictive Trade Practices Law. As more fully described below, the Group encourages the IAA to reconsider its proposed approach.

We understand that, in addition to the Combined Turnover Threshold and the Individual Turnover Threshold discussed above, the Restrictive Trade Practices Law currently requires that transactions meeting either of the following criteria be notified to the IAA:

- Where one party holds a market share greater than 50%; or
- Following the transaction, the parties will have a joint market share greater than 50%.

The Group respectfully recommends that the IAA consider an additional amendment to the Restrictive Trade Practices Law to remove these market-share based thresholds. Such thresholds are inconsistent with international best practices and in application are difficult for merging parties to apply as an objective test for filing.

The ICN *Recommended Practices* state that merger notification thresholds "*should be clear and understandable*", in order to "*permit parties to readily determine whether a transaction is notifiable.*"[8] In particular, thresholds should employ "*clear, understandable, easily administrable, bright-line tests*". The use of market share-based thresholds is explicitly mentioned as something to be avoided, as such thresholds lack "*objectively quantifiable criteria*".[9]

As the IAA will know, the definition of relevant product and geographic markets — which is a necessary precursor the calculation of market shares — is often a challenging exercise, even for specialized competition law agencies. Indeed, enforcers and private parties

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[8] *Recommended Practice* II.A; Comment 1 to *Recommended Practice* II.A.

[9] Comment 1 to *Recommended Practice* II.B. Indeed, the Commentary states that "e*xamples of criteria that are <u>not</u> <u>objectively quantifiable</u> are <u>market share</u> and potential transaction-related effects*".

(and sometimes even enforcers across different jurisdictions), frequently disagree on the precise scope of a relevant antitrust product or geographic market. For private companies, many of whom possess little or no familiarity with the principles of competition law analysis, engaging in such an exercise *ex ante*, in order to determine whether a transaction might be pre-notifiable in Israel, will be burdensome and may lead to incorrect definitions of the relevant market.

Even where the relevant antitrust product and geographic markets may be correctly defined by the parties, the calculation of market shares may be difficult, owing to the lack of proprietary or third-party data concerning the total size of the relevant market. As a result, the *Recommended Practices* expressly state that market-share based thresholds "*are not appropriate for use in making the initial determination as to whether a transaction is notifiable*."[10]

Given these clear deficiencies, the Group recommends that the IAA remove the market share-based notification thresholds from the Restrictive Trade Practices Law. If the IAA is unable (or unwilling) to do so, at a minimum we respectfully suggest that amendments be made, and clear policy guidelines issued, by the IAA to clarify the application of these thresholds, which raise considerable uncertainty for, and cost burdens upon, merging parties.

In particular, the first such threshold, requiring a filing where one party holds a market share greater than 50%, may capture transactions in which there is no competitive overlap whatsoever between the parties (and therefore no conceivable competition law concerns), so long as one party has a pre-existing market share in excess of 50%. For multi-product firms, it may also capture transactions with only *de minimis* competitive overlaps, where one party has a market share greater than 50% in respect of a non-overlapping product. Moreover, any concern with identifying high market share transactions would appear to be adequately addressed by the existence of the second market share-based threshold.

The Group also notes that the second threshold, requiring a filing where (post-transaction) the parties will have a joint market share greater than 50%, is not specific to Israel and, on its face, may require a notification in Israel where the parties' combined operations do not raise competitive concerns.

Consequently, if the existing market share thresholds are to be maintained, the Group believes that Israeli merger control law would be materially improved by: (1) the removal of the first market share-based threshold; and (2) the issuance of clear policy guidelines from the IAA indicating that the second market share-based threshold applies only in respect of transactions where the parties' would achieve a combined market share in excess of 50% **<u>in Israel</u>**.

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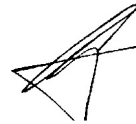
[10] Comment 2 to *Recommended Practice* II.B.

Thank you very much for considering the Group's views. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



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Members of the Merger Streamlining Group