COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE AMENDMENT TO THE RESTRICTIVE TRADE PRACTICES LAW

December 29, 2017

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law of the American Bar Association (“Sections”) respectfully submit these Comments to the Amendment to the Restrictive Trade Practices Law (“RTPL Amendment”). The Sections offer these Comments in the hope that they will assist the Israeli Antitrust Authority (“IAA”) in further refining the RTPL Amendment. The Sections are available to provide additional comments or to participate in consultations with the IAA as it may deem appropriate.

Executive Summary

The Sections recognize and applaud the careful thought that went into the RTPL Amendment, including the proposed change in the name of the law to the Competition Act with corresponding changes to the name of the IAA and other bodies as set out in the RTPL. The IAA rightly recognizes the importance of analyzing and updating competition principles in the RTPL so as to deter and prosecute anti-competitive conduct without chilling pro-competitive conduct. Based on their collective experience in multiple jurisdictions, including the United States and the European Union, the Sections offer suggestions to assist the IAA in further refining the RTPL Amendment in focusing on four subjects of the RTPL Amendment: mergers, monopolies, block exemptions, and criminal sanctions. The Sections also comment on the amended objectives.

Mergers. The Sections applaud the increase in the joint transaction thresholds for merger review. The Sections also encourage the IAA to increase the alternative thresholds for individual companies seeking to merge. The Sections also suggest the IAA reconsider its use of market share thresholds. Use of market share thresholds is not in accordance with international best practices, as it can be quite challenging for companies to calculate market shares correctly in advance of a merger notification and can be easily second-guessed.

Monopolies. The Sections applaud the proposal to amend the definition of a monopoly to include firms with market power that is not of temporary or intrinsically short duration.

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1 The Sections’ Comments are based on an unofficial translation of the Explanatory Memorandum to the RTPL Amendment. A copy of the translation is appended for ease of reference.
However, the Sections would respectfully suggest that consideration be given to modifying or eliminating the retained alternative 50% or more market share test as leading to a conclusive presumption of monopoly: in the United States as elsewhere, antitrust authorities look to other types of evidence in addition to market share before finding that a company has a monopoly in a relevant market.

**Block Exemptions.** The Sections commend the RTPL Amendment for expanding the scope of block exemptions to cover more fully arrangements that are plainly procompetitive. However, because the underlying test for determining if a block exemption may be applicable is vague, the Sections would encourage the IAA to promulgate draft guidelines, to the extent that effort may not be already underway, on specific arrangements such as joint ventures.

**Criminal Sanctions.** The Sections applaud the elevation of cartel activity as warranting a longer criminal sentence than other types of anticompetitive conduct. The Sections also applaud the increased tools given to the IAA involving obstruction of justice as to the IAA’s investigations. However, the Sections respectfully suggest that consideration be given to eliminating the continued treatment of antitrust offenses aside from cartels as potentially criminal in nature. Criminalizing such offenses chills potentially pro-competitive activities and raises rule of law concerns given that whether such offenses will violate the law often cannot be determined in advance. The Sections also respectfully request that consideration also be given to following best due process practices in the investigation and prosecution of such antitrust criminal, and related obstruction of justice, offenses.

**Objectives.** The Sections applaud the IAA’s statement in the introduction to the proposed legislation as to one of its goals being the promotion of competition. The promotion of competitive process, as opposed to individual competitors, is the lodestar of antitrust law.

However, that statement also provides that a comparable goal is to reduce the cost of living. The Sections respectfully suggest that this goal is in tension with competition-related goals. As the cost of living goal may involve the use of lower prices as a proxy for reductions in the cost of living, it may call into question procompetitive activity that can improve the competitive process and consumer welfare through non-price dimensions such as innovation or improved quality. It may also call into question whether the RPTL could be used to prosecute antitrust violations that involve lower prices but distort the competitive process, specifically monopsonies and predatory prices.

**Mergers**

A. **Proposed Revisions to Turnover-Based Notification Thresholds**

The Explanatory Memorandum indicates that the IAA proposes to increase the joint turnover merger notification thresholds in Israel. The proposal is based, in part, on reliance on OECD data suggesting that the IAA is receiving too many merger control notices. The existing joint turnover threshold requires a notification where, among other things, the parties to a transaction jointly achieved more than NIS 150 million (i.e., approximately US $42 million based on an annual average exchange rate of 1 USD=3.6 NIS) in Israel in the most recently-completed fiscal year. We understand that the IAA wishes to increase this threshold to NIS 360
million (i.e., approximately US $100 million) as the current threshold is considered to generate an unnecessarily large number of reportable transactions.

The Sections are supportive of this proposal and its reliance on the OECD data. Indeed, the International Competition Network’s (“ICN”) *Recommended Practices for Merger Notification and Review Procedures* (“Recommended Practices”) advise that merger control “should be asserted only with respect to those transactions that have an appropriate nexus with the reviewing jurisdiction”\(^2\), and that notification thresholds should “incorporate appropriate standards of materiality as to the level of ‘local nexus’ required for merger notification.”\(^3\) This “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.\(^4\) Moreover, the *Recommended Practices* appear to recognize the same problem that the IAA has identified in the Explanatory Memorandum—the negative impact on enforcers (and indeed on merging parties) from thresholds generating an unduly large number of reportable transactions. The *Recommended Practices* have concluded that merger notification thresholds lacking a sufficiently material local nexus “impose unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit.”\(^5\) Given that the RTPL Amendment also redefines the term “company” to include foreign companies, it becomes especially important that there be an appropriate nexus between a proposed merger and the Israeli economy before the IAA would exercise jurisdiction over the merger.

For the same reasons, the Sections also recommend that the IAA increase the threshold that currently requires each of at least two of the merging parties’ sales turnover to exceed NIS 10 million (i.e., approximately US $2.8 million) (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 that this nexus incorporates “appropriate standards of materiality” in connection with the requirements for merger notification.\(^7\)

In 2016, Israel had a Gross National Income (“GNI”) per capita of approximately US $36,190. Comparable countries that also have individual turnover thresholds (or similar) requiring at least two of the merging parties to have a minimum turnover in the reviewing jurisdiction include France (US$38,950 GNI per capita), Japan (US $38,000 GNI per capita),


\(^3\) *Recommended Practice* I.B (emphasis added).

\(^4\) *Recommended Practice* I.B, Comment 1 and *Recommended Practice* I.C, Comment 2.

\(^5\) Comment 1 to *Recommended Practice* I-B (emphasis added).

\(^6\) *Recommended Practice* I.A.

\(^7\) *Recommended Practice* I.B.
Korea (US $27,600 GNI per capita) and Spain (US $27,520 GNI per capita). Of these comparable countries:

- France’s individual turnover threshold is €50 million (i.e., approximately US $59 million);
- Japan requires that the acquirer’s local turnover exceeds ¥20 billion (i.e., approximately US $177 million) and the target’s local turnover exceeds, depending on the type of transaction, either ¥5 billion (i.e., approximately US $44 million) or ¥3 billion (i.e., approximately US $27 million);
- Korea’s individual turnover threshold is 200 billion won (i.e., approximately US $18 million); and
- Spain’s individual turnover threshold is €60 million (i.e., approximately US $71 million).

Taking an average of these comparable individual turnover thresholds (US $59 million, US $27 million, US $18 million and US $71 million) yields a recommended Individual Turnover Threshold for Israel of approximately US $44 million (i.e., approximately NIS 154 million).

B. Use of Market Share-Based Notification Thresholds

Based on the Explanatory Memorandum circulated by the IAA, the Sections understand that it is currently contemplated that the existing market-share based merger notification thresholds used in Israel will be maintained following the Amendment to the RTPL. For the reasons given below, the Sections would respectfully encourage the IAA to reconsider the ongoing use of these thresholds.

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.” In particular, thresholds should employ “clear, understandable, easily administrable, bright-line tests.” The use of market share-based thresholds is mentioned

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8 For economically advanced countries with smaller populations, such as Israel, the Sections believe that GNI per capita is a more accurate indicator of economic development than, for example, gross domestic product. Ireland’s Department of Business, Enterprise and Innovation recently used GNI per capita as a means for comparing Ireland to comparably-developed countries in the context of assessing proposed changes to Ireland’s merger notification thresholds, in the October 2017 “Consultation on a review of certain provisions under the Competition Act 2002, as amended, relating to merger and acquisitions”.

9 France has certain alternative thresholds for mergers in the retail trade (individual turnover threshold of €15 million / approximately US$18 million) and for mergers in French overseas departments and communities (individual turnover threshold of €15 million / approximately US $18 million). Overseas mergers in the retail trade have an individual turnover threshold of €5 million / approximately US $6 million.

10 Recommended Practice II.A; Comment 1 to Recommended Practice II.A.

11 Id.
explicitly as something to be avoided in this respect, as such thresholds lack “objectively quantifiable criteria”.12

The definition of relevant product and geographic markets—which is a necessary precursor to the calculation of market shares—is often a challenging exercise, even for specialized competition law enforcers. Enforcers and private parties, and indeed 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, 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 can 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. It is presumably for these reasons that 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.”13

Monopoly

The Sections support the IAA’s proposal as stated in Section 5 of the Explanatory Memorandum to amend the definition of a “monopoly” in Section 26(a) to include firms with significant market power that is not temporary and of intrinsically short duration. The Sections agree that market power is an important threshold that ordinarily should be addressed first,14 before considering whether the firm’s conduct constitutes an abuse of its position. This is a key tenet of antitrust law across the globe—including in jurisdictions with statutes the Sections believe to be analogous to Sections 26-30, such as Article 102 TFEU in the European Union (EU) and Section 2 of the Sherman Act in the United States—and this amendment to the RTPL provides firms with consistency across jurisdictions.15 The Sections believe, however, that the “more than half” market share threshold in current Section 26(a) of the RTPL—that imposes a conclusive presumption of definitively deeming a firm a monopoly—is over inclusive. The Sections therefore recommend that Section 26(a) be amended to remove this market share

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12 Comment 1 to Recommended Practice II.B. Indeed, the Commentary states that “[e]xamples of criteria that are not objectively quantifiable are market share and potential transaction-related effects” (emphasis added).

13 Id.

14 There may be instances in which conduct can be determined early in the course of an investigation to be procompetitive such that no inquiry into market power would be required. See American Needle, Inc. v. National Football League et al., 580 U.S. 183, 203-04 (2012).

threshold or to make a determination of “monopoly power” based solely upon market share a rebuttable presumption rather than a conclusive determination.

Indicating what market share percentages are likely to lead to market power, without turning into those percentages into a conclusive determination, can provide a useful metric for businesses in assessing the risk that their conduct (which may be procompetitive) may constitute an abuse of market position. In the United States, for example, monopolization cases often require 65% or greater (in combination with other evidence such as substantial barriers to entry) for a finding of monopoly market power, with 80% to 90% market share being required to presume monopoly market power based upon market share alone. The European Commission is unlikely to find dominance in Article 102 TFEU unless a firm has a market share of at least 40%, while market shares higher than that may be a “preliminary” and “useful first indication” to be interpreted in light of other relevant market conditions.

But that is different than using a precise market share, here 50% or more, as a decisive determinant of monopoly power. In other jurisdictions, while high market shares in a relevant market are an important factor in determining the existence of market power or monopoly power, it is not the end of the inquiry: those other jurisdictions typically analyze a variety of types of evidence to determine whether significant market power in fact exists. Direct evidence, e.g., using data analysis to show anticompetitive effects such as price increases, and indirect evidence, e.g., an analysis of structural factors such as barriers to entry, may both play significant roles in this analysis. Indeed, in other jurisdictions, direct evidence of

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17 See, e.g., 2B Phillip E. Areeda et al., Antitrust Law ¶ 532e, at 250 (3d ed. 2007) (“[I]t would be rare indeed to find that a firm with half of a market could individually control price over any significant period.”); Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002) (“Mark share at or less than 50% is inadequate as a matter of law to constitute monopoly power.”); Blue Cross & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995); Eastman Kodak Co. v. Image Technical Services., 504 U.S. 451, 481 (1992); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87 percent); United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 379 (1956) (75 percent); Am. Tobacco Co., 328 U.S. at 781 (over 66 percent); United States v. Dentsply Int’l Inc., 399 F.3d 181, 188 (3d Cir. 2005) (75 to 80 percent predominant); United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (80 to 95 percent predominant). However, plaintiffs can successfully show attempted monopolization under U.S. antitrust law even with a market share of 33% if other market factors are present, such as the weakness of competitors, and a defendant’s conduct, such as a wave of acquisitions, suggests that monopolization of the relevant market is likely. See, e.g., In re Pool Prods. Distr. Mkt. Ant. Litg., 940 F.Supp. 367, 385-86 (E.D. La. 2013).


19 See, e.g., United States v. Grinnell Corp., 385 U.S. 563, 571 (1966) (“The existence of such [monopoly] power may ordinarily be inferred from the predominant share of the market.”); ICN SUBSTANTIAL MARKET POWER ANALYSIS, supra note 15, at 3 (“Market shares are generally used as the starting point for assessing market power.”).

20 See, e.g., U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 2.1 (Aug. 19, 2010); see also, e.g., In re Pool Prods., 940 F.Supp. at 385-86.

21 See HORIZONTAL MERGER GUIDELINES, supra note 20, § 2.1; Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANT.L.J. 701, 718 (2010).
anticompetitive effects arising from potentially anticompetitive conduct can form the basis of liability absent a market share inquiry at all.\textsuperscript{22} Thus, the Sections respectfully request that an analysis of these other factors should be preserved in the Amendment to the RTPL.\textsuperscript{23}

**Proposed Revisions to Block Exemptions for Joint Ventures, R&D and Restraints Ancillary to Mergers**

The Sections understand through the Explanatory Memorandum and other summaries of the proposed legislation that the IAA proposes to expand the scope of the block exemptions for joint ventures, R&D agreements, and for restraints ancillary to mergers. The current block exemptions apply where the parties to the potentially restrictive arrangement do not exceed enumerated combined market share thresholds, or where the proposed restraints fall within enumerated exceptions. The Amendment to the RTPL would broaden the scope of these block exemptions to apply even to competitors that exceed the relevant market share thresholds, so long as (i) the arrangement is not intended to harm competition, (ii) the restraints to be included in the arrangement are necessary to fulfil the purpose(s) of the (pro-competitive) agreement, and (iii) the arrangement will not cause a significant adverse effect on competition. The Amendment to the RTPL would also simplify the procedure to apply for an individual exemption when an arrangement falls outside of the block exemption, and to reduce the review period for an individual exemption application from 120 days to 30 days (in line with the merger review period).

The Sections welcome the IAA’s efforts to expand the scope of the block exemption. While the Sections have disfavored block exemptions that remove anticompetitive conduct from the reach of competition laws in commenting on proposed immunity from antitrust laws, the proposed revisions to the existing block exemptions would apply only to conduct that is clearly pro-competitive. Moreover, as previously described, the calculation of market shares can be difficult, such that market-share based enforcement thresholds can create uncertainty for parties trying to determine whether a block exemption does or does not apply. To the extent that the proposed revisions introduce a competitive effects test, they will reduce the burden on contracting parties who wish to conduct a self-assessment but have difficulty determining market shares with sufficient particularity to conclude that the block exemption applies. The Sections further note that streamlining and expediting the approach for an exemption application where it is determined that a block exemption does not apply will further reduce the regulatory burden on parties to potentially restrictive agreements that are pro-competitive in nature.

The Sections understand that the expansion of the block exemption is intended to move the exemption toward “substantive examination of the consequences for competition of the arrangement in question and the responsibility of the parties to assess their compliance with the

\textsuperscript{22} See, e.g., Re/Max Int’l v. Realty One, 173 F.3d 995, 1018-19 (6th Cir. 1999) (“[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant’s monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition.”).

\textsuperscript{23} The Sections further support the IAA’s proposal in Section 5 to strike Sections 27-28 of the Law, for the reasons stated in the Explanatory Memorandum.
requirements for it to be a permitted restrictive arrangement." The Sections caution, however, that the substantive test as currently contemplated is vague and therefore may not give sufficient direction to contracting parties who wish to conduct a self-assessment and gain comfort that a restrictive arrangement is permitted under the block exemption. As a result, the proposed revisions may not lead to a significant reduction in individual exemption applications pertaining to joint ventures, R&D and ancillary restraints to mergers, despite the expansion of the block exemptions.

The Sections therefore recommend that the IAA draft and disseminate detailed guidelines, to the extent it is not already in the process of doing so, that provide further direction to parties conducting a self-assessment (or applying for an individual exemption, should they determine the block exemption does not apply) as to how the IAA would assess the application of the block exemption to specific conduct.

In this respect, the Sections refer the IAA to the European Commission’s *Guidelines on Vertical Restraints*, SEC(2010) 411 (in particular sections III. Application of the Block Exemption Regulation and IV. Withdrawal of the Block Exemption and Disapplication of the Block Exemption Regulation) as an example of detailed guidance on the application of a block exemption. The Sections also refer the IAA to the United States Federal Trade Commission and the United States Department of Justice *Antitrust Guidelines for Collaborations Among Competitors* as an example of detailed guidance on the application of a competitive effects analysis to potentially restrictive arrangements between competitors.

**Criminal Sanctions**

The Sections commend the IAA for increasing criminal sanctions for so-called “hard core” violations, including for price-fixing, market allocation, and bid rigging. The threat of imprisonment is the most effective deterrent to cartel conduct and a primary driver of the adoption of effective corporate competition compliance programs. In the Sections’ view, promoting the adoption of competition compliance programs is the most effective strategy for protecting global and national economies from the pernicious effects of cartel conduct: voluntary *ex ante* changes to corporate behavior benefit consumers to a greater degree than *ex post* cartel enforcement proceedings.

Furthermore, the ability to conduct a complete and efficient investigation of alleged cartel conduct is of paramount importance, not only to the effectiveness of the relevant competition law but also for the benefit of consumers, who ultimately bear the consequences of cartel conduct.

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24 Explanatory Note at p. 5.


27 The Sections note that in addition to developing and publishing initial guidelines, the IAA should develop a mechanism to revise and update any such guidelines, either to reflect changes or refinements of the IAA’s approach or to reflect new case law that may impact on the analysis of the block exemption.
Obstruction of justice, from the destruction of data and documents to the intentional misleading of investigators, remains a serious problem in all jurisdictions, frustrating efforts to combat national and global cartels. The Sections commend the IAA for adopting more rigorous tools to investigate and punish efforts to obstruct justice and encourage the IAA to actively enforce the law, within the bounds of internationally accepted norms of due process.\(^\text{28}\)

However, the Sections respectfully request that the IAA give further thought to the provisions for criminal sanctions for competition violations other than in the cartel context. For example, as the Sections have noted elsewhere in these comments, the retention of the market share threshold for determining whether mergers and acquisitions must be reported to the IAA for premerger approval introduces considerable subjective uncertainty into what should be a clear objective analysis. Market definition, as the Sections note from their experience, is a highly nuanced and contentious endeavor. In the U.S., for example, it is common for parties and the government to contest market definition at trial, well after the transaction has been notified and debated in the context of the investigation. Yet the draft law continues to treat the failure to notify a transaction to the IAA as a criminal act, when the cause of the offense may be attributable to a good-faith difference of opinion. In the Sections’ view, procedural violations such as the failure to notify a transaction should be punished through civil fines sufficiently substantial to deter intentional violations. For example, in the U.S., the current fine for failing to notify a transaction pursuant to the Hart-Scott-Rodino Act is $40,654 per day.

In particular, the draft law continues to treat so-called “abuses of dominant market positions” as criminal violations. Yet, in light of the law’s presumption that firms with market shares exceeding 50% hold dominant positions, the proposed law would threaten to criminalize behavior that is procompetitive and thus should be legal. For example, while smaller competitors may be disadvantaged by a larger competitor that prices below the costs of the smaller firms, so long as the larger competitor does not price below its own average variable costs, consumers will generally benefit from these lower prices.

The Sections also respectfully suggest that treating monopolization offenses as criminal in nature may violates the rule of law as far as the rule of law relies on reasonable notice as to when an offense may be criminal in nature.\(^\text{29}\) As in the U.S., Israel evaluates most monopolization claims under a rule of reason-type standard, which balances any identified anticompetitive effects of the challenged conduct against their procompetitive benefits to determine the net effect on competition. A business practice may be viewed in a different manner depending upon whether that business has market power. Criminal enforcement requires more reasonable notice than can be afforded through offenses that depend on a finding of market power: the ex ante nature of criminal law demands that the code give reasonable notice beforehand what citizens may not do on pain of criminal sanction either through a reasonable

understanding of what conduct may run afoul of the provision or the imposition of an intent or \textit{mens rea} requirement.\footnote{See United States v. Nash, 229 U.S. 373 (1913).}

The Sections therefore strongly recommend that the IAA revisit whether its criminal enforcement of non-hard core cartel agreements comports with due process considerations.\footnote{See United States v. U.S. Gypsum Co., 333 U.S. 364, 400 (1948).} Alternatively, if a revision of the law is not practical,\footnote{By comparison, the \textit{per se} rule, as applied in the U.S., generally provides certainty and avoids lengthy and complex inquiries into the history of a particular industry and the particular restraint in question to determine the reasonableness of the challenged conduct. \textit{See} National Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958). Only \textit{per se} violations are prosecuted criminally in the U.S.\footnote{The Sections note that the Sherman Act does not rule out criminal enforcement of its anti-monopoly provisions.}}\footnote{United States Department of Justice, Antitrust Division, \textit{An Antitrust Primer for Federal Law Enforcement Personnel}, at 4 (2005).} the Sections respectfully request that the IAA, much like U.S. Department of Justice,\footnote{United States Department of Justice, Antitrust Division, \textit{An Antitrust Primer for Federal Law Enforcement Personnel}, at 4 (2005).} affirm (or continue to affirm) that it will not seek to enforce those provisions of the law criminally. Such a consistent practice, as announced publicly, can help to meet due process concerns.\footnote{See United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).}

\textbf{Lowering the Cost of Living as a Goal of Antitrust Law}

The Sections wholeheartedly support the promotion of competition as one of the two expressed goals of the RTPL if the promotion of competition refers to the encouragement of the competitive process and competitive markets, rather than the protection of competitors, to achieve the maximization of consumer welfare.\footnote{Brunswick Corp. v. Pueblo-O-Mat, 429 U.S. 477, 488 (1977) ("The antitrust laws ... were enacted for the protection of competition, not competitors."); \textit{see} Kirtsaeng v John Wiley & Sons, Inc., 568 U.S. 519, 537 (2013) ("American law too has generally thought that competition, including freedom to resell, can work to the advantage of the consumer"). See, \textit{e.g.}, \textit{Leegin Creative Leather Products, Inc. v. PSKS, Inc.}, 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (restraints with "manifestly anticompetitive effects" are \textit{per se} illegal; others are subject to the rule of reason (internal quotation marks omitted)); 1 P. Areeda & H. Hovenkamp, \textit{ANTITRUST LAW} \S\ 100, p. 4 (3d ed. 2006) ("[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively"). To the extent that the term "promotion of competition" may be ambiguous, the Sections would encourage the IAA to clarify that term along the lines set out herein.} However, the Sections respectfully request that the IAA reconsider its other expressed goal of lowering the cost of living to the extent that the IAA intended this goal to be a concept distinct from the maximization of consumer welfare. As applied in the antitrust context, a policy objective of lowering the cost of living would introduce significant uncertainty into what is already a complex economic analysis. While lower prices can result from competition on the merits,\footnote{See, \textit{e.g.}, Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 223-24 (1993).} the touchstone of antitrust law—the promotion of

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33 The Sections note that the Sherman Act does not rule out criminal enforcement of its anti-monopoly provisions.
36 Brunswick Corp. v. Pueblo-O-Mat, 429 U.S. 477, 488 (1977) ("The antitrust laws ... were enacted for the protection of competition, not competitors."); \textit{see} Kirtsaeng v John Wiley & Sons, Inc., 568 U.S. 519, 537 (2013) ("American law too has generally thought that competition, including freedom to resell, can work to the advantage of the consumer"). See, \textit{e.g.}, \textit{Leegin Creative Leather Products, Inc. v. PSKS, Inc.}, 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (restraints with "manifestly anticompetitive effects" are \textit{per se} illegal; others are subject to the rule of reason (internal quotation marks omitted)); 1 P. Areeda & H. Hovenkamp, \textit{ANTITRUST LAW} \S\ 100, p. 4 (3d ed. 2006) ("[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively"). To the extent that the term "promotion of competition" may be ambiguous, the Sections would encourage the IAA to clarify that term along the lines set out herein.
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consumer welfare—also involves non-price factors (such as product quality, level of service, and incentives to innovate), which may be associated with higher prices and thus, a higher cost of living, but on balance, still improve consumer welfare.

The Sections are thus concerned that tying Israeli competition law to a policy of lowering the cost of living raises questions that could result in outcomes that are antithetical to competition law principles. First, it raises the question of whether a restraint that improves innovation or the quality of a product, normally viewed as being procompetitive, would be viewed in this context as not being procompetitive if it does not actually lower prices. Second, it raises the question of whether restraints that lower prices will automatically be viewed as being procompetitive even if they lead to a buyer-side monopsony or to predatory-level prices.

For example, conduct that disadvantages competitors may be deemed procompetitive only if it has macro effects in reducing the cost of living across the Israeli economy, an interpretation that could inhibit companies from engaging in conduct that does not provide sufficient benefits to the economy overall, as distinct from a specific market or market segment. Restraints that provide incentives for firms to invest in R&D or to expand production capacity could still be vulnerable to challenge, even if, on balance, the procompetitive effects of the restraints outweigh their anticompetitive effect. Examples of such conduct include short-term exclusive agreements and joint R&D agreements. While these types of agreements (or others) should still be evaluated for their net effect on competition, challenging such agreements on the basis that they may raise the cost of living would not, in the Sections’ view, benefit the Israeli economy in the long-term. Indeed, this is why Israel, and the U.S. and most other nations, provide firms with short-term monopoly rights under intellectual property law: the benefits of incentivizing innovation far outstrip any short term adverse price effects.

Conversely, a company with a dominant share of the market may have the ability to absorb short term losses on sales, if the effect of selling below cost results in competitors abandoning the market and allowing the company to recoup its losses by raising prices to supracompetitive levels once it has secured a monopoly. While U.S. antitrust law would prohibit such predatory conduct as illegal monopolization, a policy of lowering the cost of living could provide a monopolist with an unintended defense even if recoupment were possible down the line. Although the IAA could, hypothetically, wait to enforce the law until after the company

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38 See, e.g., FTC v. Actavis, 133 S.Ct. 2223, 2238 (2013) (dis. op. of Roberts, C.J.) (“The point of antitrust law is to encourage competitive markets to promote consumer welfare.”); see also note 36, supra.

39 See, e.g., U.S. DEPT’ OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, supra, § 10.

40 See, e.g., United States v. Anthem, Inc., 855 F.3d 345, 361, 365, 366 (D.C. Cir. 2017); id. at 377-78 (dis. op. of Kavanaugh, J.).

41 See, e.g., Brooke Group, 509 U.S. at 222, 224.

42 The Sections assume that the term cost of living would require lower prices to be passed-on to end-consumers if it is synonymous with lower prices even on a macro level. The pass-on of lower prices to end-consumers, at least in part, is important to the recognition of lower prices as a procompetitive efficiency. See, e.g., Anthem, Inc., 855 F.3d at 362; U.S. DEPT’ OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, supra, § 10.
raised prices following the acquisition of a monopoly position, the Sections respectfully submit that restoring competition to a market shorn of competition may prove difficult to accomplish after the fact, leaving consumers worse off in the long-term.

43 See United States v. Microsoft, 253 F.3d 34, 105-07 (D.C. Cir. 2001).