COMMENTS OF THE ABA SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW IN RESPONSE TO THE ISRAEL ANTITRUST AUTHORITY’S DRAFT REVISIONS TO THE ISRAEL MERGER CONTROL REGIME

June 2015

The American Bar Association Sections of Antitrust Law and of International Law (together the “Sections”) appreciate the opportunity to submit these comments on the draft revisions to the Merger Control Legislation (the “Legislation”) developed by the Israel Antitrust Authority (the “IAA”). These comments reflect the Sections’ collective experience and expertise with respect to application of antitrust and merger review laws in the United States, European Union and other jurisdictions and their involvement in the development of the Recommended Practices for Merger Notification and Review Procedures adopted by the International Competition Network (“ICN”)1 (“ICN Recommended Practices”), which have been implemented by many competition law jurisdictions around the world. The Sections offer these comments in order to share our experience and support the IAA’s adoption of international best practices and refinements to the Guidelines that would further clarify and enhance the effectiveness of the Legislation.

The views expressed herein are being 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, accordingly, should not be construed as representing the position of the Association.

The Sections welcome the IAA’s efforts to incorporate turnover thresholds in the existing market share thresholds, as well as to increase the existing turnover thresholds to avoid capturing transactions that are unlikely to significantly impact Israeli consumers. The Sections’ comments focus on two aspects of the Legislation. The first is the potential that the Legislation will require notification of transactions with no or minimal nexus to the Israeli economy and no impact on Israeli consumers by requiring notification of transactions where only one party makes sales in Israel, diverting the scarce resources of the IAA and the merging parties. The second is the proposal to introduce a voluntary notification system for transactions that would otherwise not require mandatory notification and the possibility of imposing criminal penalties on parties to transactions that are not reported, but are subsequently challenged after closing.

The Sections understand that through the proposed amendments the IAA is attempting to capture certain transactions with the potential to impact Israeli consumers that might escape review under the current thresholds. The Sections agree with that objective, but, as discussed below, certain aspects of the proposed amendments appear likely to have unintended and undesirable consequences.

I. The Legislation May Require Notification of Transactions With No or Minimal Nexus With Israel

The ICN Recommended Practices recommend against imposing notification requirements on parties unless their transaction, if consummated, would have an appropriate nexus with the jurisdiction requiring notification. The ICN Recommended Practices further state that “[d]etermination 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 references to the activities of the acquired business in the local territory.” The ICN’s Merger Working Group has opined that “the relevant local activities of the acquired party should generally be limited to the local sales and/or assets of the business(es) being acquired.” The ICN has thus recommended that “[m]erger notification thresholds should . . . incorporate appropriate standards of materiality as to the level of ‘local nexus’ required, such as material sales or assets levels within the territory of the jurisdiction concerned.” The ICN’s Working Group has further commented that “[n]otification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned.”

Contrary to the ICN’s Recommended Practices, two aspects of the Legislation could have the effect of requiring the notification of transactions that are very unlikely to affect Israeli consumers. Notification of these transactions would impose unreasonable costs on companies, including companies with no or minimal presence in Israel. Review of these notifications would divert the IAA’s scarce resources from more immediate concerns in the Israeli economy.

The first aspect is the proposed change to the revenue thresholds for the notification of transactions. The Legislation proposes to modify the merger control thresholds to require a filing if the aggregate Israeli turnover of the merging parties exceeds NIS 250 million and one of the following conditions applies: either (1) the Israeli turnover of at least two of the parties each exceeds NIS 10 million or (2) the worldwide turnover of at least one of the parties exceeds NIS 1 billion, including any turnover attributable to sales outside of Israel. The result of the changes to the revenue thresholds would be that, regardless of the nature or size of the transaction and its effects, or lack thereof, in Israel, a company with NIS 1 billion in global turnover and Israeli turnover of NIS 250 million would be required to report every transaction it enters into, even if the target had no connection to Israel. For example, such a threshold would require a multinational food company with global sales of NIS 1 billion and NIS 250 million of sales in Israel to report to the IAA its acquisition of a beef processor in Ohio, even though such a transaction would be very unlikely to have an effect on Israeli consumers. Other jurisdictions include provisions in their merger control regimes to ensure a nexus to the local jurisdiction. In the United States, for example, the acquisition of voting securities of a non-U.S. corporation or non-U.S. assets is exempt unless the acquired corporation or assets have specified levels of sales

2 Id., § C.
4 Id.
5 Id. At page 2.
in or into the U.S. The merger control regimes in many other jurisdictions require at least two parties to a transaction to have specified levels of local turnover.

The second aspect involves the elimination in the definition of “firm” of the requirement that a non-Israeli company be registered in Israel to qualify as a firm, combined with the way in which revenue is attributable to firms under Israeli law. The Sections understand that under current law, turnover would be attributed to a firm (assuming it is registered in Israel) only if that firm sold product to a third party (e.g., a distributor) in Israel and exercised some degree of control over the third party’s resales in Israel. It is not clear, however, whether the revised definition of firm is meant to maintain this position. One interpretation of the revised definition of firm is that it is intended to capture sales in Israel even if the firm had no control over those sales. For example, consider a situation in which a U.S. firm engages third-party distributors and those third parties have complete control over the location, pricing and terms over which the products are resold, including resales into Israel. The U.S. firm would have no control over the resales and may even be unaware of any resales into Israel. It is possible to interpret the Legislation to include such sales in evaluating whether the U.S. firm meets the revenue thresholds in the Legislation. While the Sections do not believe the IAA is intending to capture such sales, it would be beneficial if the IAA made clear that when considering the turnover of a firm, parties are to consider direct sales into Israel, even if originating outside of Israel, and sales to third party intermediaries only where the merging party has some degree of control over the location or terms of resale.

As noted above, these aspects of the Legislation are contrary to the ICN’s Recommended Practices. In particular, applying the revised threshold would require notification of transactions with no actual or plausible nexus to Israel.

The Sections encourage revisions to the Legislation to narrow the set of transactions that would be subject to mandatory notification in Israel to those where all, or at least two parties to a merger are both present in Israel or both derive material revenue from sales made directly into or through controlled entities in Israel.

II. The Introduction of a Voluntary Notification System, Potentially Leading to Criminal Fines for Closing Without Review, May Distort Incentives and Intensify Uncertainty

The proposed Legislation includes a provision that would prohibit firms from merging if the transaction has a reasonable likelihood of substantially harming competition, even if it does not meet the mandatory market share or turnover notification thresholds. The Legislation also provides that parties may notify the IAA voluntarily with respect to transactions that do not meet the notification thresholds for mandatory filing, and that the IAA must advise the parties within 15 days of such voluntary notice as to whether it intends to review the transaction. As the Sections understand the proposals, closing a transaction without filing such a “voluntary” notice could later subject parties to criminal sanctions. In contrast, under the current law, if a merger does not fall within the notification thresholds, it is deemed lawful even if it is reasonably believed to be likely to cause substantial harm.
While the Sections understand the desire to enable regulatory review of non-reportable transactions, the Sections have three concerns with the current draft. First, the structure of the proposed statute may effectively transform the “voluntary” reporting into an obligation, because parties may reasonably fear the imposition of penalties for failure to make a “voluntary” report. There should be no penalties for failure to report a transaction that does not exceed specific thresholds. Second, voluntary filings should not create a presumption or be used as evidence that the transaction is anticompetitive. Third, while the uncertainty and burdens created by this provision would be significant, there are few, if any, enforcement benefits because most, if not all, mergers that raise competitive concerns are likely already to be captured by the proposed turnover and market share thresholds.

The Sections generally oppose the imposition of criminal penalties for merger-related violations, such as failure to report or consummating transactions that are found to violate antitrust laws. We recognize that the availability of such penalties generally are a feature of the existing law, and therefore beyond the scope of these comments. Nevertheless, the Sections discourage the expansion of such criminal penalties beyond the consummation of transactions that are subject to mandatory notification but which were nevertheless not notified. In particular, parties should not be punished for consummating a transaction that did not meet any of the reporting thresholds. The remedies for transactions subject to voluntary reporting should be limited to structural and behavioral remedies designed to restore competition.

1. **Failure to Submit Voluntary Reports Should Not Risk the Imposition of Criminal Penalties**

Under the Legislation, closing a non-reportable transaction without submitting a voluntary report under Section 19(b) not only exposes merging parties to the risk of subsequent challenge and possible divestitures (a risk merging parties in the United States also face), but may also result in the imposition of criminal penalties. Even if criminal sanctions are rarely imposed, the threat of criminal penalties, in addition to traditional merger remedies is likely to lead merging parties to voluntarily report transactions that do not raise serious antitrust issues. The risk of an investigation or challenge without more should be sufficient to lead to voluntary reporting of any transactions that may raise serious competitive concerns even though they fall below the market share and revenue thresholds.

2. **Voluntary Notification May Be Seen As A Concession That A Transaction Is Anticompetitive**

The ability to submit a voluntary notification can provide the parties with additional certainty that the transaction will not be viewed by the IAA as violating Israel’s competition law. However, this option presents parties with the risk that the IAA may view the submission of a voluntary notification as a concession that the transaction raises competition issues. This concern is heightened by the tendency of competition agencies and merging parties to adopt different views as to market definitions and/or novel theories of harm. Given such differences, merging parties may be concerned that a voluntary submission could be viewed by the IAA as a validation of concerns about the transaction, even if the parties themselves do not believe that such concerns are warranted.
Assuming that the Legislation continues to include a voluntary notification option, the Sections recommend revising the draft statute to clarify that: (a) the criminal penalties for closing a transaction that is found to violate the antitrust law may be imposed only on transactions that meet the reporting thresholds; and (b) submission of a voluntary filing shall not be deemed to be an admission or concession that the transaction violates antitrust law, and may not be used as evidence in any subsequent legal proceeding regarding the legality of the transaction.

3. The Voluntary Notification Provision Creates Significant Uncertainty Without Providing Substantial Enforcement Benefits

The voluntary notification provision creates significant uncertainty as to whether the IAA would view a merger as reasonably likely to cause considerable harm to competition or more broadly to the public. In particular, absent the IAA’s issuing detailed guidelines that describe the circumstances that will lead the agency to identify particular mergers as raising substantive concerns and therefore meriting enforcement, the standard lacks a minimal level of specificity that would enable firms to assess the legality of proposed transactions. Given this uncertainty, the provision may effectively expand the reporting requirements and impose material disruption in ordinary strategic decisions of firms in Israel even if the proposed reform does not explicitly require reporting.

The risk of “missing” non-reportable anticompetitive transactions appears to be far too low to justify the imposition of sanctions for the failure to report non-reportable transactions. The current reporting requirements in Israel already include market share thresholds that prevent the accumulation or expansion of market power through a horizontal merger. In particular, the current thresholds provide that any merger that incrementally expands or creates a 50% share of a market requires review and approval by the IAA. Only transactions that fall below both the turnover thresholds and the market share thresholds would not be reportable. While it is possible that relatively small (i.e., below turnover thresholds) non-horizontal mergers or relatively small horizontal mergers that do not create a dominant position could harm competition, these circumstances appear to be sufficiently unlikely that the Sections believe the risk that they will occur is outweighed by the burden on merging parties and the IAA that the new voluntary reporting proposal in the Legislation would impose.

By comparison, in the U.S., even a merger leading to monopoly power or more than 50% of a relevant market might nevertheless not be reportable under the Hart-Scott-Rodino (“HSR”) Act if it does not meet the statute’s size-of-transaction or size-of-person thresholds. However, there are no civil or criminal fines for closing a non-reportable transaction that is subsequently determined to violate antitrust law.

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6 As noted in the Guidelines of the General Director of the Israel Antitrust Authority for Reporting and Evaluating Mergers Pursuant to the Restrictive Trade Practices Act, 1988, “the guidelines make no detailed reference to the substantive law applicable to merger review – i.e., to the circumstances under which the General Director will oppose a merger, condition his approval or approve a merger unconditionally.” Guidelines at page 3, available at http://www.antitrust.gov.il/eng/subject/177/item/33018.aspx (reviewed May 20, 2015).

7 While the Sections realize that the proposed amendments do not change the market share threshold, the Sections note the ICN’s recommendation that “Notification thresholds should be based on objectively quantifiable criteria,” and its explanation that market share tests “are not appropriate for use in making the initial determination as to whether a transaction is notifiable.” ICN Recommended Practice II.B, supra n. 1.
CONCLUSION

The Sections appreciate the opportunity to comment on the Legislation. We would be pleased to respond to questions or provide further comment.