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## The European Commission's Decision on Facebook: a lesson to be learned

The European Commission (the “Commission”) announced its decision to fine Facebook the substantial amount of EUR 110 million for, what the Commission alleges to have been, the provision of inaccurate information in the course of its examination of the acquisition of WhatsApp.

The majority of the world’s competition authorities, including the Israel Antitrust Authority (the “IAA”), are authorized to require parties to a merger, or any entity being examined by such authority as part of an enforcement action, to provide relevant information with respect to the specific examination. In addition, the obligation to provide information to such authorities often also applies to third parties who are not necessarily the subject of the examination. For example, when the IAA reviews a merger, it may require information from third parties such as customers and suppliers of the merging entities.

In Israel, provision of misleading information or the failure to furnish information with the intent to influence the outcome of an examination conducted by the IAA, may subject such party to criminal sanctions. In contrast, a party may be subject to monetary fines for furnishing, in good faith, inaccurate or incomplete information.

In recent years, the IAA has investigated and imposed fines on several entities that did not provide information as requested by the IAA or responded to such requests in an incomplete manner. In addition, the IAA’s investigations were also directed at third parties, such as customers, suppliers or competitors of the parties to the merger, who did not provide appropriate responses to such requests.

The case of Facebook is reminiscent of the famous case involving the Israeli food company Tnuva, whereby Tnuva was investigated on suspicions of not providing the IAA with an important report prepared for it by McKinsey & Company. The IAA had requested information from Tnuva in the context of its review of Tnuva’s market activities and the IAA suspected that Tnuva intentionally withheld that report. Following a two-year criminal investigation, in which senior executives of Tnuva were questioned, Tnuva and the IAA signed a settlement, in which Tnuva undertook to pay a fine of NIS 3 million. At the time, the Commissioner of the IAA clarified that there was no finding of intentional concealment by Tnuva, and that the fine was intended as a deterrent and to send a message to all parties that are obligated to provide

information to the IAA to come forth and provide full and accurate responses to such requests.

It appears from the Commission's decision regarding Facebook, that it does not suspect Facebook of providing misleading information with respect to its relationship with WhatsApp, and that the information provided had no influence on the Commission's review and final decision (approving the merger). It would seem, therefore, that the Commission's decision to impose a large fine on Facebook, was intended to serve as a deterrent and send a strong message to future respondents to its requests for information.

The Facebook case highlights the need for respondents, to ensure that they provide full and accurate responses, which, in certain circumstances, may require the engagement of professionals or advisors who have experience in dealing with the IAA. However, at the same time, it also calls into focus the need for the IAA to make sure that it clearly articulates its requests for information and the scope of the requested material, in order to avoid unnecessary failure by respondents.

In quite a few cases, the information request issued by the IAA was formulated in a broad or vague manner, which did not allow the respondent to be able to clearly define the scope of requested information in a workable manner. This is particularly apparent in "catch all" statements in which the IAA requests to receive: "reports, surveys, plans and presentations relevant to the subject under review." Such a request, especially in the context of large companies, may necessitate an internal search of thousands of emails and documents stored in the relevant company's databases. Such a task, apart from being burdensome and disruptive, may also cause such companies to fail (in good faith) to submit the documents that the IAA believes it should have provided.

In view of the heavy fines that the IAA and other competition authorities around the world have imposed on respondents in connection with their responses to requests for information, in case of doubt, it is advisable to contact the IAA and ask that it clearly defines the scope and time parameters of its inquiry.

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