The New Israeli Food Law Significantly Affects the Commercial Dealings between Suppliers and Retailers

With the recent introduction of the Promotion of Competition in the Food Sector Law, 2014 ("Food Law"), food suppliers and retailers (and every related entity thereto) that operate in the Israeli food market are now subject to robust statutory restrictions that regulate their commercial dealings. Both domestic and foreign food suppliers should make it their business to understand and comply with these restrictions as, among other reasons, there are relatively harsh civil as well as criminal sanctions for failing to do so.

The Food Law became effective on January 15, 2015. Its objective is to increase competition in the food and consumer goods sector and reduce prices for the consumer. The main provisions of the Food Law deal with relations between suppliers and retailers regarding interventions in pricing and commercial terms, product arrangements and prohibition of payments. It covers the supply of food products or any other goods that are sold in a retail store but explicitly excludes electrical appliances, textiles, office equipment, household appliances, books and newspapers ("Products").

Under the Food Law, a supplier of Products shall not dictate, recommend or otherwise intervene ("Intervene") regarding the retail price or any other term on which a retailer sells a Product of another supplier. This prohibition and all prohibitions that relate to suppliers under the Food Law cover not only suppliers who deliver Products to or through a retailer directly but also the supply of such Products through a distributor. Thus, local and foreign entities that supply Products that are sold in retail stores (a place where customers may purchase food and consumer products including online stores) will be caught by the Food Law irrespective of the fact that their Products appear on the shelves of retailers by way of sales through an independent distributor. On the reverse side, a retailer shall not Intervene regarding the retail price or any other term on which another retailer sells a Product.

Specific and additional prohibitions apply to large suppliers. A large supplier is defined as a supplier whose sales turnover in Israel to or through retailers in the previous financial year exceeded NIS 300m (~US$78m) or a supplier who is a monopolist ("Large Supplier"). Large Suppliers shall not Intervene, among other things, in the: (a) prices fixed by a retailer for the supplier's Products such as setting a recommended price, minimum price or maximum price for these Products; (b) in the sales space allocation for the Product; or (c) any amount of Products purchased out of the total amount of purchases of the Product and substitute products by the retailer. As an exception to these prohibitions, however, the Large Supplier may Intervene in such a case if it delivers a Product that was not supplied in Israel during the preceding year or has been supplied in Israel for a period of less than one year ("New Product"). Note that a Product which is not fundamentally different to another Product sold in the previous year will not be considered a New Product. The Large Supplier may also get around the above prohibition by obtaining a specific exemption, in part or in full, in respect of such practice from the General Director of the Israeli Antitrust Authority ("General Director"). Another prohibition that specifically applies to Large Suppliers is the prohibition of tying. A Large Supplier is prohibited from conditioning the sale of a certain Product to the sale of another Product supplied by it.

In addition, there are certain restrictions that apply to commercial dealings between Large Suppliers and Large Retailers. Under the Food Law, Large Suppliers cannot engage in physically arranging Products in the stores of a Large Retailer and cannot Intervene in the shelf arrangement of its Products in a Large Retailer's store. A large retailer is one who owns at least 3 stores (including online stores) and whose annual turnover in the previous financial
year exceeded NIS 250m (~US$65m) ("Large Retailer"). A Large Supplier may, however, instruct a Large Retailer on the treatment required to be accorded to such Products in order to maintain its quality. Moreover, these restrictions do not apply to a New Product and the General Director may grant an exemption for such practice.

An overarching provision that impacts considerably on the commercial relationship between suppliers, whether or not a Large Supplier, and retailers is the prohibition that a supplier cannot make payments in cash or cash equivalent to a Large Retailer. This means that every transfer of cash or cash equivalent (such as Product units or display stands) from the supplier to a Large Retailer (such as in exchange for shelf space, advertising or other services to be provided by the Large Retailer) is prohibited. This prohibition, however, does not apply to compensation payments, Product refunds or payment under a consignment agreement. Further, it does not preclude a supplier from reducing the price of a single Product unit, even in exchange for services supplied by the Large Retailer. Thus, in promoting its Products, suppliers can engage in certain commercial arrangements with retailers provided that they satisfy the requirements of the Food Law.

The Food Law also sets out a sweeping provision that probably applies to every relationship that may arise along the marketing chain between Large Suppliers and Large Retailers or distributors. It provides that Large Suppliers cannot be a party to an agreement with a Large Retailer or with a distributor the outcome of which would amount to the price of Products of bundle thereof offered by the Large Supplier being lower than or equal to the price offered by the Large Supplier for the purchase of less units of the same Product or for a smaller basket of Products. This provision is a reciprocal one and thus prohibits both Large Suppliers and Large Retailers (or distributors) from engaging in such behaviour. It further covers both the relationship between the Large Supplier and its distributors as well as the relationship between a distributor and the Retailer.

All in all, the effect of the Food Law on both domestic and foreign suppliers is significant and it is advisable that such suppliers implement various measures including internal policies to ensure that they comply with these provisions. For example, suppliers should make sure that cash or other forms of payment should be transferred only from the retailer to the supplier. In addition, Interference is given a wide formulation in the Food Law and likely includes the full gamut of intervention strategy and tactics. Thus, suppliers, who generally have an incentive to promote its Products, should think twice about the type of promotional activities it wishes to implement vis-à-vis its dealings with or through retailers, even if such Products are supplied by way of an independent distributor. Incentives and arrangements between suppliers and retailers may indeed be implemented provided that they satisfy the requirements of the Food Law.

Lastly, it is important to note that the Food Law is still in its elementary stages and the Israeli Antitrust Authority is continuing to provide guidance as to the scope of its application. Therefore, it is advisable to keep apprised of any such developments.