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Staff Position

The ISA staff positions brought hereunder are professional positions that reflect the decisions and the positions of the staff on issues concerning the implementation of securities laws. These published positions guide the ISA and its staff in exercising their powers, and the public may use them and apply them in similar circumstances.

October 23, 2019

Legal Staff Position: Territorial application of Chapter seven "C" of the Law¹

Background

On 8 June 2010, the Securities Law (Amendment 42) 5760-2010 (hereinafter: "**Amendment 42**") was passed in the Knesset, in which Chapter seven "C": trading platforms to their own account, was added to the Securities Law, 5728-1968 (hereinafter: "**the Law**"). The main objective of Chapter seven "C" is to regulate the activities of companies managing trading platforms, and to bring them under Israel Security Authority (hereinafter: "**ISA**") oversight. Amendment 42 went

¹ This document is an update to the Legal Staff Position of March 01, 2015 on the subject of the territorial application of Amendment 42 to the Law.

into force with the entry into force on 26 May 2015 of the Securities Regulations (Trading Platforms to their own account), 5775-2014.

On 26 January 2018, the Securities Law (Amendment 66), 5778-2017 (hereinafter: "**Amendment 66**") went into force, in which prohibitions were added to Chapter seven "C" on the offer and trade in binary option, pertinent to trading platforms permitting trading in that instrument to customers inside or outside the State of Israel.

A. The territorial application of Chapter seven "C" of the Law for trading platforms that do not offer trading in binary options

1. The question arose in queries to the ISA of whether a trading platform, wholly or partially managed in Israel which is directed only at customers outside Israel and does not allow customers in Israel access to the platform, must apply for a trading platform license in Israel.
2. The prohibitions on the management of a trading platform without a license and the offer to trade on a platform that does not have a license are enshrined in Sections 44M(a) and 44O(a) of the Law:
 - a. Section 44M(a) of the Law states: "No person shall run a trading platform, unless he holds a platform license and in accordance with the conditions of the license".
 - b. Section 44O(a) states: "No person shall make an offer to trade on a trading platform, unless the platform is run by a company that has a platform license or by whoever is allowed to run a trading platform without a license under the provisions of section 44DD".
 - c. Sections 53(b)(6a1) and 53(b)(6b) of the Law state that the management of a trading platform without a license contrary to the provisions of Section 44M and making an offer to trade on a trading platform contrary to the provisions of Section 44O constitute a criminal offense. Furthermore, according to item 9 in Part B and item 5 in Part C of the Seventh Schedule to the Law, these acts constitute an administrative breach.
3. In the explanatory notes to Section 44M of the bill, in the context of territoriality it states that **"the license will be required whether the platform performs its operations inside the borders of Israel, for example by having representation in Israel, clearing the transactions in Israel or installing hardware in Israel, or it is a foreign platform addressing the Israeli public, for example by having a user interface in Hebrew, advertising in Israel, making a direct contact with Israeli institutional bodies, etc."**
4. Thus, there are two prohibitions which criminal and administrative sanctions are determined alongside to them: one is a prohibition on the management of a trading platform in Israel without a license, and the other is a prohibition on offering to trade on a trading platform without a license. In discussions held by the Finance Committee in approving the Regulations, ISA staff clarified that the language of the Law and its

objective, as well as the explanatory notes to the Law, indicate that a platform addressing customers in Israel must be licensed under the Securities Law, even if it does not have representation in Israel and is not installing hardware in Israel. This is since the Law is aimed at protecting the public in Israel to which an offer is being made to engage in activities on a trading platform, and it makes no difference whether the source of the offer is a platform in Israel, a platform outside Israel, or an intermediary who directs the public to one of them.

5. The question before us is different: Is a trading platform managed entirely or partially in Israel, but that does not address customers in Israel and does not allow such customers access to activities on the platform, also subject to the application of the Law and will require a license and oversight in Israel?
6. **The staff position is that a platform addressing only customers outside Israel, which does not allow access to the platform by customers in Israel, is not subject to the application of the licensing obligation determined in Section 44(m) of the Law, even if it is wholly or partially managed in Israel. Following is a summary of the reasons for this:**
 - a. The purpose of Amendment 42 is to protect the public of investors in Israel, as opposed to investors in other countries, by placing comprehensive oversight of the trading platforms. The aim of the Law was not to protect investors in other countries (who enjoy the protection of the securities laws in those countries), and so is not meant to apply to trading platforms managed wholly or partially in Israel, but which address only investors outside Israel and do not allow access to investors in Israel. It goes without saying that once a trading platform is supervised in Israel, the supervision applies to all its activities, including those with foreign customers who have chosen to trade on it.
 - b. A similar purpose of the Securities Law can be found in connection with corporations offering securities to the public: Israeli corporations offering their securities only to the public outside Israel are not subject to the application of the Securities Law, whereas foreign corporations offering their securities to the public in Israel will be subject to the application of the Securities Law. The Law's application derives, therefore, from the identity of the public requiring protection, and a similar interpretation has previously been given by the ISA in connection with an offer of securities (following Amendment 20 to the Law).²
 - c. The explanatory notes to the bill are also consistent with that interpretation, in that they stress the component of addressing the public in Israel. If such an address is made, it makes no difference if only some of the platform's activities are carried out in Israel, or even if all of them, apart from the address to the public in Israel, are carried

² Section 15 of the Law prohibits an offer or sale of securities to the public, and the interpretation given to this prohibition is that it refers to the public in Israel.

- out outside Israel. On the other hand, if no address has been made to the public in Israel and it is prohibited from having access to the platform, it makes no difference if part of the activities (for example, the place of incorporation, or the company's offices) are in Israel.
- d. It should be noted that most of the trading platforms operate in the Internet world which in practice allows a trading platform's activities to be conducted in a certain place with the physical presence in the same place being marginal or with no physical presence at all. In light of this characteristic of the sector, there is an acute need for an interpretation that results in the protection of the public in Israel.
 - e. In view of this characteristic, and against the background of a risk that customers in Israel will be active on trading platforms managed wholly or partially in Israel, even if, allegedly, the address is intended for customers that are not in Israel, for the purposes of non-application of the Law (in other words, for the purposes of the conclusion that the platform's activities do not require a license in Israel) it is also a requirement that there will be no access to it by customers in Israel.
 - f. We would emphasize that a trading platform that does not have a license in Israel must avoid any presentation suggesting that its activities are ostensibly supervised in Israel.

For the removal of doubt, it should be clarified that Section 44M(a) of the Law also applies to a trading platform wholly or partially managed in Israel, even if its customers in Israel began their activities on the platform prior to the date of entry of the Law into force. If said trading platform engaged with customers in Israel prior to the entry of the Law into force, it must terminate the engagement and avoid addressing the same customers again in order to avoid the application of the Law.

B. The territorial application of Chapter seven "C" of the Law on trading platforms offering trading in binary options:

1. In March 2016, the ISA decided that it would not grant a platform license to companies offering their customers trading in binary options. This was after it reached the conclusion that customers were not being given a genuine opportunity to make a rational or economic analysis of trading in binary options on trading platforms. Therefore, the ISA asserted that trading platforms that give their customers the option of trading in binary options are used – in this context – as out and out gambling platforms. These activities have no added value for investors or the capital market, and as is the way with gambling, it is the cause of much damage.
2. However, in light of the fact that the licensing obligation determined in Section 44M(a) of the Law did not apply to platforms addressing customers outside Israel only, and which did not allow customers in Israel access to the platform, even if they were managed in Israel, such platforms were able to offer customers outside Israel to trade in binary

- options through them. This activity was damaging to many investors outside Israel, and led the ISA, the Ministry of Justice, and the Finance Ministry to promote Amendment 66.
3. The purpose of Amendment 66 was to establish an absolute prohibition on managing a trading platform in Israel that offers trading in binary options and on the making of an offer from Israel to trade on a platform that offers trading in binary options, whether the platform is addressing customers in Israel or is addressing customers outside Israel.
 4. In view of the aforesaid, in Amendment 66, prohibitions connected with trading in binary options were added to Chapter seven "C" of the Law and alongside them criminal and administrative sanctions. The prohibitions are enshrined in Sections 44L1, 44N1 and 44O(b) of the Law:
 - a. Section 44L1 of the Law states: "no person may offer trading on a trading platform of a financial instrument of a binary option type or trading in any other financial instrument of the type determined by the Minister of Finance at the suggestion of the ISA or in consultation with it and with the approval of the Knesset Finance Committee".
 - b. Section 44N1 of the Law states:
 - a) "No person may run a trading platform used only for clients outside Israel and offering trading in a financial instrument of the binary option type or any other financial instrument determined pursuant to section 44L1.
 - b) For the purposes of this section, "running a trading platform" – including any of the following:
 - 1) Taking strategic decisions for the trading platform;
 - 2) Operation of a trading platform with respect to a financial instrument as stated in sub clause (a), including operation of the computerized system with which the platform is run, pricing the financial instruments and their settlement or the settlement of the customer's funds, and operation of service or telephone or online marketing centers, whether directly or by a service provider".
 - c. Section 44O(b) of the Law states: "No person shall make an offer to trade on a trading platform used only for customers outside Israel, if a the trading platform is offering a financial instrument of the binary option type or any other financial instrument determined pursuant to section 44L1".
 - d. Sections 53(b)(6a), 53(b)(6a2) and 53(b)(6b) of the Law lay down criminal sanctions for a breach of the prohibitions. Moreover, according to item 9A in Part B of the Seventh Schedule in the Law and items 4A1 and 5A in part C of the Seventh Schedule, these acts constitute administrative breaches.

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