Counsel to Corporate Giants Warns: "Israeli high-tech will be harmed if Google and Facebook will be prevented from buying start-ups"

Attorney Yonatan Even, who regularly represents industry giants, warns against populist legislation: "Changes in antitrust laws in the U.S. are bound to influence the Israeli market" * "It's clear that the level of innovation in the tech sector will decline and entrepreneurs will turn elsewhere. At least in the short term, that cannot be good for Israeli high-tech."

By Ido Baum,
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The antitrust field has been the subject of recent headlines, with criticism mounting in Israel and worldwide of market concentration in general, and specifically of the control exercised by Internet platforms such as Google and Facebook over enormous databases that affect competition, privacy, and even the democratic process.

Last July, The American Federal Trade Commission, which oversees both antitrust enforcement and consumer protection, ordered Facebook to pay a fine of $5bn, mainly for violations of privacy laws. Although this fine may seem unprecedented, the FTC was harshly criticized by several Democratic presidential candidates, who are demanding that the big Internet platforms – Google, Facebook and Amazon – be broken up. According to them, the fine is nothing more than a slap on the social media giant's wrist.

"Unusually, the current interest in antitrust is coming from both sides of the political spectrum, from populists on the Republican right to the left-leaning branches of the Democratic Party," says Yonatan Even, a litigation partner and expert in antitrust law at the leading New York law firm Cravath, Swaine and Moore. Unsurprisingly, as someone who regularly represents some of the largest corporations in the world, Mr. Even is skeptical about the possibility that governmental intervention could curb the Internet giants' power.

"Every few years we see a public outcry – which often also receives political expression – against some entity that is perceived as having acquired a stable monopoly that will become permanent absent intervention by the antitrust enforcement agencies. In the U.S., over the years this outcry has been directed at the railway companies, then the oil companies, then retailers and supermarket chains, then

IBM, then Microsoft – and now Google and Facebook. Each case involves unique circumstances, but the phenomenon itself appears to be cyclical. The almost uniform political response in each of these cases was to expand and invigorate antitrust enforcement," says Even.

"No one knew how to read my resume"

Even grew up in Hofit, a small town in the Sharon area. He is the son of a retired brigadier-general who served as the IDF spokesman and military attaché to London. Even spent most of his childhood in Israel, with the exception of two years he spent with his family in London.

Even earned an LL.B. from Tel Aviv University and interned at the Danziger-Klagsbald law firm (Dr. Yoram Danziger, one of the firm's founders, was subsequently appointed a Supreme Court justice). The firm no longer exists, but Even says it was an excellent school for litigation ("I learned much from Dr. Klagsbald and from Sharon Kleinman about the handling of complex, strategic litigation"), and also introduced Even to antitrust.

After three years at the firm, with a 6-month-old baby in tow, Even and his wife decided to relocate to New York, where Even would continue his legal education. "My wife said that dreams can be realized should be realized. And so in 2003, I joined the LLM program at Columbia University, with the expectation that we'll spend two or three years in New York before we return to Israel. After I finished my LL.M., I decided to continue to a doctorate (a JSD), so I stayed at Columbia for two more years," he recounts.

He quickly revealed that law firms in the U.S. did not really know how to assess a doctorate student such as himself. Even's doctorate, which discusses the relationships between antitrust law and intellectual property laws, hardly helped him landing a job at a New York firm. "A doctorate in law is a degree pursued mainly by non-U.S. students who wish to join academia back in their home country. American firms don't look for doctoral students." Nonetheless, Even's advanced studies did ultimately prove relevant to a central client he has represented in recent years: Qualcomm.

"I received many rejection letters from multiple firms, who simply didn't know what to do with a resume like mine – a foreign doctorate student who insists on becoming a litigator. Ultimately I decided to stop sending my resume to recruiting departments and try a more direct approach. I knew that I wanted to focus my practice on antitrust, but also to practice litigation more broadly. I wrote an email to the late Bob Joffe, a litigator who at the time led Cravath's antitrust practice, explaining that the recruiting folks wouldn't know what to do with me, but that I'd like to work for Joffe himself."

Fortunately for Even, his email reached Joffe's Blackberry. "Within three minutes he replied saying he's intrigued and inviting me to come meet with him. That meeting led to a more formal job interview and ultimately a job offer."

The company that found itself in the middle of a trade war

Cravath is celebrating its bicentennial this year. Over the years it has maintained certain unique characteristics. For example, the firm has no "salaried partners," but rather all partners are equity partners; distribution of profits among the partners is done on the basis of a lockstep system, reflecting

tenure at the firm alone; the firm does not hire laterals, instead filling its associate ranks with top students recruited directly from law school; and the firm's partners, accordingly, are all promoted from within the firm. The result is a relatively small firm by New York standards (some 400 lawyers), with one central office, a collegial atmosphere and a genuine sense of partnership in fate, not just in revenues. "The firm's excellent reputation has been maintained over the years. That's how we manage to draw both outstanding lawyers and top-notch, established clients," says Even with unhidden pride.

Does the firm have a presence in Israel?

"The firm always had a presence in Israel, but in the past the Israeli market was relatively limited in terms of its size and its need for the legal services of top-tier American lawyers." For many years, the firm represented Orbotech, a publicly-traded Israeli company, including in its sale to chip giant KLA-Tencor in February of this year – a deal valued at $3.4 billion. In one prominent litigation, the firm represented Medinol in a lawsuit against Boston Scientific, where it secured hundreds of millions of dollars for Medinol in a decision that, according to Even, meant "life or death" for Medinol. "Today we have an Israeli desk," Even recounts, "and in the past year or two we've been very focused on the Israeli market. Partners from the firm arrive in Israel every three or four months, and we are cooperating with local law firms. We're advancing carefully, as our model is a little different than that of some larger foreign firms whose presence in the Israeli market is driven by a large volume of work with multiple Israeli start-ups. Our added value is in relatively large investment rounds, in IPOs, in mergers and acquisitions, and in strategic moves or disputes directed at the U.S. market."

Since joining the firm, Even gained experience in almost every type of complex litigation. "I worked on contract cases, securities and other class actions, all types of antitrust cases, as well as environmental cases and intellectual property cases. My main field of interest, however, is antitrust, and that is where my practice is focused." Even has represented and advised clients in private actions, regulatory investigations and antitrust enforcement actions brought by U.S. and foreign regulators. Even also represented clients in merger deals that require regulatory approval in the U.S. and other countries. In recent years Even has represented Delta Air Lines in its acquisition of 49% of Virgin Atlantic; the pharmaceuticals company Mylan in its defense against a hostile takeover bid by Teva, which involved also Israeli aspects; the Mexican brewer Modelo in its acquisition by beer giant ABI; ABI itself in its acquisition of SAB Miller; and Qualcomm in its attempt to acquire NXP, an automotive semiconductor manufacturer. Even also represented Qualcomm in regulatory investigations and litigation against U.S. and South Korean antitrust regulators, as well as in its global war against Apple, which ended in April.

Qualcomm is a U.S.-based, global semiconductor producer. Its size and power made the company the target of government investigations, as well as lawsuits filed by its business rivals. In the NXP deal signed at the end of 2016, Qualcomm tried to expand into the field of automotive semiconductor chips. Even handled the deal's regulatory approval in the U.S., which was no simple matter considering that in January 2017, the FTC – the regulatory body examining the merger – sued Qulacomm for monopolization. Despite the pending lawsuit, in April 2017 the deal was approved in the U.S. and subsequently in most other jurisdiction – except for China, which blocked the deal, leading to its abandonment in the summer of 2018.

In parallel, Qualcomm was sued by the FTC and Apple in January 2017. Seven Cravath partners, including Even, represented the company in these legal battles. The Apple dispute ended in a settlement that is widely considered a victory for Qualcomm – Apple paid $4.3 bn in past damages and signed a new license agreement with Qualcomm. The case against the FTC is on appeal, with oral argument likely to take place in February 2020.

Qualcomm attracted further headlines when it became entangled in the trade wars between the U.S. and China. In November 2017 Broadcom, another semiconductor company, attempted a hostile takeover of Qualcomm, committing to change the company's business model. Qualcomm objected to the takeover, and the deal was ultimately thwarted by U.S. President Donald Trump, who in March 2018 signed a presidential order to block the acquisition, citing national security concerns. The presidential order was based on a recommendation by the Committee on Foreign Investments in the United States (CFIUS), which found that Qualcomm is the global leader in developing 5G technology and that a change to its business model could harm innovation and undermine American leadership in this field. CFIUS raised concerns that the proposed takeover could allow Chinese companies – most notably Huawei – to take the lead in 5G innovation. "There's a real fear in the U.S. of China controlling crucial communications technology, and Qualcomm is the leader in this field," says Even.

"Enforcement comes at a price"

Regulation of tech giants is a central issue in the 2020 presidential race. The Democratic candidate Elizabeth Warren often criticizes Facebook and Google, advocating for the government to break them up. These ideas are gaining popularity, and public criticism of the concentration in the tech sector is mounting.

If there is a problem with the behavior of monopolies like Facebook or with the implications of mergers, why shouldn't antitrust law be expanded to deal with these problems?

"That's a possibility, of course. But the success of such expansion would depend on the ability of antitrust laws and antitrust enforcers to deal effectively with problems that are very different from the problems they currently address. The antitrust field is relatively narrow; for decades, it focused on promoting free competition in a free market. It's not at all clear that antitrust offers the best tool for dealing with Internet platforms that offer their services to users for free or in exchange for the collection of user data, or for dealing with challenges such as privacy, income inequality, environmental problems or unemployment. Every enforcement comes at a cost. Changes to U.S. antitrust laws are bound to affect the competitiveness of certain companies not only in the U.S. but globally – and would even affect the Israeli market."

How might changes to U.S. antitrust law affect the Israeli market?

"One of the proposals made in the U.S. is that platforms like Facebook and Google will not be allowed to acquire any applications that could, in hindsight, undermine the acquirer's monopoly."

Are you referring to the phenomenon whereby companies like Google and Facebook rush to buy young start-ups before they turn into a potential competitor?

"Today there are those who say that Google should never have been allowed to acquire Waze or YouTube and that Facebook should never have been allowed to acquire Instagram or WhatsApp, but that regulators don't understand the ramifications of such acquisitions and therefore we should categorically prohibit them. These proposals target not only major deals valued at billions, but even small acquisitions of nascent start-ups. One could argue about the wisdom of these proposals, but under these proposals one of the most important exit channels for hundreds of Israeli start-ups – acquisition by a foreign platform like Facebook, Google, Apple or Amazon – would disappear."

According to Even, the implications of such proposals are clear – fewer entrepreneurs would be attracted to certain hi tech sectors and venture capital funds would limit their investments in companies whose activity overlaps or complements the activity of tech platforms. "As a result, it's clear that the level of innovation in these technological areas would decline and entrepreneurs would turn elsewhere. Is this good for competition? That is unclear. But what is clear is that at least in the short term, that's really bad for Israeli high-tech."

You presume that only Google and Facebook will be prepared to buy these companies. Why wouldn't there be other investors?

"No doubt there are some products that have independent economic value, and some of those potentially could threaten a platform's dominance. Acquisitions of such products by a platform would likely raise competitive concerns, and these can be dealt with using the tools we have at our disposal today. The problem I am talking about arises from populist proposals calling for the adoption of stricter legislation that would ban acquisitions by Internet platforms completely, or at least would make them far more difficult. There are many good start-up companies for whom sale to an Internet platform is a completely legitimate exit strategy, and blocking this strategy is unjustified in my view – it will distort investment decisions and make the platforms worse for users. The central question that antitrust law – and antitrust enforcers – should ask about a proposed acquisition is: what is the rationale for the acquisition? Will the acquisition perpetuate dominance by erecting some barrier to entry, or will it simply allow the acquirer to offer a better product to its users post transaction? I understand the need for caution in this area, and undoubtedly a dominant Internet platforms should be required to provide regulators with satisfactory answers to this question. But an acquisition that perpetuates the dominance of Facebook simply by allowing Facebook to offer a better product to its users, is usually not an anti-competitive acquisition – in fact, I would argue it's an acquisition that reflects competition."

You appear skeptical of the effectiveness of antitrust laws to contend with the real challenges of this generation. If antitrust isn't a good tool for contending with the Internet giants, has it outlived its utility?

"In general, the answer is no. I don't think that antitrust laws have lost their relevance, and I also don't think that I'm skeptical of their effectiveness. What I am skeptical about is what you refer to as 'the real

challenges of this generation.' Typically, the central reason for companies' success is the development of a successful product. Google's search, Apple's iPhone, Facebook's social network, Netflix's streaming, Amazon's retail services – these are all excellent products. It's easy to undermine these tech giants' dominance by forcing them, through regulation, to offer less attractive – worse – products. But in my view, such solutions would be an inappropriate application of antitrust principles."

According to Even, the calculus is different when there is an expectation that the antitrust laws be used to solve problems that are not related to competition. "With respect to problems like unemployment, income inequality, privacy, environmental protection, or the influence of companies on the political sphere – I'm skeptical of the role of antitrust. The antitrust laws are usually not a suitable tool, and in fact, there will be situations where the solution to these separate problems will be anti-competitive. This does not mean that antitrust laws are irrelevant, or that we may not accept a solution that is detrimental to competition yet promotes other, competing values. But it seems to me that the solutions to these separate problems should be addressed in separate legislation, tailored specifically to address the problem at hand."

What do you think about the idea that personal data collected by Internet platforms will belong to the individual who's the source of the data, and not to whoever collected and aggregated the data? In other words, could changes to property laws be an acceptable solution?

"In most cases, antitrust laws do not require companies to help their competitors, including by sharing information with them. That's typically the case regardless of the ownership of the underlying data. So for example, even if the data that Google has collected about me would belong to me, Google still would have no obligation to share it with its competitors," Even explains.

According to him, in certain jurisdictions, antitrust laws recognize the duty of dominant firms to provide competitors with access to an "essential facility" that the dominant firm owns. In Israel, for example, communications infrastructure companies such as Bezeq and HOT are obligated to allow Internet providers to transfer data on their infrastructure.

"We could consider whether it would be appropriate, under certain circumstances, to recognize the data collected by an Internet platform as an "essential facility" that the platform must share with its competitors. But when we engage in this exercise, we have to ask ourselves how such a rule would impact the incentive of entrepreneurs and innovators to invest in a product whose value depends on the user data they collect. In other words, if Waze had to share its data with every other developer, would it have been developed in the first place? And if Google had to share the data it collects with its competitors, would it have invested as much in developing platforms such as Android?"