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Merger Control

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Israel

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Overview of merger control activity during the last 12 months

2013 seems to have seen a slight increase in the number of mergers notified to the Israeli Antitrust Authority ("the IAA"), after the substantial decline that followed the global economic crisis. While the average number of notifications in the years 2006 and 2007 was around 240, the number declined to 150-180 in the years 2008-2010, decreasing further to a record low of 136 merger notifications in 2012. This figure increased modestly in the year 2013, with around 162 new mergers filed (this figure is not precise since the exact numbers are currently unavailable).

During this time, the relevant filing thresholds did not change, which indicates that M&A activity in Israel has not fully recovered from the negative impacts of the global economic crisis. Another factor which presumably contributes to the relatively low number of notifications is that the market has grasped the more conservative approach of the current Antitrust General Director ("the General Director"), and thus more complex antitrust transactions are abandoned before reaching the formal filing stage.

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The Israeli Restrictive Trade Practices Law ("the Antitrust Law") provides a general procedural framework which applies to all mergers. The investigatory process is not formally divided into phases and all mergers must be reviewed by the General Director up to 30 days from the date the merger notifications were filed. The term may be extended by the Antitrust Tribunal or by consent of the merging parties. If the General Director does not render a decision within the prescribed time period, consent to the merger is deemed to have been given.

In 2012, 84% of the General Director's decisions were rendered within the 30-day period and in 16% of the mergers, the term was extended. These figures have remained stable in recent years. The data for 2013 is not yet available, but is estimated to be in proximity to past practice.

While the Antitrust Law provides a general procedural framework which applies to all mergers, in practice, the IAA screens merger notifications upon filing and classifies them into one of the following three categories: "green" (clearly benign mergers); "yellow" (mergers that merit a more detailed analysis); and "red" (mergers that are seemingly anticompetitive).

In 2012, 88.6% of the mergers were labelled "green" and were cleared within three weeks on average; 7.6% of the mergers were labelled "yellow", with decisions being issued within two months on average; and 3.8% of the mergers were labelled "red" and were decided within three months on average. The statistics for 2013 have not yet been published. However, there is a clear tendency of the IAA to seek more information for mergers labelled "yellow", and we expect an increase in the average review time of mergers labelled "green", as well.

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According to the Antitrust Law, the General Director has the power to either approve the transaction, block the transaction (if there is a reasonable likelihood that the merger will significantly harm competition in a relevant market), or approve the transaction subject to conditions (if such conditions can eliminate the harm to competition). Of the 162 mergers regarding which the IAA issued a decision in 2013:

- 93.82% of the mergers were cleared without conditions.
- 4.94% of the mergers were approved with conditions.
- 1.23% of the mergers were blocked by the General Director. It is currently unknown the number of transactions that were withdrawn by the parties before a decision was rendered.

An analysis of the IAA's track record during the last decade shows that the relative share of mergers that are blocked is stable, ranging from 0% to 2% at most, with another 1%-3% of the notifications withdrawn. These figures jumped sharply in 2012 with nearly 10% of the mergers blocked or withdrawn, dropping back to the average numbers in 2013. This drop is mainly explained by the market's perception that complex mergers are unlikely to survive the General Director's scrutiny.

On the other hand, there is an evident decrease in the use of remedies by the IAA. While in the years 2000-2005 approximately 18% of the merger decisions included remedies, the number decreased to only 6%-8% in recent years, with 2011 posting the lowest share ever for such decisions (2.6%). Although the number increased to 4.5% in 2012 and further slightly increased to 4.94% in 2013, it is still lower than the average in the previous decade. The decline in use of remedies is in line with the IAA's new guidance on remedies – see "Key policy developments" below. However, in contrast to the IAA's proclaimed policy, which prefers structural remedies, 2013 witnessed an increase in the use of behavioural remedies.

New developments in jurisdictional assessment and procedure

The main policy document regarding merger procedure has remained the "**Antitrust General Director's Pre-merger Filing Guidelines**" published in 2008 ("the Pre-merger Guidelines"). The IAA recently had a chance to elaborate on one of the issues addressed by the Pre-merger Guidelines. In 2012, the IAA blocked a transaction between Isrotel Ltd., a major hotels operator in Israel's southern city Eilat, and Laxan Israel Ltd., which owns a hotel in Eilat. The parties agreed that Isrotel would manage Laxan's hotel for a period of 10.5 years with an option to extend the period twice, for five years each time. In addition, Isrotel was granted the option to purchase 25% of the hotel. The parties argued that such an agreement does not fall under the definition of "merger transaction", since the management period is not indefinite. In 2012, the General Director blocked the merger and rejected the parties' claims that the transaction was not subject to merger control supervision. Citing the pre-merger guidelines, the General Director stated that any transaction that confers control over important competitive parameters of the services rendered by one firm (such as the quality of service and the infrastructure of a hotel) in the hands of another firm, might be deemed a merger. The length of the management agreement is yet another factor to be considered, but it does not need to be indefinite. In the case of Laxan and Isrotel, the General Director held that the agreement between the parties was a long-term agreement, which conferred a degree of control commonly attributed to mergers.

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An important development in the area of merger enforcement was the July 2012 publication of the IAA's Guidelines Regarding the Use of Enforcement Procedures of Monetary Payments, which stated that the illegal execution of non-horizontal mergers would normally result in a monetary sanction (an administrative tool), rather than criminal penalties, which could also be applied under the law. Illegal horizontal arrangements are still subject to criminal enforcement.

Recently, the IAA entered a consent decree with parties that allegedly breached the mandatory filing regime. While the IAA found no competitive issues with the merger, the parties were nonetheless required to pay 400,000 NIS (around US$120,000).

In January 2013, the IAA announced that it would allow electronic filing of merger notifications, in order to make the filing process more efficient. Moreover, public companies would no longer be required to submit financial reports and prospectuses as part of their merger notifications.

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The General Director's decisions in merger cases are subject to judicial review by the Antitrust Tribunal.

Granted that the General Director consents to a merger application, whether conditionally or unconditionally, any person who may be harmed by the merger, a trade association, as well as any consumers' association, may appeal to the Antitrust Tribunal against the General Director's decision. In the event that the General Director blocks a merger or stipulates conditions to his consent, each of the merging companies may appeal to the Antitrust Tribunal.

Section 22(c) of the Antitrust Law grants the Antitrust Tribunal the power to approve, revoke or amend the General Director's decisions. This section was traditionally interpreted by courts starting from the Tnuva case (CA 2247/95 **General Director v. Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd. (1995)**) as giving the Antitrust Tribunal a right to hold a *de novo* judicial review, unbound by the analysis, factual findings or legal interpretations of the General Director. This interpretation was later narrowed in a line of decisions rendered by the Antitrust Tribunal and Supreme Court.

In **Antitrust Authority v. Dor Alon Energy Israel (1998) Ltd,** the Supreme Court disagreed with the Antitrust Tribunal's stand that since the Tribunal's review was *de novo* there was no significant weight to the conclusions reached by the General Director at the administrative level. While the Supreme Court did recognise the *de novo* review of the Tribunal, it decided that the General Director's decision should form the basis and starting point for the Tribunal's review, which should also take into account the knowledge, expertise and experience of the Antitrust Authority's personnel who are highly professional specialists in various fields including law and economics. Therefore, the Antitrust Tribunal should attribute special importance to the General Director's professional opinion. The Antitrust Tribunal can indeed deviate from the General Director's decision but it should not review the case as if it were a new proceeding absent of a General Director's opinion.

In AT 36014-12-10 **Caniel Packaging Industries Ltd. v. The General Director** (2011), the Antitrust Tribunal mentioned the Supreme Court decision in Dor Alon and clarified that it was not the Supreme Court's intention to narrow the scope of the Tribunal's judicial review over the decisions of the General Director to a purely administrative standard of review (which is more focused on the decision-making process rather than the merits). However, the Tribunal explained that the Dor Alon decision prevents an appeal process which is not directly linked to the original decision. Moreover, the Antitrust Tribunal stated that the Dor Alon decision may have influence over which party carries the burden of proof, although the issue was left undecided and for that specific case (Caniel) the burden of proof was placed on the General Director.

In addition to raising the bar for successful challenges of the General Director's merger decisions, the judicial review is fairly limited in its applicability for practical reasons. Normally such appeal proceedings span between two to four years. Merger transactions are normally carried out relatively swiftly and parties are usually unwilling to freeze their business development plans for years, waiting in uncertainty for a court decision. Therefore, merger parties who are informed by the General Director that he will object to their merger, often withdraw their application before the General Director grants his final and public decision.

A recent Antitrust Tribunal decision took another step towards minimising the judicial review over the General Director's merger decisions. In AT 29767-12-12 **Azrieli Group v. Antitrust Authority** (2013), a party to the merger (the seller) notified the Israeli Stock Exchange that the merger agreement expired since the General Director did not approve the merger. Furthermore, the seller did not join the appeal filed by the buyer to the Antitrust Tribunal. The Antitrust Tribunal decided that given that the merger agreement expired, the appeal was theoretical and was therefore dismissed. This decision further limits merger parties' ability to appeal against the General Director's merger decisions, since rarely can parties sustain their merger agreements during the very lengthy antitrust litigation. Therefore, the already negligible number of appeals on the General Director's merger decisions may be further diminished. Azrieli (the purchaser) appealed against the Antitrust Tribunal's decision and is now awaiting the Supreme Court's decision.

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Section 30(a) of the Administrative Courts Law, 5752-1992 (the "Administrative Courts Law"), establishes the basic principle regarding a potential petitioner's right to review and copy documents used by a public authority in the process of rendering a decision. This principle constitutes the source of an appellant's right to view those documents held by the General Director relating to the decision under appeal. A party wishing to deviate from this rule bears the burden of proving that there is a valid ground for claiming that it is privileged. Once such a ground has been proven, the appellant's review regarding these materials may be restricted, but only to the most minimal degree that is required.

Section 30(b) of the Administrative Courts Law specifies several types of privileges. This is the case, for example, when the documents have no relevance to the appealed decision;

when the documents contain trade secrets; when the documents contain internal information such as minutes of meetings or decision drafts; or when disclosing the documents might infringe a right or a personal matter of a third party. Nevertheless, in accordance with the general principle that the file should be accessible to the appellant, the Section provides that reserving the right to review is allowed "provided that review is not prevented for the reasons listed in this sub-section more than is required due to that reason".

In general, the Supreme Court held in CA 4524/01 **Ma'ariv Hotza'at Modi'in Ltd. v. the Antitrust General Director** [2003] IsrSC 57(4) 521 that an appellant's interest in viewing the public authority's documents on which the decision in his case is based and the public interest in the "conduct of an exhaustive, just and complete process", will prevail over the interest of those seeking to claim privilege in the preservation of their trade secrets. This is particularly true when it is possible to reduce potential harm regarding trade secrets by having privileged documents be disclosed only to counsel (see also the decision of the Antitrust Tribunal regarding the same matter in AT (Jerusalem) 1/99 **Yediot Ahronot Ltd. v. Antitrust General Director** (decision dated 23 April 2001)).

However, it seems that in recent years this balance has shifted towards protecting the interests of third parties who seek to prevent the exposure of sensitive information, at the expense of appellants' ability to process and analyse the information contained in the IAA's documents. On several occasions, review of certain documents was completely denied. Other documents were accessed by a restricted number of counsels and experts and only in a location allocated for this purpose in the IAA's offices, subject to severe confidentiality undertakings. This trend further diminishes the ability of parties to contest the General Director's decisions.

Key industry sectors reviewed, and approach adopted, to market definition, barriers to entry, nature of international competition, etc.

In recent years, it seems that the General Director has been applying a stricter policy in the retail sector, among other things, by blocking mergers and taking pro-active steps. Thus, in 2011 the General Director conditioned the merger between two large companies that own shopping malls , Melisron Group and British Israel, which would have created Israel's largest shopping mall entity. The merger was conditioned on the divestiture of several shopping malls to a third party.

In 2012, Azrieli Group withdrew its merger notification regarding the purchase of "Ir Yamim" shopping centre, in light of the competitive concerns raised by the General Director. At the end of 2012, the General Director blocked the proposed acquisition of the "One Plaza" shopping centre in Beer-Sheva by Azrieli Group. An appeal to the Antitrust Tribunal was dismissed as theoretical, since the merger agreement was terminated and the case is currently pending in the Supreme Court.

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The high-tech sector has also been gaining increasing attention from the IAA. In recent years, numerous Israeli startup companies were acquired by foreign companies. For reasons related to the fact that most acquisitions were made by foreign firms that lack sufficient Israeli nexus, as well as the fact that most startup companies do not meet the filing thresholds, normally no filings were made in these cases. Notwithstanding, the General

Director is not blind to these acquisitions of Israeli companies and their potential effect on local competition. In a recent merger between an Israeli medical technology company and a large foreign firm, the Antitrust Authority undertook an in-depth review of the case and its effects on the Israeli market. Additionally, in the recent sale of the navigation startup Waze to Google, the General Director took a proactive approach, inquiring with the merging parties as to why they did not file the transaction for approval – an irregular action for this kind of transaction.

Key economic appraisal techniques applied

The substantive test under section 21(a) of the Antitrust Law is "reasonable likelihood that, as a result of the proposed merger, competition in the relevant market may be significantly harmed or that the public would be injured".

In assessing the possible competitive outcome of a merger, the IAA usually applies the same methodology that the relevant US and EC authorities use. The IAA would normally define the relevant market and then, if necessary, assess the relevant market shares of the parties, the existence of barriers to entry and expansion in the market, as well as other economic factors which may indicate how likely it is that the merger would result in either unilateral or coordinated effects.

The definition of the relevant market is mostly based on qualitative evidence, usually obtained by conversations with the merging parties and other market participants, internal documents, surveys, public records, information from other governmental agencies, and much more. In cases where the qualitative analysis is not sufficiently informative, the IAA may seek to strengthen it with quantitative analysis (critical loss analysis, price correlations, etc.).

The IAA increased the use of econometric analysis in recent years, but the analysis is still fundamentally qualitative. The IAA attributes special importance in merger investigations to direct evidence, such as natural experiments, internal documents, and market surveys.

In 2011, the IAA published the "**Guidelines for Competitive Analysis of Horizontal Mergers**" which describe the theoretical economic and legal foundations upon which the IAA's merger review is based.

According to these guidelines, the core purpose of merger review is to prevent the creation or enhancement of market power. The guidelines further explain that such market power can be exercised either unilaterally ("merger to monopoly") or collectively. Moreover, the guidelines explain that, in order to assess the competitive effects of a contemplated merger, the following steps will be carried out:

First, the IAA will identify the relevant product and geographical markets in which the merging companies operate. The definition of the relevant market is based on the hypothetical monopolist test, which is implemented using practical indices such as differences in the functional use of the products, price differences, price correlation, the perspectives of market participants, differences in quality etc.

Second, the IAA will identify the players in the market, their market shares, and the level of concentration before and after the merger.

The guidelines stress that the merger investigation does not rest solely on static analysis. Therefore, when the initial assessment yields that the merger raises significant concerns, the IAA will enter a more detailed analysis of the "dynamic aspects", i.e. the possibility that the new entry or expansion of existing players in the market will mitigate the immediate and potentially harmful effects of the merger.

The analysis of entry and expansion will focus on a variety of entry and switching barriers, including regulatory barriers, scale economics, network effects, strategic behaviour by incumbent firms, branding, access to essential inputs, and much more.

If the analysis results in a conclusion that the merger is anticompetitive, the IAA will examine whether there are available remedies that can eliminate the potential harm to competition.

If such remedies are unavailable, the IAA will block the merger, unless one of the following rare situations is proven by the parties:

- **Efficiency defence** – If the IAA is convinced that there are efficiencies directly resulting from the merger that outweigh the potential harm to competition, the merger will be approved. In order to enjoy the efficiency defence, one must meet certain conditions: (a) the efficiency must be merger-specific, in the sense that the parties cannot obtain similar efficiencies in any other way; and (b) the efficiency must be significant, timely and such that the benefits will mostly be passed on to the consumers and outweigh the harm inflicted on them by the loss of competition.
- **The failing firm doctrine** – This doctrine refers to situations by which the acquired entity is financially unsustainable and will likely exit the market, even absent the merger. In such cases there is no causal link between the merger and the injury to competition. In 2010, the IAA published guidelines detailing the legal basis and the practical requirements to meet the defence (see "Key policy developments").

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

As aforementioned, the merger control procedure in Israel does not have a formal classification method. However, it is not uncommon for parties seeking swift approval for complicated mergers to offer upfront remedies, attempting to expedite the review process. An excellent example for such an approach is the Bezeq-012smile merger mentioned above.

In that case, the parties identified several overlapping areas which were seemingly meaningful and would possibly have required a lengthy review. In order to avoid such lengthy proceedings, the parties suggested divestment of the overlapping activities at the outset.

However, it is more common that remedies are discussed only if the IAA reaches a tentative conclusion that the proposed merger may significantly lessen competition in the market. In such cases, the parties may propose remedies that will eliminate the harm to competition or, alternatively, the IAA may stipulate the conditions that are required in order to have the merger approved, and these can then be discussed with the parties.

In 2011, the IAA issued guidelines for merger remedies detailing key principles of its remedies policy – see "Key policy developments" below. In a nutshell, the new guidelines express a preference for structural remedies over behavioural remedies. Interestingly, the clear majority of remedies imposed until 2011 were behavioural, while in 2011 most cases involved structural remedies. In 2013, however, the majority of remedies used by the IAA were behavioural remedies.

Key policy developments

In 2011 the IAA has published several key policy documents in the area of mergers.

The first policy document is "**Guidelines for Competitive Analysis of Horizontal Mergers**", which describes the method the IAA will use to analyse the competitive effects of horizontal mergers on competition (see detailed explanation in "Key economic appraisal techniques applied" above).

The second policy document is "**Guidelines on Remedies for Mergers that Raise a Reasonable Concern for Significant Harm to Competition**".

The document outlines the governing legal principles of merger remedies, two of which stand out: (a) the IAA is authorised to request remedies only if the merger, as it was originally proposed, presents a concrete danger that competition will be significantly harmed. In other words, the IAA may impose conditions only for mergers that it can otherwise block; and (b) remedies are preferable whenever they are capable of mitigating the harm to competition.

The guidelines explain that the decision if and what sort of remedies are suitable in a particular case is based on the specific circumstances. The following considerations serve an important role in such analysis:

- The theory of harm to competition, harm which the remedies aim to prevent. Different theories of harm will likely require different solutions. For instance, a remedy which may be optimal to eliminate potential vertical issues may not help in solving a significant horizontal overlap.
- How effective is the remedy? From a set of different remedies, the IAA will prefer the most effective. The IAA further explains that the more difficult it is to effectively address the potential harm to competition, the more likely it is to block a merger altogether. Such situations may arise when the injury to competition can manifest in many and often unpredictable ways.
- The ability to enforce the remedy and to monitor deviations of the parties from such remedy. The IAA will generally prefer remedies that are easy to enforce and require less monitoring.
- The resources required for such enforcement and monitoring.
- The remedy duration. In general, the IAA will prefer remedies that are attainable in a single shot or within a definite time frame over remedies that are more prolonged.
- The ability of the merging parties to comply with the remedy. The IAA will verify if it is sufficiently probable that the merging parties will be able to comply with the imposed remedy. The IAA will tend not to impose remedies whose execution depends on the actions of their parties (for example, if a third party's approval is needed to execute the remedy).

The guidelines demonstrate that given such considerations, the IAA will generally prefer structural remedies over behavioural remedies. The IAA alleges that structural remedies are generally more effective as they deal with the proverbial disease rather than the symptoms. Moreover, they do not require complex and constant monitoring, demand fewer public resources and are executed within a defined and often brief time period. However, the IAA acknowledges that in certain instances behavioural remedies, or a mix of behavioural and structural remedies, would be more appropriate.

In 2010, the IAA published another policy document, "**Guidelines Regarding the Failing Firm's Doctrine**". The guidelines explain that when a firm is insolvent and will likely exit the market regardless of the merger, there is no causal link between the merger and the competitive harm that will follow its execution. In order for the defence to apply to the failing firm, the following conditions must be met: (a) the firm's chances to survive as an independent player in the market (including through debt restructuring and similar proceedings) are very slim; (b) there is no alternative buyer to whom the sale of the company is less anticompetitive; and (c) the merger is better, from a competition standpoint, than letting the firm exit the market. While the IAA rarely acknowledges the failing firm doctrine, several mergers were approved under this doctrine throughout the years.

As abovementioned, 2012 seems to have marked a change in the direction of the IAA's approach towards applying stricter criteria to proposed mergers. This impression was supported by the unprecedented number of blocked mergers and withdrawals of merger notifications in that year. Further insights can be gathered based on explicit remarks made by the General Director, Prof. Gilo, such as those made in the 2012 and 2013 annual IAA conferences. These statements demonstrate that the IAA does not only intend to block mergers that significantly harm competition, but also mergers in markets leaning towards higher concentration, as well as mergers which raise less concrete concerns for diminished competition, whether actual or potential. The notion that the policy has changed seems to explain the lower number of transactions blocked in 2013, as complex transactions are terminated at the drawing board.

In 2013, the IAA has published the draft "Guidelines Regarding Information Exchange in the Course of Due Diligence Prior to a Transaction Between Competitors". The draft guidelines provide theoretical principles and a procedural framework for conducting due diligence in transactions that require the transfer of sensitive information. While the draft guidelines characterise certain types of competitively sensitive information and suggest ways to transfer such data legally, they confer the ultimate discretion regarding the due diligence process and the potential liability that comes with it to the merging parties.

The draft guidelines apply only to transactions conducted between competitors. However, the guidelines define the term "competitors" broadly, thus the provisions of the draft guidelines and the attached limitations apply to a wide variety of transactions, in some cases including transactions in which the due diligence process raises no competitive issues.

The premise of the draft guidelines which is economically and empirically controversial is that, in general, parties' uncertainty as to market conditions and their competitors' capabilities and plans contributes to competition; hence, any reduction in uncertainty can harm competition. Accordingly, the draft guidelines define "competitively sensitive information" very broadly.

The General Director does not establish a sweeping categorical rule regarding the exchange of such information, and presumably there are certain circumstances in which the exchange of such information would not pose a real competitive hazard.

The draft guidelines present a number of rules for due diligence that are aimed at minimising harm to competition in a manner that is consistent with the Antitrust Law, such as the identification of competitively sensitive information, the evaluation of the necessity of information disclosure, the disclosure of information subject to a confidentiality undertaking, and the external review or review by employees who are not involved in pricing, marketing, and sales in the field in which there is a competitive overlap and documentation requirements. Furthermore, a preference should be displayed for aggregate, outdated and non-concrete information.

Reform proposals

There have been no reform proposals in Israel in 2012/2013 in the field of mergers.

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David's practice includes the representation of many leading multinational and Israeli clients in a large variety of industries.
During his time as a General Director (1997-2001), the IAA trebled in size and much of the foundation for Israel's competition law and enforcement policies was laid. As General Director, David introduced the IAA to the competition committee of the OECD, which has since included the IAA as an observant.
In the past, David was a senior partner at Caspi & Co., a leading Israeli firm; a member of the Antitrust Court and a corporate attorney with the New York law firm of Wachtell, Lipton, Rosen & Katz (1988-1993).

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Prior to joining Tadmor & Co., Shai practised law at the legal department of the IAA (2002-2007), where he was in charge of different sectors including the food sector, retailing and IP. He was later appointed as the head of the IAA's mergers team. During his term at the IAA, Shai drafted several key policy documents, including the "Antitrust General Director's premerger filing guidelines" and the "Antitrust General Director's Position on Commercial Arrangements Between Suppliers and Large Retail Chains". Shai has unique expertise and vast experience in merger control issues and, in particular, in cross-border transactions.

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