GLOBAL LEGAL INSIGHTS

Merger Control

Second Edition

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Overview of merger control activity during the last 12 months

The decline in the number of mergers notified to the Israeli Antitrust Authority ("the IAA") following the global economic crisis continued in 2012. While the average number of notifications in the years 2006-2007 was around 240, the number declined to 181 in 2008, 160 in 2009, and in 2010 only 153 new notifications were made. While in 2011 there was an increase in the number of merger filings to 195 merger notifications, in 2012 the number declined significantly to a record low of around 135 (the exact number could be closer to 140 notifications since the number of merger notifications which were withdrawn by the parties is yet to be available).

During this time, the relevant filing thresholds have not changed, which indicates that the M&A activity in Israel has not yet recovered from the negative impact of the global economic crisis. Another explanation could be that the market is starting to grasp the more conservative approach of the new General Director. Parties to transactions that are more complicated from an antitrust perspective abandon them before they reach the formal filing stage.

* * *

The Israeli Restrictive Trade Practices Law ("the Antitrust Law") sets a general procedural framework which applies to all mergers. There is no formal division of the investigatory process into different 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 2011, 85% of the mergers were decided within the 30-day period and in 15% of the mergers, the period was extended. These figures have been stable in recent years.

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

In 2011, 85.9% of the mergers were labelled "green" and were cleared within two weeks on average; 9.95% of the mergers were labelled "yellow", with decisions being issued within two months on average; and 4.2% of the mergers were labelled "red" and were decided within three months on average. The parallel data for 2012 is not public yet, but we expect the average time for merger review to be extended, in light of the General Director's tendency to apply stricter policy towards mergers, as well as an increase in the amount of data that the IAA seeks as part of its merger investigations.

* * *

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 134 mergers regarding which the IAA issued a decision in 2012:

- 92.5% of the mergers were cleared without conditions.
- 4.5% of the mergers were approved with conditions.
- 3% of the mergers were blocked by the General Director. An estimated 4%-6% of the transactions were withdrawn by the parties before any decision was given, mainly because the IAA indicated that it is likely to block the deal.

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%-2% at most, with another 1%-3% of the notifications withdrawn. The higher percentage of mergers that were blocked or withdrawn in 2012 (more than twice the average number in the past decade) seems to mark the beginning of a new hawkish approach towards mergers by the General Director. It thus appears that the appointment of the new General Director, Prof. David Gilo, had a substantial influence on the IAA's merger control policy.

On the other hand, there is an evident decrease in the use of remedies by the IAA. While in the years 2000-2005 around 18% of the merger decisions included remedies, the number decreased to only 6%-8% in the last years, with 2011 posting the lowest share ever for such decisions (2.6%). Although the number increased to 4.5% in 2012, it is still lower than the number prevailing during the last decade. The decline in use of remedies, especially behavioural remedies, is in line with the new IAA's guidance on remedies – see "Key policy developments" below.

New developments in jurisdictional assessment or procedure

The main policy document in the area of merger procedure has remained the **"Antitrust Commissioner'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 the 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 will manage Laxan's hotel for a period of 10.5 years with an option to extend the period twice, for 5 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. The General Director blocked the merger, and rejected the parties' claims that the transaction was not subject to the 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 as 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 the type of control that is normally attributed to mergers.

With a very limited number of cases that are brought each year before the Antitrust Court, merger procedure was pretty much shaped by the IAA and only rarely was the IAA's practice contested in court. In recent years, the IAA's practice was twice contested in an area which had long awaited judicial guidance – the nature and scope of the IAA's duty to reason its decisions in the field of mergers.

It has been the IAA's position for many years that when it approves a merger (with or without conditions), it is only required to provide the "bottom line". According to the IAA, it is required to provide a reasoned opinion only if it blocks a merger.

This position of the IAA is not clear of doubts. Under the Law for Administrative Procedure (Decisions and Reasons) 1958 (the "Reasoning Law"), a governmental authority which refuses to exercise its authority, must provide the applicant with the reasons for its decision.

The IAA's practice was first contested a few years ago in AT 515/04 **Cellcom Israel Ltd. V. The**

General Director (2005). In Cellcom, the IAA approved a transaction by which Bezeq, Israel's leading telecom firm, increased its share in Pelephone (one of three Israeli mobile carriers) from 50% to 100%. Cellcom, another mobile carrier, appealed the approval before the Antitrust Court requesting, among other things, that the IAA will reason its decision to ignore Cellcom's plea to block the merger or impose conditions upon it.

The Court ruled that it will be unnecessary and impractical to impose on the IAA a duty to reason every merger decision. The Court further explained that the Reasoning Law did not apply – at least not directly – on a refusal by the IAA to block a merger at the request of a third party. The Antitrust Court implied that the outcome may have been different had it been the merging parties that requested the IAA to reason its decision. The Court explained that in such a case the Reasoning Law would seem to apply, since a conditional approval generally means that the original request of the merging parties was effectively denied.

In 2010, the IAA's practice was once again contested - this time by a merging party. In AT 803/08 **Teraflex Compounds (1994) Ltd V. The General Director** (2010), the IAA approved a merger between Israel's sole manufacturers of PVC mixture: Teraflex and Kafrit. The decision was subject to conditions, one of which was the mandatory licensing of IP rights to interested third parties. Teraflex, the buyer in this transaction, preferred to waive the transaction in light of these conditions, but it was contractually compelled to complete the transaction and thus appealed the decision seeking – rather oddly – that the Antitrust Court will block the merger altogether.

Teraflex argued, among other things, that the IAA was legally required to issue a reasoned decision explaining why such conditions were imposed and why were they preferred over an outright objection to the merger (which would have allowed Teraflex to terminate the merger agreement).

The Court upheld the General Director's decision, stating it was based on solid economic and legal grounds. The Court further stated that the IAA's position was elaborately explained to Teraflex in an oral hearing which was held prior to the issuance of a formal decision. In these circumstances, the Court found the IAA's position reasonable and valid. The Court did not analyse the IAA's position in light of the Reasoning Law, which requires the relevant authority to explain its position in writing. It seems that the Court adopted a restrained approach, leaving the IAA broad discretion in shaping merger procedure, as long as its actions do not seem to cause grave injustice. The Antitrust Court's ruling was upheld by the Supreme Court in 2012, though the Supreme Court's decision addressed other issues.

A different and more critical approach was adopted by the Antitrust Court in an interim decision in AT 36014-12-10 **Kniel Packaging Industries Ltd. V. The General Director** (2011). This decision contested a different practice of the IAA, which was to first "stop the clock" with an unreasoned objection to the merger, which is followed by a reasoned opinion only after several weeks have passed. Naturally, this practice made it more difficult for the merging parties to launch a timely appeal on the IAA's decision to block a merger, which many times meant abandoning the merger altogether.

In *Kniel*, the IAA issued an unreasoned decision after four-and-a-half months of investigation, stating that it will need an additional 45 days to issue the reasoned decision. Kniel appealed to the Court and, although the request was denied for technical reasons, the Court criticised the IAA, stating that it is expected to render reasoned decisions in an expedite manner, especially when it investigates mergers for such a prolonged period. The decision sent a clear message that the Court has the power to exert judicial review on administrative and procedural decisions of the IAA and that it will not hesitate to intervene when it deems it appropriate. In its final ruling in *Kniel*, given in 2012, the Court addressed another important issue in which there is a pressing need for clarity – the burden of proof in an appeal on the General Director's objection to a merger. The Israeli Supreme Court expressed in the past contradicting opinions in this respect (these were made as *obiter dictum*). The Antitrust Court in *Kniel* assumed that the burden of proof lies with the General Director. Only once the General Director established a reasonable likelihood for significant lessening of competition does the burden shift to the merging parties to prove a defence (such as efficiency defence, failing firm, etc.).

* * *

The Antitrust Law sets a mandatory filing regime, which is enforced by the IAA. A breach of the mandatory filing requirement is a criminal offence and a source of potential civil liability. The likely impact of the transaction on competition may have some weight with the IAA, when it determines the type of enforcement actions that will be launched against the merging parties.

An important development in the area of merger enforcement was the publication, in July 2012, 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 be sanctioned by a monetary payment (an administrative tool), rather than the criminal penalties, which legally could be applied. Illegal horizontal arrangements are still subject to criminal enforcement.

In 2011, the IAA entered a consent decree with Station Holdings Ltd. and The New Tel-Aviv Bus Terminal Co. Ltd., who allegedly breached the mandatory filing regime. While the IAA found no competitive issues with the merger, the parties were required to pay 400,000 NIS (around US$120,000)

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

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

In 2012, the food sector took, once again, centre stage of the IAA's attention, following the social unrest that erupted in 2011. In 2012, the IAA promoted legislative initiatives aimed at restricting large suppliers and retail chains. The IAA approved several mergers in the food sector, but required the merging parties to divest branches in locations where it considered that competition might be harmed. For example, the IAA approved the sale of "Maman" discount chain to Israel's second-largest retail chain, "Mega", subject to divestiture in two cities where the IAA thought there was a threat of harm to competition. In December 2012, the IAA approved a major retail merger between "Bitan Wines" heavy discount chain and "Almost Free" heavy discount chain, creating Israel's third-largest retailer, subject to an obligation to sell a branch in one of the overlapping locations.

2010 and 2011 were very busy years for the IAA in the telecommunications sector. The IAA contributed to several governmental reforms initiated by the Ministry of Telecommunications, mainly in the cellular market, such as the bids to introduce two additional MNOs (currently Israel has three), facilitating entry of MVNOs, and changes in the interconnection fees between mobile carriers.

These regulatory changes were accompanied by significant structural changes in the market and the gradual formation of four telecommunications groups. These changes were brought about by the aspiration of local telecoms to become a 'one stop shop' for all their customers' needs. This desire was accomplished in two principal ways: natural growth of incumbent players to new or adjacent markets; and mergers between firms with activities in complementary telecom markets.

The IAA was somewhat hesitant about the effects of such structural changes. The theory of harm which the IAA explored was that, over time, it will become difficult for smaller firms, operating only in one market, to compete with the "full line service" of the telecom groups. If that were the case, the number of players in the telecom markets will decrease over time, with only the four groups remaining. The barriers to entry will then become significant, since any newcomer would need to enter, simultaneously, into several markets. According to this theory, once they are shielded from outside entry, the four telecom groups would have both the incentive and the ability to adopt parallel pricing behaviour.

A review of the IAA's track record on telecom mergers shows that merging parties were allowed to combine their operations in complementary markets and to form telecom groups that are capable of providing a full line telecom service to their customers. This may indicate that the IAA could not have sufficiently established the theory of harm presented above. Instead, the IAA focused on a traditional antitrust analysis, dealing with concrete horizontal (and, to a lesser extent, vertical) overlaps.

The IAA's approach is best illustrated by two major telecom mergers: the acquisition of "Bezeq" the Israeli Telecom Corporation Ltd by 012 Smile Telecom Ltd; and the acquisition of 012 Smile Communications Ltd by Partner Communications Ltd.

In 2010, the IAA approved the acquisition of Bezeq, a proclaimed monopoly in several telecom markets, by 012 Smile, which was mainly active in the ISP and the international calls services market. The merger was approved after 012 Smile's overlapping activities were divested. The IAA did not seek to prevent the combination of complementary services or non-significant horizontal and vertical overlaps between the parties.

In 2011, a merger between Partner and 012 Smile, which formed Israel's fourth telecom group, was unconditionally approved. Partner was a significant player in the mobile market and a fringe player in the ISP and domestic calls market. 012 Smile was a significant player in the ISP and international calls markets and a less significant player in the domestic calls market. The IAA cleared the merger after thorough investigation, concluding that the overlaps between the parties were not likely to injure competition. This conclusion stems from the relatively low barriers to entry in these markets, and the fact that merging firm was subject to competition from other telecom groups.

The merger directly confronted the IAA with the theory presented above, since the merger involved the combination of several complementary services that were offered by "semi telecom groups". It was clear that the merger was a significant headway towards a 'four telecom groups' structure of the Israeli telecommunications market. The IAA allowed this combination to go ahead, probably because it came to realise that the theory of harm associated with telecom groups was, at least at this point, speculative in nature.

Another core issue, which was analysed carefully by the IAA in the Partner-012 Smile merger, was the potential loss of competition in the mobile market. The IAA had long perceived the mobile market, in which competition was held between three players, as concentrated and not sufficiently competitive. At the time the merger was notified, there were regulatory reforms aimed at introducing new competition to the market either as MVNOs or MNOs. 012 Smile was seemingly a natural candidate to enter the market in either of these paths. The core issue which the IAA struggled with was, therefore, whether the Partner-012 Smile merger would eliminate a potential competitor from the mobile market and whether such elimination would result in significant injury to the competition in that market. The IAA cleared the merger, probably having concluded that 012 Smile was not the only potential competitor to the market.

In 2012 there were fewer mergers in the telecom market and no notable merger decision in this area.

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In 2010/2011, there were also several mergers in the electric appliances and consumer electronics retail sector. Prominent examples are the merger between Electra Consumer Products Ltd. and Mini-line Ltd., the merger between Newpan Ltd. and Mini-line Ltd. and the merger between Newpan and "Wholesale Electricity" (Sofer & Ben Eliezer Group).

Newpan is one of Israel's largest importers of electric appliances and consumer electronics. In addition, Newpan has a minority interest in two retail chains of electric appliances: "Best Buy"; and "Big Box". In 2010, Newpan requested the IAA's approval to acquire 33.3% of the shares in "Wholesale Electricity", a chain of electric appliances and consumer electronics retail stores which competed with "Best Buy" and "Big Box". The IAA concluded that Newpan's cross-ownership of a minority stake in these chains was unlikely to significantly impede competition, given the limited aggregate market share of these firms and the existence of competition from other market participants.

The IAA was of a different view when, in the same year, Electra Consumer Products Ltd. and Mini-line Ltd. attempted to merge. Both parties imported and marketed electric appliances and consumer electronics for home use. The merger was investigated by the IAA for several months, during which time several market participants publicly expressed concern over the parties' alleged ability to foreclose competing importers from their powerful retail chains. The IAA concluded that importers needed access to nationwide retail chains, which are an essential advertising platform for new electrical appliances. The IAA argued that Electra and Mini-line were two out of very few such relevant platforms and, thus, that the merger posed real danger to competition. The IAA was willing to approve the merger subject to divestment of a nationwide chain ("Shekem Electric" or "A.L.M"), but the parties preferred to withdraw their application.

In 2011, Mini-line filed again, this time to merge with another competitor – Newpan. This transaction too was investigated for months by the IAA, which once again concluded that the aggregate share of the merging parties in the retail segment raised material concerns. The IAA approved the merger in August 2011, subject to divestiture of Newpan's minority stake in the "Best Buy" retail chain. The IAA revoked the divestiture in late 2012, under the failing firms doctrine, after concluding that "Best Buy" could not be competitively sustained other than as a subsidiary of Newpan.

The series of mergers in the electric appliances and consumer electronics retail sector continued in 2012 and many of them were approved by the IAA. Thus, the IAA approved, subject to conditions (which were not published), a merger between Ace Auto Depot Ltd., Ace Marketing Chains – Consumer Products Ltd. and Electra Consumer Products (1970) Ltd. Other mergers were approved with no conditions, *inter alia*: a merger between Pilab M.M Reparation and Service Ltd., C.S.B. Zafon Electric Appliances 2001 Ltd., C.S.B. Electrical Appliances Ltd. and Ratfon Services Ltd.; a merger between Newpan and Fishman Chains Ltd.; a merger between Electrodan Commerce Ltd. and Exit Electronics Ltd.; and a merger Newpan Pro Ltd., Kahana Audio Ltd. and N.K. Ltd.

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 the qualitative analysis by a 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"** (see "Key policy developments" below), 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. The guidelines further 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 would likely exit the market, even absent the merger. In such cases there is no casual 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 we previously explained, 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-012 Smile 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 and 2012 most cases involved structural 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 in the area of merger remedies, out of which two stand out: (a) the IAA is authorised to request remedies only if the merger, as it was originally proposed, raises a real danger that competition will be harmed significantly. 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 of 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, which the remedies aim to disrupt. 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 more effective one. 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 be manifested in many, in part 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 can be achieved in a single-shot or within a definite time frame over remedies that are ongoing over time.
- The ability of the merging parties to comply with the remedy. The IAA will see if it is sufficiently probable that the merging parties will be capable of complying with the remedy imposed. 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 show that, given such considerations, it will generally prefer structural remedies over behavioural remedies. The IAA alleges that structural remedies are normally more effective as they deal with the disease and not merely the symptoms, do not require complex and ongoing monitoring, require less pubic resources and are executed within a defined, normally short, period. The IAA acknowledges, though, the fact 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 inception. For the failing firm's defence to exist, 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 point of view, than letting the firm exit the market. While the IAA rarely acknowledges the failing firm's doctrine, several mergers were approved under this doctrine during the years.

As stated above, 2012 seems to mark a change of direction in the IAA's approach, towards applying stricter criteria to proposed mergers. This impression is supported by the unprecedented numbers of blocked mergers and of withdrawals of merger notifications. Even more can be learned from explicit statements made by the new General Director, Prof. Gilo (for example, in the recent annual IAA conference). These statements show that the IAA does not only intend to block mergers that harm competition significantly, but also mergers in markets posing a trend towards higher concentration, as well as mergers which raise more remote concerns for diminished actual or potential competition.

Reform proposals

There have been no reform proposals in Israel in 2011/2012 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).

Shai Bakal

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Shai Bakal's practice covers all areas of Antitrust Law and Regulation. Shai regularly advises and represents leading corporations in Israel and abroad with respect to complicated antitrust matters such as mergers, joint ventures, restrictive trade practices and dominant position cases. Shai's practice includes representing clients in major antitrust cases before the IAA and in litigation before the Antitrust Tribunal, as well as representation before other governmental agencies.

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 Commissioner's Pre-merger Filing Guidelines" and the "Antitrust Commissioner'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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