GLI GLOBAL LEGAL INSIGHTS

Merger Control

2022

11th Edition

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glg global legal group

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Israel

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Overview of merger control activity during the last 12 months

According to unofficial data, approximately 200 merger notifications were submitted to the Israel Competition Authority ("ICA") in 2021 (compared to 180 in 2020). The increase in the number of merger filings demonstrates a relative recovery of the Israeli market following the COVID-19 pandemic. Indeed, the number of merger filings has been on the rise in recent years, reflecting the expansion of the Israeli economy. As official data has yet to be published, the full extent of the market recovery remains to be seen.

According to the Competition Law, the General Director of the ICA (the "General Director") has the power to either approve, block (if there is a reasonable likelihood that the merger will significantly harm competition in a relevant market), or approve the transaction subject to certain conditions (if said conditions can eliminate harm to competition). According to the ICA's merger registry, no mergers filed in 2019 and in 2020 were blocked by the General Director. According to unofficial data, two mergers filed in 2021 were blocked; and in the first quarter of 2022, two mergers filed have already been blocked by the General Director, while at least one merger filed was approved subject to conditions. If this trend continues, we may witness a very high number of decisions to block mergers or approve them only subject to conditions. These statistics could be attributed to the entry into office of the new General Director.

An analysis of the ICA's track record during the last decade shows that the share of mergers blocked is rather stable, ranging between 0–2% at most, with an additional 1–3% of notifications withdrawn. This is expected to change in the coming year.

Over the years, there has been an evident decrease in the use of remedies by the ICA. While in the years 2000–2005, approximately 18% of merger decisions included remedies, this number decreased to only 6–8% in recent years, with 0.5% in 2018 (a record low for conditional clearance decisions), approximately 1.5% in 2019, and approximately 1.7% in 2020. It remains to be seen whether the global trend of refraining from implementing even structural remedies will also permeate into Israel, and whether we will see more blocks than remedies.

As mentioned, in January 2022 a new General Director was appointed – Adv. Michal Cohen. Ms. Cohen has been working with the ICA for 15 years and previously held the office of the ICA's Legal Advisor. The New General Director took an assertive professional stand – in the past months, she has initiated several enforcement proceedings and seemingly raised the bar for approval of merger transactions.

In December 2021, Adv. Michal Cohen, then as acting General Director, surveyed the ICA's work before the Israeli Parliament ("Knesset")'s Economic Affairs Committee and, *inter alia*, stated:

"Since I have assumed office, I realized there are areas in which we need to challenge our accustomed methodology. To raise doubts and broaden the spectrum. And we will do that."

"The ICA is aware of the winds of change, blowing also globally. There are challenges which require a recalibration of route. There are areas where economic theory 'stutters' and does not provide an answer to novel challenges which have evolved in recent years. And it is necessary to address these areas as well."

New developments in jurisdictional assessment and procedure

The main policy document regarding merger procedure remains the General Director's Pre-merger Filing Guidelines, published in 2008 ("the Pre-merger Guidelines"). In addition, several years ago, the ICA published a detailed Q&A document relating to technical merger control procedure issues. In 2014, the ICA published an additional Q&A document, containing examples taken from pre-rulings filed to the ICA regarding merger control procedure and, in September 2021, published further examples. These guidelines elaborate and add important aspects that are not evident from a simple reading of the merger control provisions of the Competition Law.

One such example is the ICA's interpretive policy to classify a "merger" as a certain type of transaction that provides one entity with long-term control of essential assets of another company. Accordingly, the ICA has classified the long-term lease of critical assets or rights as a merger of companies (among others, relating to the long-term lease of a hotel and of gas stations).

The Competition Law defines a "merger of companies" as the acquisition of the principal assets of the target or more than 25% of either the outstanding shares, voting rights, rights to appoint directors or dividend rights of the target company. However, it remains unclear whether acquisitions of less than 25% of these rights may also be regarded as a merger of companies. The Pre-merger Guidelines offer limited certainty, suggesting that under specific circumstances, acquisitions of less than 25% of such rights, together with other holdings in a company, may be regarded as a merger of companies. The Pre-merger Guidelines also suggest that acquisitions of less than 25% of such rights may also be regarded as a restrictive arrangement.

On January 1, 2019, the Knesset passed a major reform to the Competition Law, formerly known as the Restrictive Trade Practices Law.

This reform, which was advocated by the ICA, introduced extensive and significant changes to the three main chapters of the Competition Law: restrictive arrangements; monopoly; and merger control. The amendment also further increased the ICA's enforcement powers and the scope of criminal and administrative sanctions for violations of the Competition Law.

The main amendments of the **merger control** chapter included:

- A revision to the turnover threshold: such threshold has been increased, such that the joint sales turnover of the merging parties that triggers a merger notification obligation has been increased from NIS 150m (approximately USD 46.3m) to NIS 360m (approximately USD 111m). The reform also implemented an automatic update mechanism at the start of each year; in 2022, the turnover threshold stands at NIS 367.9m (approximately USD 113.3m). The ICA stated in the framework of the reform that it plans to implement an increase of the threshold that at least two of the merging parties be at least NIS 10m (approximately USD 3.1m); and indeed, recently, the merger regulations were amended to NIS 20m (approximately USD 6.2m). The remaining two filing thresholds, which are based on market share tests, have not changed, although the reform did broaden the definition of

"monopoly" for other purposes. Thus, mergers falling below the new turnover threshold would still be reportable if the combined market share of the parties exceeds 50% or if one of the parties has a market share exceeding 50% in any relevant market.

- Granting power to the General Director to extend the merger review period from 30 days to 150 days, by a reasoned administrative decision. Prior to the reform, the General Director was obligated to render a decision within 30 days, which could only be extended by a judicial decree or the consent of the parties. Practically, the ICA still prefers to ask for the parties' consent to an extension, rather than extending the review process unilaterally, in order to avoid issuing a reasoned decision. Such consent is usually granted and, in practice, it seems that the ICA often does utilise its authority to practically extend the review period of the relevant transaction.
- Applying merger control to non-profit associations by expanding the definition of "company" in the Law to include an "association", as defined in the Associations Law, 5740–1980.

It should also be noted that in the framework of the reform, the maximum monetary sanction imposed by the ICA has been increased to NIS 100m (approximately USD 30.9m). Prior to the reform, the ICA had the power to impose a monetary sanction on corporations for violations of the Law amounting to a maximum of 8% of the violator's sales turnover, provided the monetary penalty does not exceed NIS 24.5m (approximately USD 7.6m).

On July 28th, 2019, the ICA published a draft amendment to the Antitrust Regulations (Registry, Publication and Reporting of Transactions), 5764–2004 (the "Regulations") for public comment. After the public consultation process was concluded, the publication of the Regulations was put on hold and no advancement was made for quite some time. In January 2022, the amendment was approved by the Knesset's Economic Affairs Committee, and in March 2022, the Regulations were published in public records and entered into force. The Regulations include significant and far-reaching changes, both with respect to the scope of the transactions that will require merger approval by the General Director, as well as to the extent of disclosure required when filing merger notifications. In the framework of the Regulations, the following changes were introduced:

- **An increase of the individual turnover threshold** – according to the old version of the Regulations, a merger was notifiable under the turnover threshold if the combined turnover of the parties was at least NIS 367.9m and at least two parties had a minimum individual turnover exceeding NIS 10m. In the framework of the amendment to the Regulations, the individual turnover was increased to NIS 20m.
- The abbreviated notification form was abolished, and all mergers will require the submission of a new unified notification form.
- The new notification form requires extensive information, both quantitatively and qualitatively, across the full range of activities of the parties to the merger. Furthermore, regardless of its competitive complexity, the following information is required for all mergers:
  - details of the stakeholders in each of the reporting parties;
  - a detailed mapping of the parties' holdings and of potential overlaps between the controlling parties and other significant shareholders;
  - details of the activities of both parties to the merger;
  - details relating to the customers and suppliers of the parties;
  - details relating to the competitive context of the merger; and
  - details of financial information regarding sales turnover and quantitative sales volume.

International mergers that must be reported to the ICA under the proposed new merger control regime will additionally require the provision of details relating to filings made in other jurisdictions. Foreign entities may also be required to provide information regarding their agents, distributors or other representatives in Israel. In the framework of the amended Regulations, the overall burden on foreign entities is expected to significantly increase. The ICA has clarified in the past that while there is indeed a significant increase in the scope of information that will be provided upon submission, this will in turn reduce the need for requests for further information and will allow for a shorter review period. However, it may be assumed that the new notification form will require parties to a merger to invest significant resources in order to meet the new reporting requirements.

In 2012, the ICA published the Guidelines Regarding the Use of Enforcement Procedures of Financial Sanctions, which stated that the illegal execution of non-horizontal mergers would normally result in a financial sanction (an administrative tool) rather than criminal enforcement, which could also be applied under the law. Illegal horizontal mergers are still subject to criminal enforcement.

In November 2019, the ICA published an amendment to Public Statement 1/16: Considerations of the General Director in determining a monetary sanction. In the framework of this amendment, it was determined that the base sum for technical "gun-jumping" violations would normally be set at 5% (with a maximum amount of 8%) of the violator's relevant sales turnover, and not more than NIS 3m (approximately USD 920,000). In June 2019, the ICA imposed sanctions on two local pharma companies (Novolog and Informed) for failing to report a merger transaction between them. The sanction against Novolog was set at NIS 404,000 (approximately USD 124,000), and the sanction against Informed was set at NIS 72,000 (approximately USD 22,000).

In 2016, the ICA introduced a fast-track procedure for mergers that clearly do not harm competition (dubbed the "Ultra-Green Merger Procedure"). If a transaction clearly does not present a threat to competition and a certain degree of information on the transaction and its parties has been provided, it will be internally classified as an "Ultra-Green Merger" by the ICA, and the 30-day investigation period will be shortened to several days. The decision to classify a transaction as an Ultra-Green Merger is based mainly on the information provided by the merging parties. A regular merger notification form (rather than an abbreviated form) will be required for a transaction to benefit from this fast-track procedure. Merging parties that wish to qualify for the Ultra-Green Merger Procedure must provide the ICA with holding charts that fully detail direct holders of interest of each party and the controlling parties of each direct holder of interest. Moreover, the notification forms must be signed by the CEO and chief legal officer of each party (rather than any authorised signatory in the regular track). The Ultra-Green Merger Procedure has been successfully employed for several years and the ICA expeditiously clears mergers that qualify for the fast track, in some cases even clearing merger transactions within a day of submission. Formally, the Ultra-Green track is still applicable. In practice, however, it seems that the ICA is gradually less willing to apply it, and less transactions are classified as competitively benign. It appears that, in general, the ICA's review of mergers is growing lengthier, which coincides with the abovementioned recent change in the General Director's authority to unilaterally extend the review.

In specific cases wherein a transaction that formally warrants filing is caught by the Israeli merger control regime, yet clearly has no effect on competition in Israel, the ICA is sometimes willing to grant a waiver from filing. This may be the case when the filing requirement is triggered by the specific characteristic of a seller that completely severs its

ties with the acquired business; or, for instance, when the transaction clearly has no relation to Israel, although the parties' groups have a presence in Israel through affiliated companies that are active in unrelated activities.

In January 2022, the ICA published a public consultation regarding the assessment of conglomerate mergers. The ICA requested the public opinion on the competitive considerations that should be taken into account when assessing mergers that are neither horizontal nor vertical. The ICA expressed the notion, which is part of a global trend, that while conglomerate mergers usually do not raise competitive concerns and may even entail significant efficiencies, some conglomerate mergers may cause harm to competition, in particular in the food industry and digital economy. The ICA asked the public to opine on several questions in that regard, *inter alia*: in what cases will a conglomerate merger raise concerns from harm to competition, and how may such concerns be established? What is the probable effect on competition of selling products in bundles or tying between products? It seems that the ICA is taking a more cautious approach towards conglomerate mergers and will not automatically approve such mergers in the future. The new approach coincides with the decreasing willingness on the ICA's part to classify mergers as competitively benign. Conglomerate mergers that, in the past, might have been filed under the Ultra-Green track, today may not be classified as such. Conglomerate concerns were at the heart of the ICA's prolonged review of the acquisition of Sea Mall Eilat shopping centre by Azrieli Group. The theory of harm explored by the ICA was that acquisition of Sea Mall, which is a highly successful mall, by a leading shopping mall chain will enable the buyer to force tenants to rent space in weaker malls that they would have otherwise avoided. After an in-depth review, the ICA concluded this concern was unlikely and cleared the transaction.

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

In September 2018, the ICA published a public consultation on competition in the internet/digital economy. According to the publication, the ICA sought input from the public, including start-up companies and leading and established companies in the hi-tech sector, regarding current issues in competition as they relate to the online world. One of the questions on merger control aspects in the hi-tech sector asked for comments as to: whether scrutiny should be increased on mergers involving large tech firms; on the effects of such increased scrutiny on competition; and on the incentives to invest in the technology sector. The ICA addressed several challenges that exist in the digital economy, such as the difficulties to implement "traditional" tests when it comes to market definition or market power tests in the digital economy. In December 2020, the ICA published a report on "Acquisitions of Israeli Start-ups: Ex-post Examination". This report was a follow-up to the ICA's contribution paper to the roundtable on "Start-ups, Killer Acquisitions and Merger Control" held before the competition committee of the Organisation for Economic Co-operation and Development ("OECD") in June 2020. The ICA issued a request for information to five tech giants: Google; Amazon; Facebook; Apple; and Microsoft, which acquired 21 Israeli start-ups over the years 2014–2019. The ICA did not find direct evidence of killer acquisitions in Israel. Having said that, the ICA's probe has found that Facebook failed to report two acquisitions of Israeli companies (RedKix and Service Friend) and, subject to a hearing, the ICA is considering imposing a NIS 6m (approximately USD 1.85m) sanction on Facebook.

In several industries that are often characterised by global geographic markets, such as digital and online advertising, pharma, technology, mobility, and telecommunications, the

ICA has increased its degree of cooperation with foreign competition authorities, mainly the authorities in the EU and US. The ICA's clear policy is to engage with the relevant foreign authorities (and, in some cases, wait for their decisions) before announcing its decision (see further elaboration below).

In recent years, the ICA has published several key decisions in numerous sectors. While each of these decisions were based on different concerns, the decisions demonstrate the ICA's tendency to block transactions even if the incremental market share increase is rather limited.

In December 2021, the ICA blocked a merger between two companies active in the monitoring of online discourse and conducting communication research in social media based on the monitoring. The ICA regarded this as a horizontal merger into a monopoly which would result in the merged company having a dominant position in both markets.

Financial sector

In May 2021, the ICA approved a merger between two leading Israeli investment houses, Altshuler Shaham Investments House Ltd. ("Altshuler") and Psagot Investment House Ltd. ("Psagot"). These two investment houses are active in the management of pension funds and other investment funds; Altshuler is a clear leader in several segments, and Psagot formerly led this segment. The ICA cleared Altshuler's acquisition of Psagot unconditionally, stating that the pension funds market in Israel is highly competitive, as indicated by the steady decline in management fees for consumers over the last years.

In May 2020, the ICA approved, subject to conditions, an acquisition made by Max It Finance Ltd. – an Israeli credit card services company – of an Israeli payment gateway provider (Credit Guard), formerly controlled by a Canadian company (Nuvei). The merger was cleared, subject to conditions aimed at maintaining full discretion for customers when choosing a payment gateway services provider.

In June 2018, the ICA blocked a proposed merger between two Israeli banks, Mizrahi Tefahot Bank Ltd. ("Mizrahi") and Union Bank of Israel Ltd. ("Union"), according to which Mizrahi would purchase Union's entire share capital. The ICA determined that the banking field in Israel is highly concentrated and is characterised by a limited number of competitors and significant barriers to entry and exit. The ICA was concerned that the acquisition of Union, which is a small bank, by a bigger bank may cause significant harm to competition, and that there is a reasonable concern that the acquisition could harm competition in banking services to the diamonds industry.

Both Mizrahi and Union appealed the decision to the Competition Tribunal. In November 2019, the Tribunal accepted the appeals and overturned the decision to block the merger. The Tribunal decided that the market definition set in the decision to block the merger raises significant difficulties, as the ICA relied upon the subjective information it collected and disregarded ongoing changes in the banking industry. The Tribunal criticised such reliance on subjective evidence and stated that concerns of harm to competition raised by the ICA were purely theoretical. The Tribunal did, however, acknowledge the ICA's concerns relating to the diamond industry, and ordered the case to be returned to the ICA to consider a remedy package to alleviate such concerns. Following the Tribunal's decision, in January 2020, the ICA approved the merger under several conditions, including a divestiture of Union's banking activity with the diamond industry.

In May 2019, the ICA approved a merger between one of Israel's leading banks, Israel Discount Bank Ltd., and a smaller bank, Municipal Bank Ltd. (known as Dexia Bank), under

conditions including divestiture of the acquired bank's credit business to a third party. A competing bank, Bank of Jerusalem, filed an appeal to the Competition Tribunal against the approval of the merger, mainly alleging that the approval of the merger thwarted the bank's ability to enter the market, which is characterised by high entry barriers. Bank of Jerusalem argued that practically, the approval of the transaction prevents its ability to acquire Dexia Bank by itself, and that such acquisition would have been better for competition in Israel. The appeal was dismissed by the Competition Tribunal in February 2020, finding that Bank of Jerusalem did not provide the required legal grounds for the appeal as it did not suffer an antitrust injury. An appeal on the Competition Tribunal's Decision was subsequently denied by the Supreme Court.

Food and retail sector

In March 2022, the ICA blocked a merger between one of Israel's largest food suppliers and a local manufacturer of tofu products. The ICA's review raised several concerns that the market for tofu products in Israel is fairly concentrated, in which the acquired company is responsible for over 50% of production. As the merging companies are also active in the marketing of other tofu products, the ICA expressed concern from foreclosure of competitors in the retail sector. The ICA also regarded the acquiring company as a potential entrant to the market and, therefore, expressed concerns that the merger would deny new entry into an already concentrated market. In light of the abovementioned concerns, the General Director decided to block the merger.

In July 2021, the ICA approved a merger between two real estate companies that manage shopping centres, in the framework of which one company purchased a shopping centre owned by the other in the city of Modi'in. The General Director approved the acquisition, subject to a fix-it-first remedy in which the acquiring company was forced to sell a shopping centre owned by it in Modi'in prior to the acquisition.

In June 2021, the ICA raised concerns regarding a proposed merger between two Israeli food suppliers, concentrating on the waffle segment. The ICA was concerned that the parties, who were regarded as low-cost suppliers in the waffle segment, would be able to raise prices post-merger and would not be constrained by more expensive "premium Waffle suppliers". In light of the ICA's concerns, the parties withdrew the merger notifications. The ICA's position was criticised in the Israeli media for being fixated on a negligible niche, while at the same time clearing much more important and no less complicated mergers.

Failing firm doctrine applied

In August 2018, the ICA approved a merger between two Israeli television broadcasting and production companies which were running their own separate commercial television channels, Reshet Media Ltd. ("Reshet") and the new Channel 10 Ltd. ("Channel 10"). The approval of the merger was conditional on the prior sale of Reshet's holdings in Israeli News Company Ltd. (which was jointly held by Reshet and a third competitor, Keshet Broadcasting Ltd.). The ICA's approval of the merger was based on the "failing firm" doctrine, which was last applied almost 15 years ago. The ICA decided that in the present case, the three conditions of the doctrine are fulfilled: (1) Channel 10 was unable to sustain its activities without the merger and was likely to exit the market; (2) there was no alternative purchaser better for competition; and (3) the merger alternative was better for competition than the cessation of Channel 10's activities altogether.

In June 2019, the ICA once again referred to the failing firm doctrine and approved a merger between Cellcom Israel Ltd., a leading Israeli telecommunications company, and IBC, a company active in the provision of optical fiber communications infrastructure services for

wholesale customers, and which is jointly held by the Israel Electric Corporation Ltd. and other corporations. The ICA implemented the failing firm doctrine and decided to clear the merger even though it raised several competitive concerns, due to the fact that IBC was facing insolvency issues.

Key economic appraisal techniques applied

The substantive test under Section 21(a) of the Competition Law is a "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 2011, the ICA published the Guidelines for Competitive Analysis of Horizontal Mergers, which describe the theoretical economic and legal foundations upon which the ICA'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.

Firstly, the ICA 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, and so forth.

Secondly, the ICA 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 ICA 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, and access to essential inputs, among others.

In assessing the possible competitive outcome of a merger per the substantive test mentioned above, the ICA usually applies the same methodology as the relevant US and European Commission ("EC") authorities. The ICA 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 discussions with the merging parties and other market participants, internal documents, surveys, public records, information from other governmental agencies, and so forth. In cases where the qualitative analysis is not sufficiently informative, the ICA may seek to strengthen it with a quantitative analysis (critical loss analysis, price correlations, and so forth).

The ICA has increased the use of econometric analysis in recent years, but the analysis is still fundamentally qualitative. In January 2017, the ICA published a study on the methodology for defining markets utilising econometric models of demand. The study demonstrates the use of an econometric model for the evaluation of demand elasticity on the basis of

consumer behaviour in order to define markets. The ICA notes, however, that the form of analysis demonstrated in the study is remarkable in its complexity and breadth and falls outside the scope of the ICA's resources in its day-to-day operations.

The ICA attributes special importance in merger investigations to direct evidence, such as natural experiments, internal documents, and market surveys. In recent years, many of the more complex cases filed with the ICA required an assessment of potential competition concerns. In this regard, the ICA is increasingly basing its analysis on the internal documentation it collects from the parties and on subjective assessments. Examples of this appraisal technique can be found in: the *El Al/Israir* merger, in which the ICA decided to block the merger on the assumption that El Al intended to enter the route to Eilat were it not for the merger (to date, hypothetical); and the *Mizrachi/Union* merger, in which the Competition Tribunal criticised the ICA's decision to block the transaction, stating that it gave too much weight to subjective data, which was inconclusive. More recently, internal documents played a major role in the opposition of the ICA to the contemplated merger in the tofu market mentioned above.

The ICA will adjust its analysis to the case at hand and may adopt different market definitions within the same industry. For instance, in the food retail industry, the ICA's common approach has been to define broad demand areas when determining the relevant geographical market. However, in June 2019, subject to conditions, the ICA approved a merger between two food retail chains active in ultra-orthodox cities, Nativ Hahesed and Bar-Kol. Based on the unique consumer habits of this demographic, the ICA defined an ultra-narrow geographic market (short walking distance around each store) and accordingly required that in four areas, the parties would divest one of their stores. In many areas, the ICA refused to view large discount retailers positioned in close geographic proximity and beyond walking distance to competitors.

Approach to remedies

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

If such remedies are unavailable, the ICA will block the merger, subject to the rare situations whereby an efficiency defence or the failing firm doctrine may be applied, as mentioned above.

In 2011, the ICA published the Guidelines on Remedies for Mergers that Raise a Reasonable Concern for Significant Harm to Competition (the "Remedies Guidelines").

The Remedies Guidelines outline the governing legal principles of merger remedies, two of which stand out: (a) the ICA 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 ICA may impose conditions only for mergers that it would otherwise block; and (b) remedies are preferable to outright objection to the merger whenever they are capable of mitigating harm to competition.

The Remedies Guidelines explain that the ICA will generally prefer structural remedies over behavioural remedies. The ICA 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. At the same time the ICA acknowledged that in certain instances, behavioural remedies, or a mix of behavioural and structural remedies, would be more appropriate.

However, over the years the ICA's willingness to accept behavioural undertakings has been significantly reduced. Since the implementation of structural remedies has also faced difficulties, including a failed attempt at divesting several supermarket stores in a major food retail case, the ICA shifted to an *a priori* sale of assets ("fix-it-first") remedy as the "new standard". This was demonstrated in the decisions to approve the merger between Shufersal Inc., (retail chain) and New-Pharm Drugstores Ltd. (drugstore chain), the merger between Reshet and Channel 10, and the aforementioned Nativ Hahesed merger with Bar-Kol.

In the *Shufersal/New-Pharm* case, the ICA even took the fix-it-first policy a step further and not only required the divestiture of assets to a third party before finalising the merger, but also the sale of 10 stores as a bulk to the same third party. The ICA concluded that there are two main chains active in the relevant segment, and thus conditioned the approval of the merger between Shufersal and New-Pharm on the sale of 10 stores to create a third competitor and increase competition. While it would have been sufficient to require the sale of assets to any third party in order to alleviate concerns from harm to competition on the specific divested locations, the ICA attempted to restructure the market in a more competitive way. In retrospect, the ICA's attempt failed and the third party that acquired the divested stores entered financial difficulties, forcing the sale of some of the stores. In the Nativ Hahesed merger, the ICA also required the third-party acquirer to compensate the ICA in the event of the failure to operate the divested stores for a period of 18 months.

In the *Cimsa/Cemento* case, a merger between two foreign cement suppliers, Cimsa acquired two production plants from Cemento in Spain and in the US. Upon review of the merger, the ICA, in deviation from its declared policy of recent years, adopted a non-structural remedy. The ICA identified a concern for potential harm to competition in the provision of white cement in Israel and therefore imposed a remedy. Likely due to the fact that the merger was foreign to foreign, the ICA showed leniency and imposed a non-structural remedy, according to which the local subsidiary that distributes Cemex's products in Israel will contract with a third-party supplier of white cement for the acquisition of white cement to be distributed in Israel. The purpose of such remedy was to maintain competition in the market for the provision of white cement in Israel.

As mentioned above, the merger control procedure in Israel does not have a formal classification method. Regardless, it is not uncommon for parties seeking swift approval for complicated mergers to offer upfront remedies, attempting to expedite the review process. However, it is more common that remedies are discussed only if the ICA reaches a tentative conclusion that the proposed merger may significantly lessen competition in the market. In such cases, the parties may propose remedies that eliminate the harm to competition or, alternatively, the ICA may stipulate conditions in order to secure merger approval, which may then be discussed with the parties.

As the new General Director was appointed in the beginning of 2022, it remains to be seen whether the ICA's policy with respect to remedies will change as her tenure progresses. It would not be surprising if the new General Director adopts current trends from the US, according to which difficult mergers should be met with more scrutiny, and even structural remedies may not suffice.

Key policy developments

As can be seen above, recent regulatory changes are expected to affect the merger control regime in Israel. On the one hand, the turnover filing threshold has been elevated significantly in order to filter less substantial transactions; on the other hand, the new merger notification

form is also expected to increase regulatory uncertainty. The scope of information that filing parties will be expected to collect before submission will be significantly broader. It remains to be seen whether the ICA's declarations that this reform will expedite the review period will come to fruition, or that in fact, the preparation period may increase, resulting in an overall increase in the process from preparation to clearance.

In the field of remedies, the ICA's tendency to demand stringent remedies is expected to continue. As described above, the ICA prefers to implement structural remedies and, with respect to divestitures, implements a fix-it-first policy. Structural remedies, the fix-it-first policy and other requirements intended to ensure adherence to remedies are gradually becoming the default position of the ICA when remedies are implemented. Obligations and commitments of third parties that acquire carved-out assets are also becoming more prevalent.

With respect to international mergers, especially those involving industries with which the ICA is less familiar, or when the "remote" access of the ICA to the foreign entities makes it difficult for the ICA to gather the extensive information needed to analyse the merger, the ICA's policy is to defer its approval pending the decision of other antitrust authorities (namely the EU and US authorities). This practice has become increasingly common in past years in foreign-to-foreign transactions, and may have a significant influence on the review schedule of certain merger transactions. The ICA will usually want to consider remedies offered to the foreign authority and possible Israeli-specific aspects, and will take a few business days after the relevant foreign authorities' decision to finalise the decision locally.

While the ICA has in the past taken a slightly more lenient approach towards international mergers, it seems that it is now gradually starting to give the same treatment to international mergers as is given to local transactions. In that context, it seems that the ICA is currently changing its policy of adopting the foreign authority decision with respect to divestitures, and insisting on independently approving the third-party acquirer of the divested business.

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Dr. David E. Tadmor is the co-chairman and managing partner of Tadmor Levy & Co. David represents leading multinational clients, as well as many of Israel's largest companies.

He founded Tadmor & Co. in 2005 with three associates, later to become Tadmor Levy & Co., a leading Israeli law firm with 140 lawyers and trainees. David is widely recognised as a foremost expert in competition law, and as a leading government regulation lawyer. He has 30 years of experience in mergers and acquisitions – public companies, private equity, privatisations and cross-border transactions. He also regularly represents Israel's largest banking institutions.

David spent five years as a corporate attorney with Wachtell Lipton Rosen & Katz ("WLRK"). He received his first law degree from the Hebrew University of Jerusalem and his Master's and doctoral degrees from NYU School of Law. David is a member of the Israel and New York State Bar associations. He is also an accomplished photographer, whose work can be seen at: https://www.tadmor.photo/.

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Shai Bakal heads the firm's Competition/Antitrust practice group.

Shai's practice covers all areas of antitrust law and regulation. He regularly advises and represents leading corporations in Israel and abroad with respect to complicated antitrust matters, including complex mergers, joint ventures, restrictive trade practices and abuse of dominant position proceedings. He is well acquainted with the different sectors of the Israeli economy, particularly the food, energy, retail, and banking sectors. Shai has created and implemented antitrust compliance programmes for large Israeli companies and multinational corporations. He advises leading suppliers and retailers in Israel with respect to the recently enacted food sector law, as well as leading conglomerates regarding the new anti-concentration law.

Shai successfully represents clients in complex antitrust litigation before the Competition Tribunal and in civil litigation, including class actions and appeals before the Supreme Court. In addition, Shai has represented clients before various Israeli regulators, as well as in administrative petitions to the Israeli Supreme Court.

Shai has been lauded among international legal ranking directories, including *Chambers*, *The Legal 500* and *Who's Who Legal*, and was recently hailed as "a great professional, extremely knowledgeable and very pleasant to work with". Prior to joining the firm, Shai practised law in the legal department of the ICA (2002–2007), where he was in charge of, among others, the food sector, retailing, and intellectual property. He was later appointed as the head of the ICA's mergers team, where he participated in the International Competition Network's subgroup for merger investigative techniques.

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