

# The International Comparative Legal Guide to: Merger Control 2010

A practical insight to cross-border merger control issues



Published by Global Legal Group with contributions from:

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## 1 Relevant Authorities and Legislation

### 1.1 Who is/are the relevant merger authority(ies)?

There are two relevant merger authorities: (i) The Israeli Anti-Trust Authority (the “**IAA**”) which is an independent government enforcement agency established in 1994, headed by the Anti-Trust Commissioner (the “**Commissioner**”) who is statutorily charged with enforcing the applicable anti-trust legislation in Israel; and (ii) The Anti-Trust Tribunal (the “**Tribunal**”) which sits within the Jerusalem District Court.

The powers conferred on the IAA and the Commissioner are promulgated in accordance with the recommendations of the Minister of Trade and Industry (the “**Minister**”). The Commissioner decides on the approval, conditioning or rejection of a merger.

The Commissioner must consult with an Advisory Committee (the “**Committee**”) prior to approving a proposed merger (he does not have to consult with the Committee if he rejects a merger). The Committee is composed of representatives from both the private and governmental sectors, having economic expertise. Once the Commissioner approves a merger, obtaining his approval suffices and there is no need for further approval.

The Tribunal serves as an appellate court on the Commissioner’s decisions on all non-criminal aspects of anti-trust proceedings and it can issue both interim and final decisions and/or orders with respect to issues such as violation of the anti-trust legislation or it can approve or disapprove decisions made by the Commissioner with respect to merger clearance.

Other courts may also hear criminal proceedings emanating from violation of anti-trust legislation and private claims from aggrieved parties (not relating to a specific decision of the Commissioner).

### 1.2 What is the merger legislation?

The relevant legislation for mergers in Israel is the Restrictive Trade Practices Law, 5748-1988 (the “**Law**”) and regulations promulgated thereunder (the “**Regulations**”) as well as several statutory block exemptions, some of which are more specifically referred to hereinbelow. The specific merger legislation is set out in Chapter ‘C’ of the Law. Recently, in June 2004, the Economic Committee of the Israeli Parliament approved certain new regulations, namely, Restrictive Trade Practices Regulations (Registration, Publication and Reporting of Transactions), 5754-2004 (“**New Regulations**”) which were enacted on 20.08.04. These New Regulations are particularly revolutionary in that they allow a “fast track” approval for mergers where: (i) the parties’ mutual

product comprises more than 30% of the relevant market; (ii) neither of the parties is a ‘monopoly’; and (iii) none of the merging parties are linked to a third party, that acts as a competitor in the relevant market. The purpose of these New Regulations is to reduce the bureaucratic level of the process, whilst allowing focus to be given to mergers that require more in-depth scrutiny.

In January 2008, the Director General’s Guidelines Regarding the Process of Reporting and the Assessment of Mergers in Terms of the Antitrust Law, 1988 have been enacted (hereinafter: the “**Guidelines**”). They address in detail the Director General’s approach and interpretation mainly regarding the classification of transactions which entail merger notification, the interpretation of the Law, definition regarding both the thresholds for notifying a merger transaction, as well as the categorisation of companies, including foreign companies, which are required to submit a merger notice. The Guidelines also relate to procedural and substantive aspects in the IAA’s merger review process. The Guidelines are published in both the Hebrew and English language within the IAA’s website (<http://www.antitrust.gov.il>).

Furthermore, In 2008 the IAA distributed a bill to amend the existing law with regard to oligopolies, namely Antitrust Bill (Amendment 11), 5768-2008 (the “**Bill**”). The bill is meant to cope with competition concerns arising within specific market fields, in which a combination of limited number of strong competitors, along with high barriers to entry, exists. The Law’s current structure fails to deal properly with the phenomenon of oligopolies, since it does not differentiate it from the manifestation of monopolies, although in fact the two represent a different form of market power, and should thus be confronted with a different set of norms and sanctions. Thus, the bill is designated to reform the current law’s structure in two ways (i) changing the definition of oligopolies and (ii) creating a distinction between a monopoly and an oligopoly and the manner in which the law regulates them. Accordingly, the bill purports to imprint different sanctions on members of such oligopolies, by enabling the IAA Commissioner to discontinue the activities of members to such an oligopoly, who prevent or damage competition, as well as to prohibit publication and/or mobilisation of comparative information between members of such oligopoly. The bill also stipulates criminal sanctions (three years’ imprisonment or a varying fine), as well as civil sanctions (violation of the law constitutes a Tort).

### 1.3 Is there any other relevant legislation for foreign mergers?

There is no specific legislation dealing with foreign mergers; however, the Law addresses the issue of foreign mergers where the foreign entity has a market share or sales revenue in Israel

(construed as business activity). As published on the IAA's official website, the Guidelines distinguish between three types of foreign entities, which are parties to a merger transaction: (1) a company which is registered on the Israeli Companies' Registry as a "foreign entity" - such company is considered a company for the purposes of the Law, and will be therefore obligated to file a merger notice if the thresholds stipulated within the Law are met; (2) a foreign entity which is not registered as a "foreign entity", but is connected to an Israeli company - case law (based on the Commissioner's Decisions) has determined that a foreign entity holding more than 25% of the share capital of an Israeli company will be bound to file a Notice of Merger ("Notice/s") to the IAA once it or the Israeli company in which it holds shares purports to merge with another Israeli company, irrespective of whether the merger is carried out by a local or foreign entity; and (3) a foreign entity which is not registered as a "foreign entity" and does not have an Israeli subsidiary, but rather an Israeli place of business - when a foreign entity is operating within the Israeli market, to an extent that its involvement constitutes an "Israeli business presence", failure to comply with Israeli registration duties will not relieve the merging party from its obligation to submit the IAA with a notice. In case one or more of the merging parties conducts their Israeli business activities through the means of an Israeli mediator (distributor, representative, delegate etc.), rather than through an Israeli subsidiary, the IAA will review whether the foreign entity has the power to determine prices for the company's commercial representative, as well as other business terms, in order to gain outside control of Israeli market sales. Based on the extent of affinity and dependency reflected within the written distribution agreements, or rather within the customary business relations between the merging parties and the Israeli "route to market", the IAA will determine whether the foreign entity is considered an Israeli company for the purposes of the Law, and therefore liable for filing a notice. The Law is silent with respect to foreign entities which do not maintain a business activity in Israel.

#### 1.4 Is there any other relevant legislation for mergers in particular sectors?

The Law does not distinguish between mergers in different sectors. However, the Minister is authorised to exempt a restrictive arrangement from all or some of the provisions of the Law, if he believes that it is necessary on grounds of foreign policy or national security.

It should be noted that some sectors are governed by specific laws, these sectors include telecommunications, banking, media, cable and insurance and the acquisition of securities registered in Israel.

## 2 Transactions Caught by Merger Control Legislation

### 2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The term 'control' is defined in the Law as holding more than 50% in a company with respect to voting rights and/or the right to appoint the directors.

For the purposes of the definition of a "merger" between companies the term 'control' is defined as one or more of the following:

- the acquisition of the essential assets of a company by another company;
- the acquisition of more than 25% of the nominal share capital of another company;

- the right to appoint more than one quarter of the board of directors; and
- the right to participate in more than 25% of a company's profits.

The above applies whether the acquisition is effected directly or indirectly as well as in respect of transactions with fewer percentages, ending in the same result. Additionally, the IAA interprets the definition broadly enough to incorporate transactions establishing a significant affinity between the decision-making organs of two or more entities.

Future rights in themselves do not constitute "control" until manifested.

### 2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The term "merger" was intentionally left un-described within the Law's definition, except for several specific instances, in which the acquiring company gains definite control of its merging party, as defined by the Law (see our answer to question 2.1 above). Hence, the IAA might consider a wide variety of transactions, in which competition concerns are revealed, as constituting a merger transaction, even though definite control is not gained by the acquiring party. For example, in cases where the acquired company is decentralised in terms of ownership, factual control could be gained even upon acquisition of less than 25% of its shares and/or voting rights. Therefore, such acquisition of a minority shareholding could likely be construed as constituting a merger.

### 2.3 Are joint ventures subject to merger control?

Any agreements allowing for the "restraint of trade" are subject to the Law and therefore must be approved.

On March 2001, new regulations were legislated namely, The Restrictive Trade Rules (Block Exemption for Joint Ventures - 2001) (the "**Block Exemption Rules**"). The main objective in introducing the Block Exemptions Rules was to encourage the set-up of joint ventures, whilst ensuring minimal harm to competition.

The Block Exemptions Rules distinguish between three types of joint ventures:

- joint ventures between parties that do not compete;
- joint ventures between competitors that do not compete; and
- joint ventures among competitors from the same field;

All three types of joint ventures described hereinabove have either accumulative conditions or considerations that have to be met in order to qualify for an exemption or fall within a restriction listed as permitted.

In March 2006, an amendment to the existing Block Exemptions for Joint Ventures was enacted, namely The Restrictive Trade Rules (Block Exemption for Joint Ventures - 2006) (the "**Revised Block Exemption Rules**"). These Revised Block Exemption Rules, which presented new terms and conditions to the various types of exempted joint ventures, excluded previously formed joint ventures, whose formation was subject to the previous enacted Block Exemption Rules, for a period of 5 years from the date of the inception of the Revised Block Exemption Rules, or rather upon termination of the existing exempted joint venture, whichever is sooner.

Where no Block Exemption is available, one must apply either to the Commissioner or to the Tribunal, depending on the potential market effects of the proposed agreement, for approval. A decision of the Tribunal is necessary with respect to transactions that will have a strong impact on competition in which case the Tribunal will

balance the interest of the public against the anti-competitive effects of the proposed transaction.

It should be noted that parties to a joint venture, whose concentration meets the Law's thresholds for filing a merger notice (as detailed below in question 2.4), must submit a Merger Notice, even in cases where such joint ventures only supply goods to an Israeli and/or Israeli based parent business, while having no current presence in Israel or current dealings with third parties, as well as in cases where a party to the joint venture is a start-up company, or when the joint venture relations are purely contractual and do not form a new legal entity. In these specific cases, the IAA will examine the affinity and control reflected between both parties to the joint venture and the connection they have to the Israeli market, in order to determine whether they should be deemed Israeli Companies for purposes of the Law. In light of same, any formation of a joint venture which is likely to have an effect Israeli market's competition should be subject to the IAA's approval, either through filing of Merger Notices, or through confirmation by means of a Pre-Ruling by the IAA's Commissioner.

Furthermore, in order to prevent practical difficulties in companies' divestiture, the IAA demands that Merger Notices on account of a formation of joint ventures are submitted by both parties to such an agreement and prior to contractual implementation of the companies' cooperation, even in cases where the factual implementation is solely forward looking.

For the avoidance of doubt, in cases where future affect on competition is uncertain, both parties to a joint venture should approach the IAA and request for a Pre-Ruling involving the ramifications of such future possible concentration. The application will be scrutinised in accordance with "the IAA's rules for the granting of pre-rulings on behalf of the IAA's commissioner", as published within the IAA's website. Such request will generally receive a response within 15-30 days upon submission. The Pre-Ruling procedure should also be addressed in case where only one of the parties to a future and/or advisable merger, approach the IAA prior to the implementation of a subject concentration.

Irrespective of the above, if a joint venture results in the assumption of the principal or substantial assets of one or more of the parties, the transaction may be deemed a "merger" as defined hereinabove. Additionally, joint ventures between parties with a combined market share of 50% or more are subject to the monopoly provisions of the Law.

#### 2.4 What are the jurisdictional thresholds for application of merger control?

The Law defines the thresholds for filing a Notice to the IAA as follows:

Each of the merging companies (either directly or indirectly, i.e., through representatives and/or affiliates) maintains a business activity in Israel and **any** of the following conditions are met with respect to such activity in Israel:

1. The total combined local annual revenues of the merging parties, exceeds NIS 150 million (approximately US\$ 41,808,350/EUR 28,525,244), and each of at least two of the merging parties enjoys local annual turnover of not less than NIS 10 million (approximately US\$ 2,787,223/EUR 1,901,682). The NIS figures have not been adjusted since February 1999; the US\$ and EUR rates are based on the 2008 Representative Average Rates Chart published by the Bank of Israel. For more information, please refer to updated Annual Average Rates at <http://www.bankisrael.gov.il/deptdata/mth/average/averg08e.htm>.

Please note that: (i) the said turnover includes the value of total sales according to audited financial statements, but excludes V.A.T. and purchase taxes; and (ii) if a merging party is affiliated with third parties or representatives, the threshold is determined according to the integrated turnover.

2. The combined market share of the merging parties will constitute a 'monopoly' in that it exceeds 50% of the total manufacture, sales, marketing or purchases of a particular or a similar product or service in the local market. However, the Minister, as already indicated, has the authority to declare that a lower market percentage in specific sectors may constitute a 'monopoly' (e.g. in the gas market the percentage has been reduced to 30%).
3. Either of the merging parties constitutes a 'monopoly' (in the local market) prior to the merger.

#### 2.5 Does merger control apply in the absence of a substantive overlap?

The Israeli legislation has set out wide notification requirements with considerably low thresholds.

For example, when one of the merging parties has been defined, prior to the merger, as a 'monopoly' in the relevant local market, the Law and Regulations apply, regardless of an increase in market share.

However, the New Regulations have distinguished between mergers that do not create a dramatic effect on the market, and therefore on competition, and those that do. If the merging parties meet all three conditions mentioned in question 2.4 hereinabove, one of the conditions being that the merging parties together hold less than 30% of the relevant market, then the merger control legislation still applies, however the parties may file a short notice introduced by the New Regulations ("**Short Notice**"). Finally, an increase in a merging party's market share is relevant to pre-determine the Commissioner's involvement and further requirements prior to approving a merger.

#### 2.6 In what circumstances is it likely that transactions between parties outside Israel ("foreign to foreign" transactions) would be caught by your merger control legislation?

Foreign entities are obliged to file a Notice if their local activities fall within the criteria of the thresholds defined in question 2.4 hereinabove. In other words their overseas activities are excluded. The provisions of the Law concerning mergers shall apply solely with respect to the sales turnover of the entity in Israel and with respect to the company's market share in Israel in the production, sale, purchase and marketing of an asset or the provision or receipt of a service.

The Commissioner has determined, through case law, that where a foreign entity is not registered in Israel and/or does not operate directly in the local market, a Notice must be filed if it holds more than 25% of a local company that meets one or more of the threshold requirements. It is advisable to consult with the IAA or apply for a 'pre-ruling' in order to enable the Commissioner to determine if a merger requires clearance, and whether or not a Notice must be filed.

#### 2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There are no mechanisms or provisions that override the thresholds specified in the answer to question 2.4 hereinabove. However, in

foreign to foreign transactions when the local turnover is substantially low in comparison to the global turnover, it is recommended to apply to the Commissioner for a “pre-ruling”, thereby acquiring clearance as to whether filing a Notice is required or not.

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### 2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

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Neither the Law nor the Regulations acknowledge a “merger in stages”.

As soon as a threshold is triggered by a merger (see question 2.4 above), the transaction is considered a merger and is subject to Notification. If a company is involved in several transactions, that each triggers a threshold, then the Law considers each transaction as a separate merger and thus, requires that an individual Notice be filed.

## 3 Notification and its Impact on the Transaction Timetable

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### 3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

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Once the jurisdictional thresholds are met, the filing of a Notice is compulsory and each of the merging parties is obliged to submit to the IAA such Notice in accordance with the format prescribed in the Regulations.

There is no specified deadline to file a Notice, however clearance must be given prior to a first act of a merger (e.g. transfer of ownership; ability to appoint directors; purchase of the majority of the assets of the target company, etc.). One should note that the definition of “first act of merger” has been given a broad interpretation by the Israeli courts.

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### 3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

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There are several statutory block exemptions that have been legislated and that exempt certain merger transactions from the necessity of obtaining the Commissioner’s approval. A recent statutory block exemption, the Block Exemption for Restraints Ancillary to Mergers (the “**Ancillary Block Exemption**”), which came into force on March 11, 2004, exempts merging parties from filing a Notice and receiving clearance with respect to restrictive trades arising from the subject merger (see the answer to question 5.5). Foreign to foreign mergers are subject to clearance if the jurisdictional thresholds are met with respect to their activities in Israel (see the answers to questions 2.4 & 2.6 hereinabove).

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### 3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

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The Law specifically states that failure to file a Notice will be deemed a criminal offence. A party to such a prohibited merger and/or its executive organs can be liable to the following criminal sanctions: (i) three years’ imprisonment; or (ii) a fine of up to NIS 2 million (approx. US\$ 592,000/EURO 298,000), in addition to a daily fine for continued violation, or alternatively a double fine. The level of the fine is calculated in accordance with the specific rate of fines set out in the Penal Code 5737-1977. There are also aggravated circumstances in which the Law imposes imprisonment for a period of five years.

Clause 47 of The Restrictive Trade Practices Law, 5748-1988 enumerates several omissions which constitute a criminal violation, such as failure to notify of a merger transaction, or merging without the Commissioner’s consent. The Tribunal may additionally order the divestiture of companies that have merged in violation of the Law and there are also private measures that can be taken by an aggrieved party (see the answer to question 4.2 below). Foreign entities are subject to the same sanctions as local entities if they fail to comply with the Law (e.g. fall in line with the threshold of local sales turnover); however enforcement on entities which do not have a presence in Israel poses practical difficulties.

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### 3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

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Since there is no deadline to filing a Notice, parties to a merger in a different jurisdiction could theoretically complete a merger outside Israel subject to obtaining Israeli clearance. However, this could be non-practical if such a foreign merger impacts the Israeli market and is deemed an illegal merger for Israeli purposes, in which case sanctions could be applied.

However, since it is within the Commissioner’s powers to approve “merger on terms”, allowing for a merger transaction to take place, subject to the merging parties executing certain provisions stipulated within the Commissioner’s Decision, it seems possible to consult with the IAA and reach some preliminary agreement whereby the foreign entities merge prior to receipt of Clearance in Israel but the local activities do not merge until receipt of Clearance from the Commissioner. It should be noted that the IAA usually does not negotiate the approval of such “hold separate” arrangements, in order to avoid practical difficulties in divesting the merging parties, after the merger transaction was already implemented.

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### 3.5 At what stage in the transaction timetable can the notification be filed?

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There is no specific time defined in the Law whereby a Notice has to be filed. Generally, parties should notify the IAA after a definitive agreement has been signed, however, if there is a high probability that the transaction will be carried out, a Notice can be filed attaching a Memorandum of Understanding. In light of the above it is imperative that the merging parties ensure that any agreement will be pending on the clearance of the Commissioner and in any event a party to a merger should not initiate any actions to promote or exercise a merger (e.g. transfer of shares, board resolutions etc.), without filing a Notice.

There are no specific guidelines with respect to public offers, this would normally have to be notified once the offer has been formally announced and the takeover commenced. In case of a purchase offer in the stock exchange the purchaser may file a Notice on its own behalf, with a request for a ‘pre-ruling’ from the Commissioner.

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### 3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

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The IAA must give its decision to approve, condition or reject a merger within 30 days of receipt of the Notices from all the merging parties. Failure to respond within this time framework will deem a merger approved.

It should be noted that the Commissioner may demand further information in addition to the one furnished under the Notice, in

which case the 30-day period will be stayed for the period of time lapsed from such request until the receipt of such additional information. Consequently, where the Commissioner asks for additional information, and both or one of the merging parties decline to cooperate, the Commissioner will not be bound by the 30-day deadline, until full cooperation of the merging parties is met and all the information required by the Commissioner is received.

The said 30-day period may be extended by the Tribunal if the Commissioner or an interested third party demonstrates appropriate grounds. In any event the parties can present a special request to the IAA for a time extension. Although it is not formally provided by the Law, in practice, if parties wishing to merge show valid reasons as to why a shorter time frame is essential, the IAA will usually be inclined to assist.

The New Regulations have introduced the Short Notice in accordance with the format annexed to the Regulations. Where a Short Notice is lodged, the Commissioner may, within 15 days from its receipt, require a full Notice to be submitted to him, in which case the count of 30 days for the Commissioner's decision will commence only upon receipt of the full Notice as required.

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### 3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

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It is imperative that the merging parties obtain clearance from the Commissioner prior to exercising any transaction and/or initiating any other attempt to carry out a merger. Failure to abide by this prerequisite will result in the Commissioner refraining from considering the Notice at all and the violating parties may be liable to both criminal and civil sanctions. The parties should also bear in mind that under Israeli law failure to obtain clearance can render the entire or part of the transaction subject to annulment by the Israeli Courts.

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### 3.8 Where notification is required, is there a prescribed format?

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A full (regular) Notice should be furnished to the Commissioner in 4 copies (the same applies to the Short Notice) and in accordance with the format prescribed in the annexes to the Regulations. The New Regulations also prescribe the required format for lodging a Short Notice with the Commissioner. The documents consisting of the Notice should be in Hebrew, however the Commissioner will usually accept documents in English.

The data required in the full (regular) Notice format should contain:

- Names and addresses of the parties [both locally and overseas].
- A description of the conditions obligating a party to submit a notice.
- A description of the provisions of section 17 to the Law that are met in the Merger and thus require the filing of a Notice.
- A short description of the Merger transaction.
- Businesses and fields of activities which are subject to the Merger.
- Description of a reporting party's assets, products or services provided in Israel and its share in the Merger.
- Information concerning the relevant markets and the role of the reporting party in them.
- Barriers to Entry in the relevant markets.
- An estimation of the shares of the merging parties' *vis-à-vis* other companies in their sector with respect to services or products and their combined post-merger market share.

- Additional relevant information with respect to the effects of the Merger on competition.
- Names of the filing party's main competitors in the local market.
- Data of any other mergers in the 3 preceding years.
- Names of the filing party's subsidiaries and parent-companies.

In addition, the following documents should be furnished with the Notice (the same applies to a Short Notice):

- A copy of the merger agreement.
- Copies of the audited financial statements of the filing party and its Israeli subsidiaries (if applicable) for the two preceding fiscal years.
- Any other document that might be relevant to the merger.

The Commissioner may request additional information as deemed fit with respect to the merger.

A Short Notice requires the following:

- Description of a reporting party.
- Businesses and fields of activities of the merging parties.
- Information regarding clients and suppliers of the merging parties.
- Basic information concerning the relevant markets relating to the Merger.
- Data of any other mergers in the 3 preceding years.

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### 3.9 Is there a short form or accelerated procedure for any types of mergers?

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As described in question 2.5 above, under the New Regulations, a Short Notice format was introduced. According to which, where all of the following three prerequisites are met, the merging parties may submit a Short Notice:

- a) the merging parties together hold less than 30% of the relevant market;
- b) neither of the merging companies is a monopoly in the relevant market concerning the merger; and
- c) neither of the merging companies is party to an arrangement with a rival third party with respect to the relevant market concerning the merger.

The Commissioner is entitled to inform the merging entities to submit a regular Notice within 15 days from receipt of the Short Notice, if he has grounds to believe that:

- 1) The above mentioned prerequisites are not satisfied, in whole or in part, or if there is an actual doubt concerning the correctness of the information contained in the short notice.
- 2) The product market definition applied by the party filing the short notice is incorrect.
- 3) The merging parties compete in another product market, which is not the product market that is the subject of the transaction and their combined share exceeds 30% and may, under the circumstances, raise a reasonable likelihood of material injury to competition.

The benefit of filing a Short Notice is that, normally it is an accelerated process and the Commissioner's decision is given earlier than with a regular Merger.

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### 3.10 Who is responsible for making the notification and are there any filing fees?

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Each party to a merger must file an independent and separate Notice to the IAA irrespective if such party is filing a regular Notice or a Short Notice. There is currently no filing fee.

## 4 Substantive Assessment of the Merger and Outcome of the Process

### 4.1 What is the substantive test against which a merger will be assessed?

The tests according to which the Commissioner examines a proposed merger are set out in the Law. Primarily, the Commissioner will consider whether the merger will result in the creation of a 'monopoly', as more specifically defined in the Law, or enhance an existing monopoly. The Commissioner may also examine whether the proposed merger will inflict substantial damage on competition in the specific sector with which the merger is concerned, or on the public interest.

The Commissioner will meticulously scrutinise what effect the proposed merger will have on prices, accessibility and availability of goods or services, quality of goods or services and barriers to entry, supply and demand. One should note that the Commissioner has a wide discretion when applying these tests.

To date, there is no precedent for rejecting a merger on oligopoly grounds. Nevertheless, the Commissioner has imposed restricting conditions in cases where a merger resulted in the acquisition of a substantial market share and/or restricted competition. The evaluation of such cases will also observe whether the enhanced market share held by the parties enables them to coordinate their actions and the resulted influence thereof.

### 4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

In addition to the criminal and civil sanctions described hereinabove, a merger that has not been approved by the Commissioner can be construed as constituting a tort within the meaning of the Civil Wrongs Ordinance (New Version) and any person, competitor, supplier, distributor or customer can file a claim against the merging parties. Additionally, a complainant can apply for an injunction preventing the merger and the Law further provides for class actions against the merging parties. Where the Commissioner has given clearance to a merger, any person, trade union and/or consumer group/s can appeal the decision to the Tribunal.

Unless the Tribunal orders that certain material be sealed for reasons stated in the answer to question 4.4 below, a complainant will have access to all key documents and has the right to attend hearings.

The Commissioner in most cases addresses the merging parties competitors in order to obtain their position, in writing or verbally, on the merger. The Commissioner, prior to approving a merger, must consult with the Committee as well as the Director General of any governmental ministry in whose jurisdiction any of the parties conduct business.

### 4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The Commissioner has the right to demand further information pertaining to a Notice in order to consider such Notice in more detail. For example, the Commissioner can demand that the merging parties forward him their business plans, list of shareholders and directors and other data relating to the financial market or markets in which the merging parties are active. Failure to submit this information will result in the Commissioner suspending the process.

Furthermore, the Commissioner has access to governmental databases and may obtain additional information from there. Alternatively the IAA may require a party to file an extended/additional Notice if it finds the original Notice unsatisfactory. The IAA maintains a large database, mainly based on previous merger notices, which may serve to compare information filed by the merging parties to previous information already held by the IAA.

Clause 45 of the Law, allows the IAA to act as follows: (i) to search and confiscate; enter any business (excluding residential apartments) and confiscate, without a court order, information and/or documentation that may be relevant to the merger; (ii) to summon and cross-examine any relevant party; and (iii) to give penalties.

The Commissioner may file a motion to the Anti-Trust Tribunal to impose financial sanctions on a party who fails to submit and/or to reveal relevant information.

### 4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The Merger Notice, as well as additional information filed to the IAA, is strictly confidential. In fact the top of each page of the Short Notice format reads "Confidential". There is therefore no requirement to file a specific motion to impose confidentiality, since the Commissioner is aware of the commercial consequences if confidentiality is not maintained. Notwithstanding, the IAA is liable to civil sanctions that may be imposed in cases of commercial injustices and in compliance with the relevant Tort legislation, allows parties to file a claim for damages as a result of breach of confidentiality.

Accordingly, the IAA does not publish the fact that a Notice has been filed. However this may be revealed during the course of a merger since the IAA can address third parties to obtain relevant information.

## 5 The End of the Process: Remedies, Appeals and Enforcement

### 5.1 How does the regulatory process end?

The Commissioner's response to a Notice has to be given within 30 days of the filing of a full and complete Notice (see the answer to question 3.6). Failure to respond within 30 days will deem the merger approved. In most cases a formal decision is issued by the Commissioner to the requesting parties.

### 5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The Commissioner has the right to approve a merger upon the fulfilment of certain conditions. Common conditions include the following: (i) the merging parties will not condition or tie, directly or indirectly, the sale of a product combination; (ii) separation of operations, separation of directors and decision making process; (iii) restrictions on future business co-operations and acquisitions; and (iv) the merged entities do not make wrongful use of their status in the market.

The Commissioner can decide that the conditions should be satisfied by subsidiaries or parent companies of the merging parties. Such conditions qualify as a "decision" reached by the Commissioner (see question 5.1). A party is entitled to file an appeal on any or all of the conditions set out, to the Tribunal.

### 5.3 At what stage in the process can the negotiation of remedies be commenced?

There are no formal guidelines with respect to this issue, however it is most likely and practical that such negotiations commence once the Notice has been filed and the Commissioner has already stated the proposed conditions.

### 5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

As stated in question 5.3 above, this issue is more practical and thus examined and treated on a case by case basis. The terms and/or demands of the Commissioner are affected by the scope and the scale of the “competition problems”, and its potential affect on the relevant markets. The Commissioner will then decide (in accordance with the power vested in him in Article 20 (b) to the Law) what steps should be taken in order to rectify the problem, and the merging parties may try to convince him that other steps could/should be imposed. The final decision, with respect to the measures applied, is of course in the hands of the Commissioner.

### 5.5 Can the parties complete the merger before the remedies have been complied with?

No. A merger cannot be completed and receive the Commissioner’s clearance before the remedies prescribed by the Commissioner are fully implemented. Any attempt to complete a merger contrary to the above will be deemed as a breach of the Law and might be liable to sanctions prescribed by the Law (see the answer to question 3.3).

### 5.6 How are any negotiated remedies enforced?

Failure to comply with any or all of the conditions of a merger could bring about the criminal sanctions described in the answer to question 3.3 above. Additionally the Commissioner, via the Tribunal, can obtain an injunction preventing the merger due to failure to comply with any or all of the conditions imposed.

### 5.7 Will a clearance decision cover ancillary restrictions?

The Ancillary Block Exemptions allow for anti-competition provisions in connection with the subject merger and forming an integral part thereof, and parties will not have to request further and specific approval and will not have to report such restrictions to the Commissioner.

The Ancillary Block Exemptions define an “ancillary restriction” as (a) a non-competition clause; (b) a non-solicitation clause; (c) a seller’s commitment not to transfer any knowledge he acquired due to his holdings in the acquired business; (d) an agreement between the seller and the acquired business regarding the purchase or supply of goods under the same terms as prior to the merger or under beneficial terms, as long as the terms prior to the merger did not infringe the Law; or (e) any other restraint that is essential for the preservation of the economic value of the acquired business.

### 5.8 Can a decision on merger clearance be appealed?

Where merger clearance has been given by the Commissioner, any person, trade union or consumer group/s may appeal such decision to the Tribunal (within 30 days from the date the decision was published in two daily newspapers).

The Tribunal can approve, vary or revoke the Commissioner’s decision. The judicial review here is not ordinary in the sense that the Tribunal does not only sit as an appellate court but it can also re-evaluate all the issues concerning a merger. The Tribunal is thus authorised to assess the entire merger from inception, using the same considerations as the Commissioner.

The appeal on the Commissioner’s decision will not delay the merger unless an interim order has been given.

An appeal on the Tribunal’s decision may be submitted, of right, within 45 days to the Supreme Court. It is also possible to appeal to the Supreme Court on an interim order issued by the Tribunal.

### 5.9 Is there a time limit for enforcement of merger control legislation?

Where there is an ongoing violation of the Law, there is no time limit for enforcement. However, once the violation has either been remedied or the merging entities revoke their merger, the time limit for enforcement is five years for criminal sanctions and seven years for civil proceedings.

## 6 Miscellaneous

### 6.1 To what extent does the merger authority in Israel liaise with those in other jurisdictions?

Parties to a merger are currently not obliged in any way to report to the Commissioner decisions issued in other jurisdictions and the Law focuses solely on local concerns. However, the Commissioner monitors closely the decision making process in other jurisdictions, in particular, the United States, EU and the U.K.

Israel has been a member of ICN since 2001. One of the advantages of ICN may be with respect to assisting smaller countries like Israel against large entities.

On 15 March 1999, an agreement was executed between Israel and the United States with respect to applying their respective competition rules (the “**Agreement**”).

This is the first international agreement entered into by Israel in this area. The provisions of the Agreement are similar to the agreement between the United States and the EU.

The Agreement is mainly declarative rather than constitutive.

### 6.2 Please identify the date as at which your answers are up to date.

01 September 2009.

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