

Antitrust Authority

**Guidelines of the General Director of the
Israel Antitrust Authority
For Reporting and Evaluating Mergers
Pursuant to the Restrictive Trade Practices Law, 1988**

Clarification

- This document is intended to provide general guidance (as such may be published from time to time) regarding the policy and interpretation used by the Israel Antitrust Authority with respect to various matters involved in the procedural framework of the mergers provisions in the Restrictive Trade Practices Law, 1988 (hereinafter: “the **Law**”).
- This document deals with a number of selected issues relating to the application of the Law’s mergers provisions. It does not purport to exhaust the variety of situations, matters and issues relating to the Antitrust Authority’s policy concerning the mergers provisions and concerning the interpretation it follows. This document collects and adds to what is stated in previous decisions issued by the General Director, and it does not replace, detract or change anything stated therein.
- This document cannot serve as a replacement for obtaining legal advice and it does not detract from, change or cancel anything stated in the Restrictive Trade Practices Law, or in the regulations enacted pursuant to the Law or in the orders, directives and conditions issued in accordance with it. To remove doubt, the guidelines may not be relied upon if the result of such reliance – in a concrete case – is the modification of, detraction from or cancellation of an order, directive or condition issued pursuant to the antitrust laws.
- The Antitrust Authority’s general position as expressed here will not apply in situations in which a concrete position has been announced in a specific case. To the extent that the text of a guideline does not provide otherwise, reliance on the Authority’s position as expressed in this document does not require the addressing of a prior inquiry to the Authority.
- These guidelines applies respect to the relations between the individual and the Authority only, and it has no binding force in terms of civil legal effects between private parties. Therefore, this guideline does not detract from the rights granted by law to any person, including the right to challenge, in any legal forum, any action taken in reliance on these guidelines.

- The updated text of this document is that which has been published at any particular time on the website of the Israel Antitrust Authority's (hereinafter, "the IAA").

Preface

The review of corporate mergers came into existence only when the Restrictive Trade Practices Law was enacted in 1988. Reviewing of mergers began only in January of 1989, some five years before the IAA was established. Various issues regarding the application of the Law's mergers provisions were at the basis of the General Director's decisions issued several years after that, in the **Zelkind Case**¹ and the **Tnuva Case**.² Increased awareness of the scope of the obligation to apply to the General Director regarding merger transactions came about in the coming years, with increased enforcement, and afterwards as a result of the prosecution, in the **Carmiplus Case**, of parties to a merger who did not comply with the requirement of applying for advance approval, and who carried out a merger without obtaining the General Director's approval.

More than anything else, the significant increase in the number of reported transactions and the numerous occasions on which the legal department needs to decide policy and interpretation issues with respect to the application and scope of the duty to report in advance and the waiting periods established in the Law's mergers provisions indicate the increased awareness of the Law's provisions among business managers. A unit within the legal department was established early on in order to provide a response to such appeals. This unit has expanded the scope of its activities in accordance with the continued increase in the number of appeals made.

The scope and nature of the appeals to the IAA indicated the growing need for a collection of the IAA's positions and interpretations – for a guidance document to be made available to the public. At the same time, the procedure involved in the merger review, and the stages thereof, has slowly taken shape. Through a process of evolution, on a case by case basis, a consistent interpretation policy also developed. The guidelines set out here are thus mostly the fruit of the accumulated experience of ten years, from 1997 and onwards – a period during which a procedural format for reporting and investigating company mergers was developed, and during which the IAA has formulated interpretations and procedures regarding the operation of the Law's mergers provisions.

Under these circumstances, we found that alongside the clear need for this, a long period had passed in which practical experience had been accumulated – for better or worse, from the different positions taken by the IAA at different stages, and that this experience

¹ *Re: Acquisition of Nechushtan shares by Gershon Zelkind* (Determination Regarding Merger) 1992 Antitrust 3001296.

² *Re: Tnuva and Osem Investments Ltd.* (Approval of Merger with Conditions) 1996 Antitrust 3001310.

made it possible to collect in writing the IAA's coherent policies regarding the legal issues involved in the procedure for the review of corporate mergers pursuant to the Law.

The purpose of these guidelines is to create certainty, consistency and transparency regarding the normative basis on which the merger review is grounded, in terms of procedure. The guidelines lay out, in summary form, the interpretation of the law as expressed in the customs and procedures applicable during the IAA's evaluation of mergers. We have also seen fit to include in this document the practical lessons that have accumulated in many cases that were put before the IAA since its establishment in 1994.

These guidelines make no detailed reference to the substantive law applicable to the merger review – i.e., to the circumstances under which the General Director will oppose a merger, condition his approval or approve a merger unconditionally. This issue is dealt with in the court rulings given by the Antitrust Tribunal and in the General Director's decisions. These guidelines deal with rationalizing the normative procedural basis involved in the reporting and evaluation process.

Note that with regard to mergers, as is the case with other chapters in the Antitrust Law, the legislature has used expansive language, the purpose of which was to subject to prior review all transactions which could, as a *prima facie* matter, have implications for competition in any particular sector. In these cases, when a real doubt arises, the parties may appeal to the IAA and inquire about its position.

a. Introduction

a.1. Introduction: The Merger Review System

The Law deals with four types of restrictive practices: restrictive arrangements, company mergers, monopolies and concentrated groups. These types of practices are all related, at their core, to the main economic phenomenon that the Law was intended to prevent and restrain – the phenomenon of market power.

Market power, in its narrow economic sense, is the ability of a firm to collect, for a product or service that it provides, a higher price than would have been established under conditions of effective competition. Market power results from the absence of sustainable competition, and is generally expressed through reduced production with the purpose of raising the price for the consumer, or through a negative effect on the product's quality. The purpose of the antitrust laws is to prevent the creation of market power, or to prevent its strengthening, other than in the context of competition for the consumer's preferences.

The creation (and strengthening) of market power is carried out in three main ways which are the subject of the Restrictive Trade Practices Law: the restriction of the activities of competitors by a dominant entity – referred to in the Law as “abuse of position by a monopoly”; coordinated commercial behavior of separate and independent companies – referred to in the Law as a “restrictive arrangement”; and the structural consolidation of such companies – referred to in the law as a “corporate merger” and which is sometimes rises to the level of one business having been “absorbed” by the other (acquisition of full control). These guidelines deal with the last of the three described methods.

The rationale at the basis of pre-merger review is prevention of a structural combination of companies, if there is a reasonable risk that the result of this combination in the market in which such companies operate will be the creation (or strengthening) of market power; with along its side effects: reduced production; price increases; lowered quality, variety or service.

The assumption at the basis of the pre-merger review system is that the structural change created by a merger can upset the competitive mechanism and enable the creation, strengthening or preservation of market power. This disruption can be the result of, *inter alia*, the acquisition of a controlling position in the market by the merged firm, which allows it to exercise market power unilaterally (a unilateral effect) or of a situation in which the reduction in the number of competitors in the market allows them to exercise power in coordination (a coordinated effect). The disruption of the competitive mechanism results from the ability to block competitors' access a critical entry or critical marketing channel from (market foreclosure).³ The pre-merger review system therefore

³ Obviously, this is not an exhaustive list of possible circumstances in which competition can be affected. The question of which circumstances give rise to a significant harm to competition scenario is beyond the scope of these guidelines, and the answer is to be found in the rulings issued over the years by the General-Director of the IAA.

deals with the structural combination of companies: the owner of one business becoming the owner of an interest in another company. The scope and strength of this interest may vary from case to case. The assumption which, on the basis of experience, has been at the foundation of these matters is that mutual links between two companies will affect the manner in which they conduct themselves, and this effect can be a reduction or prevention of competition between them, or a reduction of the competition between them and third parties. This assumption has been anchored in the case-law, in the legal literature and in economic literature. The purpose of the IAA's review is to ascertain that this structural connection created between the merged companies does not endanger competition in the overall market.

A corporate merger is expressed as either a full or partial consolidation. The nature and result of this consolidation is the creation of a structural link between one company and another. The term "structural link" refers first and foremost to the granting or strengthening of a foothold, to the acquiring company with respect to the other company's decision-making mechanisms, which prior to the acquisition had been separate and independent. Unlike a behavioral link between two companies – which takes the form of agreed coordination between two separate and independent companies regarding their behavior (the type of coordination which is the subject of the Law's provisions dealing with restrictive arrangements)⁴ – a structural link is unique in that upon its creation, it grants to those who have such a link either an ability to participate in the internal decision-making of the other company or an ability to influence that decision-making process.⁵

⁴ The distinction between a restrictive arrangement and a corporate merger is not always easily discernible. This is an issue that arises in a variety of contexts (joint enterprises, long-term contracts, etc.) and there is no single exhaustive test that provides an answer for the entire range of relevant transactions. In the area of joint ventures, it is important to distinguish between a venture that creates a new type of activity (regarding which the tendency is to categorize it as a restrictive arrangement) and one which involves the granting of a foothold in an existing operation which is already carried out by one of the parties (regarding which the tendency is to categorize it as a corporate merger). Regarding this issue, see also *Re Tourist Destinations Ltd.* (Determination regarding a restrictive arrangement between transportation companies) 2001 Antitrust 3012980. Among the additional considerations that are examined in connection with the distinction between a restrictive arrangement and a merger are the nature and strength of the link created between the parties to the transaction, the degree of structural integration involved in the transaction, the stability of the link in terms of its duration, etc. It should also be noticed that the distinction between a corporate merger and a restrictive arrangement is not made through a technical and formal application of any particular test, but rather on the basis of an examination of the economic-business substance of the process – a substance which is arrived at through various auxiliary tests whose nature and weight vary in accordance with the particular case. Thus, for example, a venture which is engaged in joint marketing will almost always be classified as a restrictive arrangement, despite the fact that it involves the combination of both parties' current operations. The main reason for this is that the substance of joint marketing ventures is, as a general rule, the coordination of the commercial behavior of the venture's parent companies.

⁵ The impact is sometimes the opposite: take a case in which one company purchases only the right to receive a dividend from the other company with which it is in competition. Such a transaction can also create a corporate merger, even though the purchaser has not acquired a direct right to participate in the acquired company's decision-making process. This is because from the moment that the acquiring company becomes entitled to a benefit out of the profits of the competing target company, there is a

Experience has shown that most of the mergers do not endanger effective competition in a significant manner and that their basic purpose is to acquire the advantages of size and variety. Nevertheless, there are mergers that change the industry's structure in a manner which can create a reasonable likelihood that market power will be created or strengthened. The purpose of the merger review is to identify **and stop** those merger transactions which create **a reasonable risk that the degree of competition will be restricted** in the relevant industry, such that it will no longer be effective, or – if there is no such competition currently in existence – to stop those transactions **which will prevent or make difficult the creation of such competition in the future.**

a.2. The Structure of Israeli merger review

Israel's merger review system is made up of three elements:

At the first stage, **the classification of the transaction**, the antitrust review system takes in all the types of transactions that constitute corporate mergers – i.e., transactions that create links between the decision-making processes of separate companies, or which significantly strengthen a link that had already existed between them.⁶

At the second stage, **the identification of the public interest in an examination of the transaction**, the Law carries out a rough “triage” of merger transactions, eliminating those mergers, which, due to the size of the economic activity carried out by the significant parties to such mergers or due to the competitive stature of those parties, are not of the type in which the public has an interest in their assessment.⁷

Only a transaction which has been classified as a merger and which is characterized by one or more of the alternatives described in the Law, which establish that there is a public interest in the transaction's examination, will be subject to a requirement to submit a merger notice to the General Director and a requirement that the General

reasonable likelihood that it will reduce its competitive behavior, because if it competes strongly with the other company, it will cause damage to its own property. In addition, once the rights are purchased, the decision-makers in the target company will take into consideration the benefit of the new shareholder, and this is likely to reduce the competition between the two companies. The Law therefore provides that a purchase of more than one quarter of the right to participate in a company's profits necessarily gives rise to a corporate merger. It should be noted in this context that Israel has not adopted the exemption which exists under the United States' Clayton Act, which provides that purchases of an interest in a company “for investment purposes only” is exempt from merger review.

⁶ Such purposive and expansive interpretation of the term “corporate merger” is not unique to Israel, but is a fundamental characteristic of the regulatory regime for mergers, worldwide. Thus, for example, the American mergers laws apply to a very wide range of transactions – in shares and in assets. See, e.g., ABA, 1 ANTITRUST LAW DEVELOPMENTS (Fifth ed.), 2002, at 319, and the cases cited there.

⁷ Section 17 will from time to time reach mergers which (at least on a *prima facie* basis) do not appear to have any impact on competition. However, **these mergers also require the General Director's approval**, if they are characterized by one or more of the alternatives set out in Section 17.

Director's approval be obtained prior to the transaction's consummation. Such a transaction is moved on to the next and final stage of review – the analysis stage.

Only at the third stage, **the competitive assessment stage**, are the merger transaction's likely effects on competition evaluated and measured in detail. As stated, this stage is reached only by those transactions that are classified as merger transactions and regarding which it has been found, in accordance with Section 17 of the Law, that the public has an interest in their evaluation.

It therefore appears that an analysis of a transaction's effects on competition constitutes a chronologically and legally separate stage from the stage at which the reporting requirement for the transaction is examined and determined. That stage involves a characterization of the type of transaction that is to be examined by the General Director – a corporate merger transaction. The legislature's instruction was that this type of transaction, when carried out between economic units of a certain type or of a certain size, can, under certain circumstances, create a risk regarding the reduction of competition. This risk does not by itself justify the stopping of the merger, but it does require that the merger be examined in terms of the effect on competition in the marketplace and of the public interest. This indicates a requirement that the transaction be submitted for evaluation by the General Director and that his approval be obtained for the transaction.

b. The meaning of the application of the Law's mergers provisions to a merger transaction: a requirement of prior notification and a requirement to wait for a response before consummating the merger

b.1. General

The Law's mergers provisions deal with transactions that involve the obtaining of a foothold (or the strengthening of an existing foothold) in business activity. The Law does not deal with the manner in which one company obtains a link granting it influence over the other company's activity. The Law deals with the result of such a merger for the relevant market, in terms of competition.

Since a review of all the merger transactions in the Israeli economy would not be efficient, the legislature created filters that are intended to sift through these transactions and to retain for evaluation – out of all the acquisition transactions in the economy – those transactions regarding which there is a higher likelihood that they will infringe upon competition. These filters are found mostly in Section 17 of the Law, which defines the transactions regarding which the public has an interest in an evaluation of their effect on competition. Later on, we will deal with the scope and interpretation of these filter provisions.

Once an acquisition transaction has come within the scope of the Law's mergers provisions in the Antitrust Law, the parties are subject to **special requirements**, regarding which the IAA has been especially diligent. The source of these requirements is in Section 19 of the Law, which provides as follows:

Companies may not merge unless a merger notice is filed and the consent of the General Director to the merger is obtained and, if such consent is conditional- the merger must be consummated in accordance with such conditions, all as provided in this section.

Two primary and extensive requirements for parties to a merger are derived from the language of this section, and they are essentially two sides of the same coin. The first requirement is the **advance reporting requirement**, the main aspect of which is the duty imposed on the parties to the merger to appeal to the General Director, to notify him of the planned merger and to obtain the General-Director's prior approval for the merger - i.e., the review process is a condition *ex ante* for the merger. The second requirement is **the waiting requirement**, and the main part of it is the absolute prohibition imposed on the parties against any consolidation whatsoever of their activities, **and against any initiation of a merger act** until the General Director's decision is issued, and against taking any action other than in accordance with that ruling.⁸

The advance reporting requirement and the waiting requirement are fundamental elements of the review method. The basic purpose of the merger review regime is to protect against **and to prevent, in advance**, the anti-competitive element involved in certain merger transactions. The prior review of merger transactions is critical for the protection of competition in the markets. As Hovenkamp and Areeda have explained:

Once the merger transaction has been completed, both the reallocation of ownership and the reorganization of the post merger firm can produce significant problems of "unscrambling the egg", as it is sometimes put. **For this reason the antitrust system encourages challenges to mergers before they occur.**⁹

The failure to comply with the reporting and waiting requirements frustrates the statutory purpose and will in any event lead to the main exercise of enforcement discretion being carried out primarily with respect to sanctions instead of with regard to the granting of permission to consummate mergers. In other words, when a merger has already been implemented, the practical question faced by the merger review system involves the nature of the measures that can be taken against the parties to the merger with respect to statutory violations. The question of whether or not to permit the merger has at that point lost its importance (since the merger has already been consummated). Note, this does not mean that at this stage the competitive aspect of the merger is no longer examined. The

⁸ Regarding the first date on which a corporate is deemed to have taken place, see *Golkal 1992 Ltd. and Zovar Trading Company, Ltd.*, (Determination to be a *de facto* corporate merger) 1998 Antitrust 3001329.

⁹ .H.AREEDA, H.HOVENKAMP, J.SOLOW, 4A ANTITRUST LAW (2004), ¶990 C1.

merger's competitive effects will still have significance with respect to the **type of remedy** chosen by the General Director. Thus, for example, the General Director's authority, pursuant to Section 25 of the Law, to require the separation of the merged companies, arises only if the merger gives rise to a "reasonable risk regarding significant damage to competition."

A failure to comply with the reporting and waiting requirements, which we call a "*de facto* merger" is also likely to lead to (and has in fact led to) the initiation of criminal proceedings alongside the General Director's request for a civil remedy consisting of a request to have the companies separated.¹⁰ In the **Carmiplus** case and in the **Ofek-Aropan** case, the IAA brought criminal proceedings against companies that had violated the waiting and reporting requirements. In the United States as well, the FTC takes strong and unequivocal measures against violations of the duty to wait established in the American law (such violations are referred to there by the phrase "gun-jumping").

b.2. What is considered to be a "*de facto* merger"?

The prohibition applies to any act which on some level gives the acquirer a foothold in the target company, to a full or partial combination of activity, or to an act which is expected to have a significant effect on the behavior of the target corporation. Among these acts are: the transfer of consideration to a seller or on its behalf; the transfer of securities to a buyer or to a party acting on its behalf; the transfer of economic risk involved in the holding of securities; the transfer of a right to benefit from the increased value of a corporation; the transfer of the right to vote at the corporation's general meeting; the appointment of officers in the corporation – all these, whether in theory or in practice, are covered.¹¹ Actual examples of such are described in the following cases:

- In the **Golkal-Zovar** case, it was found that a *de facto* merger had taken place through the transfer of the acquired shares and the conduct of the company by trustees who were effectively the holders of control in the acquiring company.
- In the **Arutzei Zahav** case, the acquisition agreement provided that the consideration for the shares would be transferred immediately prior to the General Director's ruling, and that even if the General Director objected to the transaction, the consideration would not be returned, but the acquirer would be responsible for selling the shares onward, bearing the risk and the chance that the value of the shares would change. Additionally, it was held that the shareholders would refrain from distributing dividends for an unspecified period of time. The General Director believed that the combination of these conditions created a *de facto* merger.¹²

¹⁰ See CivP 916/03 *Gen.Dir. v. Braun-Fishman Communications Ltd.*, Pad'or (unpublished) 379(3)(14).

¹¹ For a detailed guideline regarding actions the implementation of which will be considered to be a violation of the waiting requirement, see *Golkal and Zovar (De facto merger)*.

¹² The merging companies paid NIS 600,000 to the State, in the framework of an agreed upon order approved by the Antitrust Tribunal.

- In **liquidation cases**, it is customary that the liquidator asks the parties that are interested in purchasing the company to inject funds into the company with which they wish to merge. This injection of funds generally involves supervision by the financing party of the use made of the injected funds. These actions require prior approval from the General Director, since the injection of funds (and the rights that accompany such an injection of funds) can affect the competitive activity of the liquidated company, as well as the behavior of the financing party. The creation of this influence link requires the prior approval of the General Director of the IAA.¹³

In general, while in the context of the advance reporting requirement and the waiting requirement, there is a prohibition against a potential acquirer injecting funds or appointing directors (whatever titles are actually given to them) for the target corporation, there is no prohibition against transferring shares and consideration funds to an external trustee, so long as these transfers are not accompanied by additional rights given to an acquirer wishing to merge with the target corporation, and so long as the trusteeship mechanism creates a **complete and real buffer** between the transferred rights and the acquirer, and the acquirer does not have, because of the trusteeship, any actual link to the transferred shares.¹⁴

b.3. Date for reporting the acquisition of shares and options

As explained above, merger transactions that are subject to the antitrust merger review system require advance reporting to the General Director of the IAA and they may not be consummated before the General Director's approval of such has been obtained. Such approval **may be requested** from the time that the contractual relationship establishing the merger transaction has taken concrete and complete form, in the form of the merger agreement.¹⁵ This approval **must be requested** prior to the commencement of the merger's implementation.

¹³ In situations in which a delay in the injection of funds creates a solid and substantial risk that the sale of the company in liquidation will be frustrated, a request may be addressed to the IAA in order to find an appropriate legal solution to the issue.

¹⁴ The transfer of shares to a trustee could, under certain circumstances, constitute a corporate merger between the trustee and the held company. For further discussion of this matter, see *Golkal and Zovar (De facto merger)*.

¹⁵ Under certain circumstances, the IAA will agree to accept merger notices and to carry out an evaluation even in the absence of a merger agreement - for example, when a merger is carried out through a tender offer on the stock exchange. Additionally, there are situations in which the IAA will agree to begin the examination of the merger on the basis of a memorandum of understanding, if the parties to the transaction provide the IAA with a persuasive reason for doing so, and subject to the memorandum of understanding being sufficiently detailed and specific and including a clear and complete outline of the transaction, on the basis of which it is possible to properly estimate the effects the merger will have on competition. Note that the number of days in which the General Directors is required to give a ruling regarding a merger will in any event begin only when the full merger agreement, with all its attachments, is submitted as required by law.

Over the years, the IAA has encountered many questions regarding the moment at which a merger notice must be submitted with respect to **options for the purchase (or sale) of rights in a corporation.**¹⁶ The main question that arises in this situation is whether the advance reporting and the waiting requirements arise at the time the options are exercised or at the time the options are granted.¹⁷

The rule adopted by the IAA is that the correct and binding date for the reporting of options is **the time of their exercise.** This means that the options may not be exercised before the General Director has given his approval for such, but the granting of the options does not require, in itself, advance approval. According to this rule, the correct date for filing the merger notice is when the owner of the options formulates a concrete intent to exercise them in the near future (on the assumption that the owner of the option has the contractual right to realize this intent at the said time). The merger reporting date is therefore **close to the exercise date, while in any event, there is a prohibition against exercising the options without obtaining the General Director's approval for such.**

At the same time, a duty to report will occasionally already arise **at the time that the options are granted.**

This will be the case, for example, when at the time the option is granted, there is a high likelihood that it will be exercised, taking into consideration the ratio between the option's exercise price and the market price (a "deep in the money option"). The reason for such is that in such a case, the very fact that the option is held has an influence on the array of the option-holder's incentives which is similar to the influence created by financial interest the source of which is the ownership of shares in the corporation. This will also be the case when the holding of the options is accompanied by additional rights by virtue of which the option holder obtains a foothold in the held corporation.¹⁸

¹⁶ The term "option," as used here, refers to various types of arrangements that give a person a future opportunity to require another person to sell or to purchase, as is relevant, rights in a corporation. Thus, the term "options" will also include convertible debentures and similar arrangements of this type.

¹⁷ Of course, the starting point in the following discussion is that in the context of the transaction, share options are purchased **in such a quantity that the threshold of holdings sufficient to create a corporate merger is passed** (directly, due to the percentage of rights granted in the options, or due to the accumulation of rights covered by the options together with the purchaser's additional holdings). The analysis of transactions in which the purchased options grant rights of a quantity **that does not** reach the merger threshold (for example an option whose exercise grants the holder 15% of the rights in the corporation) is similar to the analysis of transactions in which shares are purchased in an amount **that does not** reach the merger threshold. Such an analysis is beyond the scope of this discussion.

¹⁸ An example would be veto rights with respect to matters that can affect the corporation's competitive abilities, a position on the board of directors, or the power to influence resolutions adopted at the general meeting. For the sake of clarity, we note that this does not serve to negate the possibility of granting standard protections to an option-holder, the purpose of which is to prevent the destruction of the options' economic value (such as a condition prohibiting the distribution of bonus shares without the issuance of shares in an appropriate amount to the option-holder as well). Such conditions, by themselves, will not advance the date on which reporting is required, so long as they do not allow the holder to exercise any

Up to now, we have dealt with the date on which **there is a requirement** that the General Director's approval be requested. A different question arises with respect to **the earliest date** on which the IAA will agree to review a request for the approval of an option. As has been explained above, this date is generally the date on which a concrete intention to exercise the option has been formulated.

The IAA has occasionally been asked to approve options at the time that they are issued. The granting of an approval at the stage of the options' issuance gives the parties certainty that at the proper time, it will be possible to exercise them. Of course, this certainty has implications for the options' financial value.

Nevertheless, the examination of all transactions involving the granting of options obligates the merger review system to respond to a very great number of transactions that may never be consummated. This is neither efficient nor practical. It involves a waste of limited public resources and raises a very wide range of practical difficulties.

In a gradual process, the IAA has formulated a number of practical rules in this context, which balance between the needs of the parties to a merger to increase the certainty regarding the exercise of the options on the one hand, and the public's interest in maintaining efficient and focused review of merger transactions on the other hand.

The first rule is that at the time that a merger notice is submitted with regard to a merger transaction, the merging companies can request that the approval of the merger will also refer to the possible exercise of options granted in the transaction, the exercise of which will increase the acquirer's holding in the target company. In this way, the merging companies will not be required to submit an additional notice when the options are exercised.¹⁹

What is the rule with respect to a merger notice filed with regard to options the exercise of which creates a corporate merger, when the issuance of such options is not accompanied by a corporate merger agreement²⁰ In such a case, the IAA will not deal

influence on the held corporation, and so long as sensitive information, which can damage competition, is not exchanged by virtue of such conditions.

¹⁹ Assume for example that Company A purchases 30% of the shares of Company B and receives an option to purchase an additional 30%. As a rule, the approval of the merger that is given to Company A will refer only to the purchase of 30% of the shares in Company B. At the time that the options are exercised, the companies will be required to submit an additional notice, as the exercise will lead to the crossing of the threshold of half of the rights in Company B. In such a case, the companies may request that the approval for the purchase of 30% also include an approval regarding the exercise of the options. The IAA will generally grant such a request, subject to the merger being carried out within one year from the date of the approval and that the options are exercised not later than three years from the date of the approval. (In certain markets, the IAA will limit the date for the exercise of the options so as to create a shorter period during which they must be exercised.)

²⁰ For example, an agreement that does not include a transaction in shares or assets, but only gives the purchaser an option to purchase half of the rights in the corporation.

with the merger notice, unless it is presented with a special reason justifying the need to decide the propriety of the option agreement before a concrete intention to exercise the options has been formulated. Special reasons are generally related to the competitive complexity involved in the transaction, which leads to increased uncertainty as to the possibility of it being approved in the future. Parties requesting approval for such a special reason must specify the complexity which, in their view, justifies the IAA's involvement with the matter. If the IAA decides that there is a justification for allowing the issuance of the options, based on such a special reason having been provided, the parties to the merger will be given a merger approval that will be valid for one year. If the options are not exercised during this period, the parties will be required to submit an additional notice prior to the exercise of the options.

c. Classification of a transaction – what is a corporate merger?

The special obligations that apply to parties to a merger transaction which requires approval pursuant to the Law sharpen the need to recognize the limits of the application of the Law's mergers provisions.

c.1. General

The risk regarding competition regarding merger transactions is most clearly present in a transaction in which one company obtains **full control** over another company that prior to the merger transaction had been independent and separate. However, the risk regarding competition is also present in other situations that do not reach the level of full control. Thus for example, when a company has acquired the right to participate in the internal management of another company, to have a significant influence on its behavior or to share in a portion of its profits – even if this acquisition does not amount to the acquisition of full control, the structural link can reduce competition between the two companies.

A corporate merger is defined in Section 1 of the Law as follows:

Including the acquisition of most of the assets of a company by another company, or the acquisition of shares in a company by another company through which the acquiring company is accorded more than a quarter of the nominal value of the issued share capital, or of the voting power, or the power to appoint more than a quarter of the directors, or participation in more than a quarter of the profits of such company; the acquisition may be direct or indirect or by way of rights accorded by contract.

The definition of a corporate merger is composed of two aspects: a wide and open one (which is not specified in the definition) and a collection of specific cases, which are listed in the definition, each one of which **necessarily** creates a “corporate merger.” In other words, the collection of specific cases in the definition are in addition to the basic transaction that constitutes a “corporate merger” which is not expressly specified in the Law's definition, since the legislature believed that its core was clear: any creation or

strengthening of a substantial influence link between the decision-making mechanisms of two companies.²¹

c.2. A merger according to the wide and general aspect of the definition

Any transaction that creates (or significantly strengthens) a substantial and continuous influence link between the decision-making mechanisms of the companies involved in the transaction, either directly or indirectly, falls within the definition of a “corporate merger.”

As the word “including” – used at the start of the “corporate merger” definition – indicates, the Law seeks to include in the definition **all** transactions that give one company a substantial structural link to another company (or which strengthen an existing link, in a not inconsequential manner), whatever the formal structure of such transaction and whatever technique is used to create such a link.

The competitive review focuses on transactions that grant the acquirer **a foothold in the target company** which includes in it the potential to influence the conduct of the target company or the potential to significantly influence the business conduct of the acquiring company. These transactions of course include those that involve the granting (either actual or potential) of full or partial²² control of the target company, including the various forms of such control (individual control, partnership in a controlling bloc, a general right to participate in control or in a certain type of decision, or negative control - the ability to prevent resolutions from being adopted).²³

²¹ The expression “**substantial influence link**” refers to influence with a similar weight to that which accompanies the holding of more than a quarter of one or more of the type of rights listed in the definition of a corporate merger (issued share capital, participation in the corporation’s profits, voting power and the right to appoint directors).

²² The term “partial control” is not defined in the legislation. What is involved here is a range of situations in which the party receiving the rights does not have definitive control (more than 50%), but nevertheless has a substantial foothold in the company’s decision-making process (by virtue of being one of the largest holders of rights within the company, or by virtue of holding a veto right in connection with the adoption of certain resolutions, etc.)

²³ It is nevertheless clarified that the above does not negate the inclusion in the merger agreement of negative covenants – i.e., clauses in which the target company undertakes that during the standard period of time in between the signing of the agreement and the closing of the transaction, it will not carry out certain activities that could significantly change the business condition of the target company during that period. This also does not negate the inclusion of limitations on expenditure of funds by the target company, so long as such limitations are fixed in advance and are consistent with the target company’s regular business activity during the period prior to the merger. Nevertheless, care should be taken that these contractual terms do not in actuality transfer to the intended purchaser the power to direct the target company’s operations or to control its affairs, or that such terms do not allow the intended purchaser to subject the interest of the acquired company – even if only partially – to the interest of the purchasing corporation, or to the interest of a party controlled by the purchasing corporation, or for the benefit of a party controlling, controlled by or under common control with the purchasing corporation.

It is therefore clear that the wide and general aspect also includes situation in which one company obtains a significant foothold in another company, even if the technique used to create the structural link is not one of those included in the list of specific cases in the definition. The following is a non-exhaustive list of such situations:

- A case in which the foothold is not “acquired” but is instead given or granted in another manner (not for consideration, or through transfer, assignment, etc.) The Law is concerned only with the **result** (a structural link between the companies) and not with the **method** that led to such result;
- Cases in which the acquisition grants the acquirer less than a quarter of a category of rights, but because the wide dispersal of the other holdings in the target company, the acquirer is effectively given a significant foothold in the company by virtue of the acquirer being, for example, the largest shareholder;²⁴
- Cases in which the acquisition grants more than a quarter of any type of rights in the corporation to a group of acquirers, although no single one of them independently reaches the threshold of one quarter of any type of right, and the acquirers have a connection to each other;²⁵
- Cases in which the acquisition grants the acquirer more than a quarter of a type of right that is not one of the concrete rights listed in the definition (i.e., a quarter of the issued share capital, voting rights, rights to appoint directors, or the right to participate in profits), but the package which has been acquired grants the acquirer a significant foothold in the business affairs of the target company;
- A case in which the control is not transferred between “companies,” but through an individual who controls a business that falls or businesses that fall within the definition of a “company”;²⁶

²⁴ This refers to a foothold that is of similar importance to that accompanying an absolute holding and in many cases, the situations are those which create a merger by virtue of the specific alternatives listed in the definition as well. Thus for example, a shareholder who holds 20% of the voting power in a public company with widely dispersed holdings will sometimes be able to appoint more than a quarter of the company’s directors.

²⁵ When there is an **equity connection** between the purchasers, such as when a company and its subsidiary are together purchasing another company, their purchases will at any rate be joined, since the Law will in any event view them as a “single substantive entity.” This item therefore refers to cases in which the relationship is not at the level of a parent and subsidiary company, but instead primarily refers to cases in which there is a connection based on an agreement between the purchasers. The term “a connection based on an agreement” refers to a wide range of arrangements and agreements in the context of which the purchasers are joined with regard to the manner in which they vote or in which they will act within the company’s various institutions. Regarding the matter of a joint purchase, see Chapter c.3.1 below.

²⁶ Such a case will also reach the level of a corporate merger according to the specific aspect of the definition, which applies to the purchase of rights and assets, whether carried out directly or indirectly. See also *Re: Acquisition of Nechushtan shares by Gershon Zelkind* (Determination Regarding Merger) 1992 Antitrust 3001296.

- Cases in which a person is given the right to participate in and significantly influence the decision-making in the company (either with respect to decisions in general, or of a certain type) or the right to prevent them, other than in the role of any type of shareholder – instead, the right is given pursuant to a contract.²⁷

The rationale at the basis of the merger review system requires an expansive interpretation of the definition of a “corporate merger” such that the definition applies to any situation in which one company achieves the power to control or to significantly influence the decision-making processes relating to the other company’s business conduct.

C.3. The specific cases the constitute a corporate merger

In addition to the wider aspect of the definition, which is hidden behind the text of the “corporate merger” definition in Section 1 of the Law, the Law expressly establishes, in that definition, a number of specific situations in which a “corporate merger” **necessarily** takes place. They are the following:

- the acquisition of most of the assets of a company;
- the acquisition of shares in a company through which the acquiring party is granted more than a quarter of the nominal value of the issued share capital;
- the acquisition of shares in a company through which the acquiring party is granted more than a quarter of the voting power;
- the acquisition of shares in a company through which the acquiring party is granted the power to appoint more than a quarter of the directors;
- the acquisition of shares in a company through which the acquiring party is granted the right to participate in more than a quarter of the company’s profits.

These specific cases do not negate the generality of the broader aspect of the definition; they only represent the typical merger situations, as a partial concretization of the broad and general aspect of the definition.

It is clear that the “**acquisition**” component does not require that the acquisition be one to which the target company or its controlling shareholders have agreed to. A “hostile takeover” acquisition can also constitute a corporate merger. This is because the specific technique through which one company acquires a substantial influence over the other company has no relevance to the matter. From a competition perspective, the emphasis is placed on the existence of the link, and not on the means through which it was achieved.

²⁷ These cases are likely to occur with respect to the specific aspect of the definition as well, which applies expressly to the purchase of rights or assets “by way of rights accorded by contract.”

“Acquisition” – refers also to a long term lease: An acquisition can also include a long-term lease of an asset or of the rights to operate it. This means that it is not necessary that the acquisition involve the full ownership of an asset or a right, and it could also include the acquisition of a right to use, the result of which is the continued control of the leased company’s commercial behavior (or of the transferred activity, whichever is relevant). This interpretation by the IAA is at the foundation of the order that was agreed upon by the General Director and the Delek Group, with regard to the leasing of petrol stations by the Delek Company, for periods longer than seven years. In that case, the General Director believed that there had been a corporate merger.²⁸

c.3.1 Merger through the acquisition of rights

The Law lists a number of rights the acquisition of which, **if it grants more than a quarter of one or more of such rights**, will create a corporate merger: issued share capital, voting rights, power to appoint directors, and the right to participate in the company’s profits. These rights are referred to together, hereinafter, as “**the rights.**”

The scope of the holding of voting rights or of the power to appoint directors represents the degree of influence that the holding company has vis-à-vis the management and decision-making of the held company (“**active rights**”).

In contrast, the holding of issued share capital and the holding of a right to share in the corporation’s profits (“**passive rights**”), by themselves, have an influential effect on the set of incentives which the holding company has for competing with the held company, and vice versa.

Both in general and in terms of the merger review, the antitrust laws attribute implications to a holding of both active and passive rights. The Law therefore directs that the crossing of the statutory threshold with respect to any of the types of rights indicated above will constitute a corporate merger. Thus, an acquisition which grants more than one quarter of a certain right will constitute a corporate merger, even if the right is a completely passive one.

Can an acquisition that grants less than one quarter of a type of shares in the company be considered to be a “corporate merger”? The statutory language – and especially the existence of the broader aspect of the definition of a corporate merger – would support such an approach. Nevertheless, it would appear that there would be very few situations of this type. Thus, for example, such a situation would arise if an individual makes an acquisition that grants the individual less than a quarter of some

²⁸ There can be purchases of rights to use an asset or leases of such rights that will be categorized as restrictive arrangements. The distinction, for this purpose, between a corporate merger and a restrictive arrangement is made on the basis of all the circumstances in the particular case, which may include the nature of the asset and the character of the right which is granted. Of course, the longer the duration of the period to which the right to use refers, the greater the chance that the agreement will be classified as a corporate merger. The interpretation of the “corporate merger” definition is discussed further in *Golkal 1992 Ltd. and Zovar Trading Company, Ltd.*, (Determination to be *De Facto Corporate Merger*) 1998 Antitrust 3001329.

category of rights, but under the circumstances, given the dispersal of holdings in the company, the limited package of rights that the individual has acquired would have the practical effect of granting him significant influential power. Another type of situation that would be considered to be a corporate merger would be when the acquirer receives, alongside the regular rights that he has obtained, additional preferential rights.²⁹ An additional case that falls within this group would be cases in which, given the circumstances, although the acquired rights do not achieve the level of being “more than a quarter,” they are nevertheless added to a set of arrangements between the acquirer and the target, which are sufficient to establish a corporate merger on an aggregate basis. For example, this would be the case if the transaction is for an acquisition of 20% of the target’s issued share capital, but this acquisition is in addition to a creditor-debtor relationship between the acquirer and the target. In cases such as these, it may be necessary to conclude that the transaction is to be seen as a corporate merger, even if it did not involve the transfer of more than quarter of a particular right.³⁰

The issue of joint acquirers – will the size of their holdings be calculated on a joint basis? What is the rule when a number of companies acquire more than a quarter of the rights in a company, but no single one of them independently crosses the threshold of having acquired one quarter of any particular right in the corporation? Do we refer to the size of each one of their holdings separately, or do we accumulate the rights that they all hold?

The review system treats an acquisition which is to be consummated by a number of units as a joint acquisition, in a variety of circumstances and situations. This is certainly the case when these units acquired the shares together or contracted between themselves, in the framework of a voting agreement, to coordinate their exercise of their rights in the company.³¹ This will also be the case in other situations, in which an analysis of all the

²⁹ This would be the case, for example, if a person has made a purchase that grants the person 20% of the issued share capital and of the right to appoint directors, but with regard to the adoption of resolutions about the company’s product’s prices, the purchaser is given a veto right, or the purchaser is given a “golden share” that grants it special rights in general or in connection with specific issues, which constitutes effective control.

³⁰ This is aside from the question of whether a transaction in which a purchase grants to the purchaser 25% of the rights (or a lower percentage than that) could possibly be classified as a restrictive arrangement, depending on the circumstances of the case.

³¹ For this purpose, a “voting arrangement” shall mean an agreement, understanding or other arrangement among shareholders, relating to the exercise of any of the rights in a coordinated manner, including any of the following: an arrangement regarding voting at the general meeting (or at a parallel institution) regarding specific or all resolutions; an arrangement regarding the appointment of directors or company officers; an arrangement regarding the convening of joint preliminary meetings before the holding of the general meeting or a board of directors meeting; joint voting procedures at the company institutions or in other corporations. The logic of this is that in these situations the size of the direct holding of the shares in the corporation does not reflect the shareholder’s true status in the corporation, and the shareholder effectively has, by virtue of the voting arrangement, an influence which is equal to the type of influence that would be involved in a transaction that constitutes a corporate merger (or perhaps even more than that). A clear (and non-exhaustive) example of this would be a situation in which two shareholders, each holding 20% of the

circumstances will indicate coordination among the different entities, since under these circumstances, the size of the acquisition made by each unit does not reflect the degree of influence that will effectively be granted to that party with respect to the corporation's conduct. As an example, the acquisition of rights that exceed one quarter, by a group of individuals who conduct their business together, and who customarily cooperate with each other in terms of their business activity, will be a corporate merger, even if no one individual by himself has acquired more than a quarter of any right whatsoever, and even if such individuals do not have an actual voting arrangement.. In such cases, to the extent that as a result of the acquisition, the joint holding by a group of coordinated units crosses the one quarter threshold– a corporate merger has taken place.³²

✚ **“More than a quarter”:** what are the levels of holdings beyond which a corporate merger has been created?

As stated above, the Law provides that an acquisition that grants more than a quarter of any category of the rights listed above creates corporate merger. It should be recalled that the acquisition of this amount of rights, or of a smaller amount, can be considered to be a corporate merger by virtue of the above-mentioned broader aspect of the definition, and can also constitute a restrictive arrangement pursuant to Section 2 of the Law, especially when it allows for the appointment of an officer in the company whose shares have been acquired.

The significance of this is that **a corporate merger, as defined by the Law, will arise whenever the holding level of 25% (or an additional 25%) is reached** with respect to a type of rights in the corporation.³³ The reason for this is that the strength of the holdings and the meaning thereof changes with each 25% bracket. The meaning of an agreement to a holding of 25.1% of a company does not have the same meaning as an agreement to grant the acquirer actual control of the company, and the consent given for one does not necessarily involve consent for the other. This means that the General Director is given the discretion to decide whether to agree to merger between companies, and this discretion can change in light of the size of the acquisition and its power.

Nevertheless, the IAA's main policy is that as a rule, **it will not require that a merger notice be filed** if a person **properly** holding more than one half of **each** of the types of rights in the company increases his holdings of any right whatsoever to a percentage that

shares in a corporation, agree between themselves to vote together regarding matters brought up at the general meeting. In such a situation, it is clear that by virtue of the agreement, the shareholders effectively hold 40% of the voting power at the general meeting and the law requires that this fact be given proper legal expression.

³² See also Chapter 4.5 of *Golkal and Zovar (De facto merger)*.

³³ Thus, for example, if Company A holds 20% of the issued share capital of Company B and it increases its holdings of Company B's issued capital to 40%, Company A is carrying out a corporate merger (as it is passing the 25% threshold). Now, if after some time, Company A again increases its holdings of Company B's issued capital to 60%, this is again a merger transaction (Company A is now crossing the 50% threshold).

exceeds 75%.³⁴ The reasoning is that under such circumstances, a change in the size of the holding does not, as a rule, express any significant change in the link between the decision-making process of the parties involved in the transaction. At any rate, the Law sees a person and the company in which the person holds more than 5% of a certain type of rights as a “single substantive entity.”³⁵ Nevertheless, this exception can be qualified, such that the IAA may insist on the filing of a merger notice if, for any reason whatsoever, the formal holder of control did not previously hold actual control of the corporation, or in exceptional circumstances in which there are special competition consequences attributable to the change in the strength of the holding.

Acquisition of rights – internal organization and reorganization in a cluster of companies

Another common situation is one in which a corporate merger takes place in a formal sense, but is nevertheless not accompanied by a change in any link between the decision-making processes of the companies involved in the merger, is one which is a reorganization within a cluster of companies (i.e., a concern). Intra-organizational changes within a cluster of companies are common events which do not generally give rise to any significant change from the perspective of the antitrust laws. The reason for this is that in any event, subsidiaries and subsidiaries’ subsidiaries and all such companies are identified with the controlling company. The manner in which the chain of control is maintained and the number of corporate layers between such companies has no significant implication in terms of competition. Indeed, such an organizational process will frequently constitute a corporate merger according to the formal tests established in the Law, but it will not involve anything that will in any way modify the quality of the link between the decision-making processes of the parties involved in the “merger.” Therefore, there is no practical reason for it to be examined by the General Director.

Thus, the IAA’s policy has been not to require the submission of a merger notice when the same entity³⁶ **holds all the rights** in the merging companies. The IAA’s policy of not requiring a merger notice refers only to cases in which **all the rights** in the merging

³⁴ Thus, for example, if Company A holds more than half of either the voting rights or the power to appoint directors or the right to profits or the issued share capital in Company B – and such holdings were acquired properly – the IAA will not insist that a merger approval be obtained for a transaction in the context of which company A increases its existing holdings in Company B. On the other hand, in the event that Company C holds more than half of the voting rights and the issued share capital of Company D, and only 40% of the rights to profits and of the right to appoint directors, then a transaction in which Company C crosses the threshold of holding more than half of the right to Company D’s profits will constitute a corporate merger that requires the General Director’s approval.

³⁵ See for example, section 3(5) of the Law.

³⁶ For example: Company A holds **all the rights** in Companies B and C. A wishes to transfer the activities of Company B to Company C and to bring about the complete and final elimination of Company B. this transaction would appear to constitute a corporate merger, but it does not change in any way the link between the decision-making mechanisms of the merging companies and the IAA will therefore not require that a merger notice be submitted because of the transaction.

companies are held by the same party **and there is no change in the composition of the ownership of the shares.** When the controlling party does not hold full ownership of all the categories of rights, the IAA's policy can still apply. However, this matter will be examined by the IAA on a case by case basis, according to a detailed appeal from the relevant parties.

Calculation of rights: How is the size of the holding in a corporation determined?

As stated above, an acquisition through which the acquirer receives more than a quarter of a type of right indicated in the statute will create a corporate merger. This is the case whether the acquisition is direct or indirect. For the purpose of calculating the size of the holding in the corporation, it is necessary to distinguish between the above-mentioned two types of rights:³⁷

Active rights (voting rights and the power to appoint directors) are calculated by way of attributing all the rights to the controlling shareholder of the acquiring company. This method of calculation correctly expresses the degree of real influence involved in the holding of the held corporation.³⁸

Passive rights (right to share in profits and the issued share capital) will be calculated through the use of a multiplier consisting of the percentage of the holding in the chain of ownership. This method of calculation correctly expresses the possible influence of the holding in the target company with regard to the holder's willingness to compete with the company that the holder has just acquired.³⁹

Acquisition of rights – either directly or indirectly

As stated above, the acquisition of more than a quarter of a category of rights will create a corporate merger, whether this is done directly or indirectly. We present below a number of common cases of indirect acquisitions of rights:⁴⁰

³⁷ For calculating holdings through the multiplier method and by way of the method of locating a controlling shareholder in additional contexts, see also Admin. App. 6352/01 *Israel News (TNNC) v. Minister of Communications* ISRSC, 56(2) 97.

³⁸ For example, A. holds 30% of the voting rights in Company B. The controlling shareholder in Company B is C. Company B holds 60% of the voting rights in Company D. A's share of the holding of the voting rights of Company D is 0%, since all of Company B's holding in Company D is attributed to the controlling shareholder of Company B. Similarly, C's share of the holding in the voting rights in Company D is 60%.

³⁹ For example, A holds 30% of right to share in Company B's profits. The balance of the rights in Company B are held by C. Company B holds 60% of the right to participate in Company C's profits. A's share of the holding of the right to participate in Company D's profits is 18% (60%* 30%). C's share of the holding of the right to participate in Company D's profits is 42% (60%* 70%).

⁴⁰ To remove doubt, this list does not exhaust all the methods through which an indirect purchase of rights in a corporation can be implemented.

- **Acquisition of rights through indirect holding (chain of rights)**

As stated, the calculation of passive rights is done by multiplication of the size of the holdings at each level of the chain of holdings. There could therefore be cases in which the increase of the direct holding will not create a corporate merger between the holder and the company that is directly held, but it will lead to a crossing of the holding threshold established in the Law with regard to a company that the holder holds indirectly. In such a case, the transaction will create a corporate merger between the holder and the company that the holder holds indirectly.⁴¹

- **Self-purchase of shares**

The Companies Law, 1999 (“the **Companies Law**”) allows a corporation to purchase its own shares (“**self-purchase**”) subject to a number of conditions listed therein. When a corporation purchases its own shares in an unequal manner as between its shareholders, the shareholders’ proportionate shares in the company changes. The reason for this is that according to company law, the shares that the company has purchased become “dormant” shares and they no longer grant their holder any rights whatsoever. Thus, the shareholders from whom no shares were purchased at all or from whom shares were purchased at a different rate will increase their holdings of rights in the company as a result of the said purchase. When one shareholder, as a result of a self-purchase of shares, crosses the 25% holding level (see above), a corporate merger – as defined by the Law – arises between the shareholder and the company that is held. In calculating the size of each shareholder’s holding, the issued share capital will not include the shares that are held by the company or by the company’s subsidiary, or by a company controlled by the company. This is also the case when a subsidiary acquires shares in its parent company.⁴²

- **Acquisition of rights due to arrangements among shareholders**

In addition to the arrangements imposed by law, relationships among the shareholders in a company are arranged through two main mechanisms: the corporate by-laws, and

⁴¹ Situations can arise in which, by way of a merger between a parent company and a subsidiary, an indirect merger between the parent company and the subsidiary’s subsidiary will take place. For example: Company A holds 60% of the shares in Company B and Company B holds 60% of the shares in Company C. When Company A increases its holdings in Company B to 100%, its holdings of the passive rights in Company C increased from 36% (60%*60%) to 60%. According to the statutory language, this transaction requires the submission of a merger notice, since through it, a party has acquired a holding that exceeds half of the rights in a company. In addition, there is no direct application of the IAA’s policy relating to a merger between a parent company and a subsidiary in this case. Nevertheless, the IAA will generally view this indirect merger as a merger which is absorbed into an intra-organizational process and it will therefore not insist on a merger notice with regard to it.

⁴² For a further discussion, see IAA Opinion 2/00, *Duty to Submit a Notice in the Case of a Merger By Way of a Self-Purchase of Shares*, 2000 Antitrust 3008218.

specific arrangements among shareholders. The size of a shareholder's effective holding of a type of rights in a company can change in accordance with the arrangements such shareholder has with other shareholders, whether in a wide sense (i.e., through the company's by-laws) or in a specific sense (a specific arrangement with another shareholder). The Law expressly provides that the technique through which a corporate merger is consummated is of no importance, and what is important is the quality of the effective link created as a result of the merger transaction. Therefore, when the acquirer crosses the holding level of one quarter of a type of rights in a corporation, either directly or through an arrangement between the acquirer and additional shareholders, a corporate merger⁴³ has taken place.

c.3.2 Merger through the acquisition of a company's main assets

The acquisition of influence over a company's business activity can be carried out through the acquisition of a foothold in the corporate decision-making mechanisms relating to such activity, or through the acquisition, **from the company**, of the business-production activity.

The Law lists the purchase of assets as one of the typical methods for implementing a corporate merger, even though this is clearly not a structural link **between companies**. The reason for this is simple: the purpose of the law is to supervise the creation of a structural link between business activities, whether such a link arises through an acquisition of an activity carried out through a corporation or whether the link arises through the direct acquisition of the activity itself. Therefore, the acquisition of a "company's main assets" is listed in the Law as one of the clear specific cases of a corporate merger.

What are a "company's main assets"? The IAA has frequently been asked for an interpretation of a "company's main assets." In responding to these requests, the IAA has stated that this term must be interpreted in light of the statutory purpose and the values the Law is intended to protect. Since the merger review system seeks to prevent damage to competition and to the public in the examined areas of activity (the "relevant markets"), the phrase "company's main assets" refers to the substantive-economic aspect: the issue is whether the transaction effectively transfers an asset that constitutes a significant element in the selling corporation's competitive ability in the examined line of business. If the answer is affirmative, we are dealing with a corporate merger, even if the selling corporation's other lines of business are equal in value to the sold assets. Thus, the conclusion is that a company's main asset is one that constitutes a significant element in its ability to compete in a particular line of business. The main reason for this is that the impact of the sale of a line of business on competition is identical, whether the selling corporation is active only in connection with sold line of business or whether it is

⁴³ For example: A holds 20% of the voting rights in Company B. C holds 15% of the voting rights in Company B. A and C agree that they will exercise their voting rights jointly. In such a case, each of them is viewed as having purchased 35% of the voting rights in the company. This arrangement thus creates a corporate merger.

also active in many other areas, even if the sold line of business is one of the smallest of these.

On the other hand, it is clear that with respect to the “main assets,” the definition intends to exclude the sale of a minority of the assets within a **single line of business**. Such a sale does not fall within the definition of a corporate merger. At the same time, it should be noted that here as well, there are a number of practical aspects that have arisen over the course of the years:

First, the term “main” does not necessarily refer to the lion’s share of the assets, but only to a substantial part of the corporation’s ability to compete in the relevant line of business. Thus, for example, a corporation that sells the trademark through which it markets its products can sell its main assets even if it has retained all its manufacturing facilities and the balance of the corporation’s assets. In circumstances in which a trademark has substantial influence on the ability to compete of any player in the sector, the creation of a connection between a new acquirer and this trademark must be examined in the context of a merger review. Another situation in which the main assets are deemed to have been sold is the sale of the main assets that are used for activity in the examined geographical market, even if the company retains more valuable assets in the same line of business, but in different geographical regions in which it competes.⁴⁴

Another situation which falls within the wide net spread by the Law is the “bit-by-bit” sale of assets. A company that sells its assets to a particular acquirer in a number of separate transactions, over a relatively short period of time, will, for the purpose of the Law, be considered, to have sold all the assets that were transferred in a single transaction. The reason for this is that the definition of a corporate merger is concerned with the substance of the transactions and not with the formal frameworks that the parties give to them. **The focus on substance over form** is the linchpin on which the entire merger review regime is based and without it there would be no effective protection for free competition.

All in all, the definition of a corporate merger will apply to a partial acquisition of a company’s assets that constitute a unit which can be distinguished from the company’s other activities, and to the acquisition of assets that have a substantial impact on the company’s ability to compete in a certain line of business.⁴⁵

D. Classification of a transaction: what is a “company” for the purpose of the section on corporate mergers?

⁴⁴ A clear example of this is to be found in a case in which a chain of hotels sells its Eilat operations, while retaining significant operations conducted in other parts of the country.

⁴⁵ Trademarks, brand names and other intellectual property rights which have a significant and determinative impact on the company’s competitive activity within a specific line of business will fall within the scope of this rule.

d.1. General

The term “company” is defined in Section 1 of the Law as follows:

A company founded and incorporated in accordance with the Companies Ordinance [New Version], 1983, including a foreign company so incorporated, an incorporated cooperative society within its meaning in the Cooperative Societies Ordinance and a partnership incorporated in accordance with the Partnerships Ordinance [New Version] 1975.

In light of the definition’s language, two major questions arise, which we will discuss in order: **first**, does the Law also apply to an individual person who acquires a company in his individual capacity? And **second**, does the Law apply to a foreign corporation that has not been registered in Israel as a foreign company?

d.2. The acquisition of rights by a private person

The merger review is intended to apply to those transactions that create a substantial link between the decision-making mechanisms of business entities (or which strengthen such a link). The legislature’s assumption was that the merger review system must direct the actions of large business entities, and these, by nature, are operated in incorporated form. The antitrust merger review system does not as a rule apply to an acquisition of a company carried out by an individual person.

However, the situation is completely different when an individual who holds a substantial influence link in one corporation acquires rights that grant him a significant influence link – even if he makes the acquisition with his own private resources – in a different corporation: In such a case, a clear substantial link has been created between the decision-making mechanisms of the two companies held by the same person. Such a transaction is classified as a corporate merger even according to the general and broad aspect of the definition, in that it involves the creation of a substantial link between the decision-making mechanisms of business entities that had previously acted separately.⁴⁶

In this context, the question may arise as to what is the minimal size of a holding in the two corporations which will create an indirect merger between the two of them. There is no doubt that when a person who holds **the control of a company acquires more than a quarter** of any type of rights in another company (or the main assets of such a company), the acquisition creates a “corporate merger” as defined in the Law (and this applies, *a fortiori*, if this person acquires the control of the other corporation).⁴⁷ However,

⁴⁶ Regarding this, ⁴⁶ *Re: Acquisition of Nechushtan shares by Gershon Zelkind* (Determination regarding merger) 1992 Antitrust 3001296 and *Golkal 1992 Ltd. and Zovar Trading Company, Ltd.*, (Determination to be *De Facto Corporate Merger*) 1998 Antitrust 3001329.

⁴⁷ The term “**control**” in this document generally refers to its economic-substantive meaning. A legal formulation of this type of control is found in the ANTITRUST RULES (GENERAL PROVISIONS AND DEFINITIONS), 2006 (hereinafter, “*2006 Antitrust Rules*”).

“substantial influence in a company” is not necessarily identical with control of the company, since a substantial influence link can arise even when the holding in the company does not rise to the level of “control” (even in its broad substantive sense).⁴⁸

⁴⁸ For a detailed discussion of this issue and of the principles used in making determinations regarding this issue, see *Golkal and Zovar (De facto merger)*.

d.3. A merger transaction to which a foreign company is a party

When a foreign company is involved in a transaction that creates a merger link between it and an Israeli company, the question arises as to whether, because one party to the transaction is a foreign company, the transaction stands outside the definition of a corporate merger.⁴⁹ In this context, it is necessary to distinguish between a number of different situations:

- **The foreign company is a foreign company registered in Israel** - in such cases, the question does not arise, since the definition of a corporate merger expressly applies to a registered foreign company.
- **The foreign company is not registered in Israel but it has previously acquired an Israeli company** – in such a case, the merger transaction creates a corporate merger, indirectly, between two Israeli companies held by the same foreign company. The rule therefore is that when a foreign company holds **more than a quarter** of an Israeli company (or if a different acquisition-type of link exists between it and an Israeli company),⁵⁰ the Israeli company is to be seen as the appropriate party in any merger transaction in which the foreign company is involved.⁵¹ This is also the case when the foreign party holds negative control of the Israeli company, for example through the existence of broad veto rights or of another ability to block decisions, due to the structure of the board of directors, etc.
- **The foreign company is not registered in Israel, and does not have a merger connection with an Israeli company, but it has a place of business in Israel** - in such a case, the foreign company is treated as a registered foreign company. The reason is obvious: a foreign company that maintains a place of business is required to register pursuant to the Companies Law. A refusal to apply the Law to companies that were required by law to register and which did not do so provides a negative incentive with respect to the registration of companies and encourages the violation of the Companies Law. A purposive interpretation of the Law requires that a situation in which the wrongdoer benefits must be prevented. In these circumstances, the registration requirement is to be viewed as if it had been fulfilled, or in other words, the company is to be treated in accordance with the rules of equity which – with regard to the imposition of obligation – consider that which was supposed to have been done and was not done (in this case, the registration as a foreign company) as having been done. A foreign company will be

⁴⁹ It should be mentioned that even if it is a corporate merger, a duty to report the transaction to the General Director still does not necessarily arise. Such a duty arises only if the transaction is characterized by one of the alternatives established in Section 17 of the Law.

⁵⁰ Either directly or indirectly, either alone or together with others, either in potential or in practice. This link does not necessarily result from property ownership but can also arise as a result of contractual rights granted to the foreign company.

⁵¹ For further discussion, see *Re: Tnuva and Osem Investments Ltd. (Approval of Merger with Conditions)* 1996 Antitrust 3001310.

considered to be maintaining a place of business in Israel when it has substantial influence over the activity of a local representative. In this context, the IAA checks as to whether the foreign company has been given – either through an arrangement or in practice – the ability to determine on behalf of the Israeli representative (whether referred to as an agent, distributor, representative or by any other term) the level of prices or size of inventory, the character of the presentation and other aspects of the business' conduct.⁵² To the extent that the foreign company has powers and rights of this type, the tendency will be stronger to view it as having a presence in Israel and as conducting business there, through a long-arm presence and any merger to which it is a party will be subject to the Law.

- **A foreign company that has not conducted any business in Israel, regarding which none of the above discussion is true and is making a first acquisition of rights in an Israeli company** – is not required to file a merger notice.

E. The public interest in reviewing a merger – when does the duty to file a merger notice arise

e.1. General

Not every merger transaction requires the delivery of a notice to the General Director and a period of waiting for its approval. The duty to file a merger notice for the General Director's approval arises only when two conditions are both present:

1. A business process creates a corporate merger as such is defined in the Law.
2. The merger involves one or more of the following alternatives established in Section 17(a) of the Law:
 - (1) As a result of the merger, the market share of the merging companies in the production, sale, marketing or purchase of a particular asset and a similar asset or in the provision of a particular service and a similar service, would exceed fifty percent, or such lower market share as the Minister shall determine with regard to a monopoly, in accordance with section 26(c);
 - (2) The aggregate sales turnover of the merging companies, in the fiscal year preceding the merger, exceeded NIS 150 million, and the combined sales

⁵² It is not necessary for the foreign company to determine all the said aspects on behalf of the local representative. What is needed is an analysis of the substance of the relationship between the foreign company and the local representative, the subject of which is the measurement of the nature and depth of the influence given to the foreign company with respect to the local representative.

turnover of at least two of the merging companies is not less than NIS 20 million for each of them,⁵³

- (3) One of the merging companies is a monopoly within the meaning of the term under Section 26.

The purpose of the Law's Section 17(a) is to identify the economic entities involved in a merger transaction, in order to sort out those mergers in which the public has no substantial interest in their being investigated by the General Director. Section 17 implements a rough and preliminary sorting of merger transactions. **In many cases, the section will cover mergers that are not expected to give rise to a real risk in terms of an effect on competition, but this has no significance with respect to the existence of a duty to report and to wait for the General Director's approval.**

A merger which does not give rise to a risk regarding competition will be given the General Director's approval, but to the extent that any of the alternatives established in section 17(a) are present in the transaction, the parties must report it to the General Director and wait for its approval.

e.2. The monopoly alternative

The main purpose of the merger review is to prevent the creation or the strengthening of market power. Consequently, the Law provides that merger transactions which create a dominant market share, or transactions with a party who is a party with a monopoly position **require review and must be reported.** The Law assumes that a transaction in which a party with a monopoly position is involved will, by its nature, create a risk of significant damage to competition, and that there is a need to have the General Director make a careful evaluation as to whether, under the circumstances, such a risk exists.

For the purpose of determining the presence of these alternatives, the parties must identify the relevant markets in which they operate and estimate their share in these markets, in order to see whether the monopoly alternative is present in any of the markets. In many cases, it is a simple matter to identify the relevant sphere of competition. In other cases, a doubt may arise regarding the proper definition of the market or regarding the status of a party to the merger in the relevant market. In these cases, it is proper to adopt a cautious approach and to submit merger notices to the General Director, in light of the difficult consequences of a violation of the duty to report which is established in the Law.

⁵³ Section 17(a)(2) of the Law, and Regulation 9 of the *ANTITRUST REGULATIONS (REGISTER, PUBLICATION AND REPORTING OF TRANSACTIONS)*, 2004 (hereinafter, also: "the Mergers Regulations")

e.2.1 The joint share of the merging companies exceeds 50%

Section 17(a)(1) of the Law requires an examination of the markets shares of the parties to the transaction **at each level in the chain of production**. If the merger creates a market share of more than 50% of production **or** of sales **or** of marketing **or** of purchasing of a specific asset, the requirements of section 17(a)(1) have been met and a merger notice must be filed.

For the purpose of calculating the aggregate market share of the parties to the merger, all the companies in control relationships with the companies entering into the merger agreement must of course be taken into consideration.⁵⁴ Thus for example, a merger between two competing companies each of which enjoys a 40% market share must file a merger notice, whether one company acquires the other directly or whether the acquisition is carried out through a subsidiary which is not active in the same line of business.

When the accumulated sales turnover of the parties to the merger is calculated, it is also necessary to pay attention to the geographic aspect of a market's definition. A merger that creates a monopoly level of market share in a specific geographic market in Israel will be subject to reporting. Thus, for example, a merger between marketing chains whose total national market share does not exceed 50% and which does not meet the sales turnover requirement will still be subject to the reporting requirement if it creates, in the relevant geographical market, a monopoly level of market share for the merged company.

e.2.2 A party with a monopoly position as a party to the merger

- A corporate merger to which a party with a monopoly position is a party must be reported to the General Director. Note the monopoly need not be in “the market which is relevant to the merger.” The implication for competition of a monopoly, and the possible implications for the existence of competition in the relevant markets will be examined when the merger notices are submitted, but the involvement of a monopoly in the merger transaction creates, by itself, a need for review, subject to the provisions set out below.
- The duty to report exists whether or not the party with a monopoly position has been declared to be such. The reason for this is that the declaration that a party is a party with a monopoly position does not create the standing as a party with a monopoly position but only declares its existence.⁵⁵

⁵⁴ Control relationships listed **in the context of the alternatives established in Section 17 of the Law** refer to the Law's definition of the term “control,” while with respect to other matters mentioned in this document, the reference is to the interpretation of the term “control” given in the *2006 Antitrust Rules*.

⁵⁵ See also Admin. App. 7/95 “*Bezeq*” *Israel Communications Company Ltd. v. Gen.Dir.*, 1997 Antitrust 3001553.

- The Law’s definition of a monopoly requires that a party with a monopoly position be given “conglomerate” treatment and it encompasses within this treatment all the companies in a control relationship with the party with a monopoly position. Thus any transaction consummated by a company with a control relationship to a party with a monopoly position requires the submission of a merger notice, as the Law identifies the party with a monopoly position with the economic unit to which it belongs. We arrive at this same result by way of Section 1 of the Law, which also includes a corporate merger consummated indirectly (and thus transforms a party with a monopoly position into a relevant party in any merger consummated by a company which is included in the same cluster of companies to which the party with a monopoly position belongs). The logic of this reasoning in the context of the merger review system is clear and obvious. In the absence of a substantive view of the economic unit to which a monopoly belongs, parties with monopoly positions could easily avoid the reporting requirement established in Section 17(a)(3) by having merger transactions be consummated through other companies that are included in the cluster of companies to which they belong. This result would empty the section of any meaning and would undermine the goal which is the foundation for the section – i.e., the identification of the economic entities that are involved in the merger transaction. Nevertheless, the imposition of a reporting requirement on any company with a control relationship to a party with a monopoly position, without referring to the lines of business in which the monopoly exists or to the inter-relationship between these lines of business and the products and activities of the other party to the merger can lead to an over-expansion of Section 17(a). Those transactions in which a party with a monopoly position has either direct or indirect control relationships with a party to the transaction and also competes (even if only in a partial and limited way) with the activity conducted by the group to which the other party to the transaction belongs, must be subjected to the filtering of the merger review system. Such a competition-based connection will mainly arise when the goods or services are alternatives to each other (a horizontal connection) or when the goods or services of one party serve as an input in the manufacture or marketing of the goods of the other party (vertical connection).⁵⁶ Note that for this purpose, a horizontal connection would refer to the existence of either actual or potential competition.⁵⁷

In implementing the monopoly test we must therefore apply a two-stage test: **at the first stage**, we must identify all the monopoly-holding entities included in the economic group to which each party to the merger transaction belongs.⁵⁸ **At the second stage**, we must determine whether there is a competition-based connection between the monopoly given to any of these entities and the product or service provided by a company included in the other economic groups involved in the merger.

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⁵⁶ Another situation in which a relevant competition link may arise is one in which the parties to a merger are active in tangential markets, as that term is defined in the *2006 Antitrust Rules*.

⁵⁷ See, for this purpose, the term “Competitor” in the *2006 Antitrust Rules*.

⁵⁸ In actuality, this refers to all companies that are directly and indirectly controlled by the first element in the chain of control (the “ultimate parent entity”) of the party filing the merger notice – i.e., sibling companies, subsidiaries’ subsidiaries, cousin companies, etc.

When the reporting requirement is based only on the monopoly alternative, and there is no horizontal or vertical connection presented by the circumstances of the case, the IAA may notify the parties that under the circumstances, the IAA will not insist on compliance with the duty to file a merger notice based on the monopoly alternative, nor will it require that the transaction receive approval from the General Director. Such a notice from the IAA will be given only in response to detailed inquiry from the parties to the merger, which shall include a full disclosure of all the relevant details, and only if the IAA believes that the information provided to it indicates that under the circumstances, there is no relevant competition link involved in the merger – neither horizontal, vertical or other.

The IAA's policy is based on the recognition that the monopoly alternative, unlike the sales turnover alternative, imposes a test beyond the competition link (even if it is only rough and general). It is therefore necessary to outline the reporting requirement such that it will refer to the existence of a monopoly within the corporate group that includes the reporting company only if this monopoly has some kind competition connection with the operations of the other party to the merger.

e.3. The sales turnover alternative

A company's sales turnover serves as a measurement for estimating the scope of the business activity it carries out. The antitrust laws use sales turnover as an additional tool for filtering the unimportant merger transactions for which an examination by the General Director serves no public purpose. In contrast, a merger transaction in which the sales turnover threshold established in the law has been met **will require reporting and approval**, whether or not, on its face, it creates a risk regarding competition.

According to the Law and to the regulations enacted pursuant to it, the parties to a transaction must report the merger and refrain from carrying it out before the General Director's approval is issued, if the parties' aggregate and consolidated sales turnover exceeds NIS 150 million (updated as of June 2004) and the combined sales turnover of at least two parties to the merger exceeds NIS 10 million.

e.3.1. Consolidated Sales Turnover

The sales turnover alternative seeks to identify the economic entities involved in a merger transaction according to the size of their activity. Therefore, Regulation 9 of the Antitrust Regulations directs that for the purpose of calculating the sales turnover of the merging company, the sales turnovers of all the entities that it controls or that are controlled by it must be combined. Two practical rules are derived from Regulation 9 regarding the calculation of the sales turnover of a party to a merger: one is that the calculation of the sales turnover **must take into consideration the sales turnover of all the entities controlling or controlled by or through the merging company, and the turnover of any entity controlled by or controlling any of these, either directly or indirectly**

(hereinafter, “**the related entities**”).⁵⁹ The other rule is that **the calculation of the sales turnover will be in accordance with accepted accounting practices**. In other words, the merging company’s sales turnover is the sales turnover that combines all the entities under the control of the primary entity, or that are within the chain of ownership of the party filing the notice - the “ultimate parent entity.”⁶⁰

e.3.2. Calculating the sales turnover in the case of the complete sale of an operating division or company

As stated above, the sales turnover alternative seeks to identify the volume of the activity of the parties relevant to the merger transaction, which are generally the companies who share in the structural link created by the merger and those companies that have a control relationship with them.

However, in merger transactions in which the seller is **completely** separated from a business operation that the seller owns, the merger creates a delineated structural connection, between the acquirer and the sold operation. In such a case, on the assumption that **all links** between the selling entity and the sold operation have indeed been cut off, there is no need to deal with the sales turnover of the selling entity in its other lines of business which have no part in the structural joinder that is the subject of the merger.⁶¹ Therefore, the IAA’s position is that such cases, for the purpose of calculating the sales turnover of the party that is acquired in the merger, it is necessary to calculate only the sales turnover which is relevant to the sold operation, and the selling company’s sales turnover can be ignored. This is the IAA’s position only in situations in which **all links** between the selling entity (including any affiliated entities) and the sold operation have been removed. The IAA’s position in this regard, also applies, as relevant, to the sale by a party with a monopoly position of a company or operational division, to the extent that the transaction leads to a **complete detachment** of the sold operation from the party with a monopoly position.

⁵⁹ For example, Company A merges with Company D. Company A is controlled by Individual A, who controls Company B which controls Company C. The sales turnovers of Companies B and C will be included for the purpose of calculating the sales turnover of Company A.

⁶⁰ Similar rules are applied in the statutory systems of comparable legal systems. The same rule appears, for example, in Section 5.4 of the new European merger regulation - COUNCIL REGULATION 139/2004 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS, OJ L 24, 29.1.2004.

⁶¹ Example: Company A sells all its holdings in Company B to Company C. Company B controls Company D. The calculation of the sales turnovers of the parties to the merger will be carried out as follows: The **purchaser’s** sales turnover will be the combined sales turnover of the first entity controlling Company C. On the assumption that the transaction detaches all links between Company A and Company B, the sales turnover of the **seller** will be the combined sales turnover of Company B (which includes the sales turnover of Company D).

e.3.3 Sales turnover in Israel

Section 18 of the Law provides:

In the case of a merger with a company conducting business both in Israel and overseas, the provisions of this section shall apply solely with respect to the sales turnover of the company within Israel and with respect to the company's market share in Israel . . .

Consequently, when the sales turnovers of the merging companies includes sales that are carried out abroad, the provisions of Section 18 of the Law are applied and only the part of the sales turnover that refers to sales in Israel is taken into consideration.⁶²

e.3.4 Calculation of the sales turnover for financial entities

The Law and the Mergers Regulations refer to the “sales turnover” of parties to a merger as a measurement according to which it can be determined that a merger must be reported to the General Director. However, there are many companies active in the Israeli economy that deal in financial activity rather than manufacturing operations (such as investment companies, banks, insurance company and other financial entities). For these companies, operations are not expressed in terms of “sales” but rather in terms of receipts and income from various sources. The IAA's position is that for the purpose of calculating the “sales turnover” of these entities, the amount to be calculated is the entity's **total income from current operations**, as is relevant (whether commissions, dividends, management fees, premiums, etc.). The reason for this is obvious: the sales turnover alternative requires that a calculation be made of the volume of the business activities of the parties to the merger. The total receipts from current operations reflects the volume of the activities of financial entities and constitutes a measurement comparable to the sales turnover of a productive company.

The above does not detract from the rule that requires that the turnovers of companies with control relationships to the merging company must be combined. In such a case, the sales turnover of companies in the group will be added to the total of the financial company's income from current operations, and the total amount will be considered to be the relevant sales turnover of the merging company.⁶³

Without detracting from the generality of the above, the following are a number of examples that demonstrate the above-mentioned principles.

⁶² Nevertheless, any entity whose entire operation involves only exports can be subject to the reporting requirement, if, for example, its market share together with that of the other party to the merger, with respect to the **product's manufacture**, exceeds one half.

⁶³ For a similar rule, see COUNCIL REGULATION 139/2004.

- **Banking institutions** – for banking institutions, the total of income from current operations will include, *inter alia*, the following income: interest income, commissions, income from investments in securities, dividends from investments in securities and from subsidiaries.
- **Insurance companies** – for insurance companies, the total of income from current operations will include, *inter alia*, all income from insurance premiums (including income from renewals of insurance policies).
- **Investment companies** – for investment companies, the total of income from current operations will include, *inter alia*, the following income: income from management commissions, dividends and other receipts from investment assets.

e.3.4 Calculation of sales turnover in the case of a merger of a parent company and a subsidiary company

As stated above, the IAA's basic policy is that as a rule, the filing of a merger notice is not necessary if a single person properly holding more than half of any of the types of rights in a company increases its holdings of any right whatsoever to a rate that exceed 75%. The question remains as to how the sales turnover is to be calculated with respect to the merger of a parent and a subsidiary if the parent company holds more than half of **only some** of the rights in the subsidiary.⁶⁴ The rules for this case is that the sales turnover of the **acquiring company** will include the sales turnover of the parent company, and of any person controlling it or controlled by it, and that of any other party controlled by either of these.⁶⁵ The combined turnover of the subsidiary company and of any companies subject to its (direct or indirect) control will be deducted from this amount. The combined sales turnover of the subsidiary and of any companies subject to its (direct or indirect) control will be considered as part of the sales turnover of the **target company**. In other words, in the said transaction, one side will consist of the parent company with its combined sales turnover, less the combined sales turnover of the subsidiary, and the other side will consist of the subsidiary and its combined sales turnover and those of the companies that it controls.

⁶⁴For example: A merger between a company and its subsidiary, when the company, prior to the merger, holds 60% of the voting rights and of the power to appoint directors in its subsidiary, but only 40% of the profit-sharing rights. In the context of a merger transaction the company will pass the one-half threshold with respect to the profit-sharing rights. Under these circumstances, the IAA's policy will not apply and the transaction is not *a priori* exempt from reporting.

⁶⁵ See Chapter e.3.1 above regarding the calculation of the combined sales turnover.

F. The Merger Evaluation Process

f.1. General – How does the IAA review mergers?

The parties to a merger transaction which is characterized by one of the two alternatives established in Section 17(a) of the Law must report the transaction to the General Director and wait to receive approval.

Merger transactions are reported on a form in which the parties provide basic information that assists the IAA in beginning the evaluation, with respect to the merger's impact on competition (the "Merger Notice Form"). In the past, this form included very few details. Consequently, the IAA's economists were required to make extensive and burdensome use of their power to request further details. This was burdensome for the parties to the merger and delayed the merger approval process.

The IAA therefore initiated a change in the format for reporting merger transactions, according to which the scope of the initial reporting required of the parties in the context of the merger notice was somewhat expanded, and an opportunity was given to submit a relatively summarized report for certain merger transactions.⁶⁶ The purpose of the change was to make the IAA's merger review process more focused, efficient and quick.⁶⁷

After merger notices are received, they are given a preliminary assessment by the IAA's economic department and submitted to the relevant economist for handling. At the end of the examination process, an economic opinion is submitted to the General Director along with a recommendation to either approve the merger, approve it conditionally, or oppose it.

At the end of the evaluation, or close to the end, the General Director consults with the Exemptions and Mergers Committee.⁶⁸ After this consultation, the General Director makes a decision regarding the merger and he or she may approve it, establish conditions for its approval or oppose it, if he or she believes that the merger creates a reasonable risk of harm to competition, which cannot be resolved through the imposition of appropriate conditions. The General Director's decision is issued to the parties to the transaction and published in the Official Gazette, in two daily newspapers and on the IAA's website.

⁶⁶ In 2004, this change was given statutory force in the *Mergers Regulations*. It should be noted that mergers with the potential for causing damage to competition can fit within the scope of the abbreviated track, in which case they should be reported through the regular track.

⁶⁷ For an expanded discussion of the IAA's reform of pre-merger reporting and the IAA's policy on practical issues dealing with its implication, see QUESTIONS AND ANSWERS REGARDING MERGER REPORTING; 2005 Antitrust 5000120 (hereinafter, "*Q & A on Merger Reporting*").

⁶⁸ Section 24 of the Law provides that "the General Director shall not consent to a merger of companies, conditionally or unconditionally, except following consultation with the Committee."

f.2. Who is required to submit the merger notices?

Section 20(a) of the Law provides:

Every one of the companies intending to merge shall give the General Director notice thereof, providing such details as shall be determined by regulations.

(Emphasis added).

Thus, the duty to provide the notice to the General Director is imposed on **each** of the merging companies and **on the companies themselves**.⁶⁹

The logic of this provision is clear – in order for the General Director to be able to initiate an effective evaluation of the merger transaction, preliminary information is required to be submitted from all the relevant parties to the transaction. Section 20(b) of the Law therefore also provides that the period of time after which the General Director must make a decision will begin to run only after “. . . the merger notice is received **from all of the companies seeking to merge . . .**” (Emphasis added).

Notwithstanding the above, in exceptional cases and on the basis of a prior detailed request, the General Director will also be willing to conduct a review of a merger transaction on the basis of a notice provided by only one party to the merger. An example of such a case would be a merger carried out through a hostile tender offer, in which the management of the target company opposes the merger and intentionally delays the filing of the merger notices in a manner which could frustrate the tender offer. In such a case, the General Director will likely be satisfied with a merger notice from the acquirer, and will use the power to request details – established in Section 46(b) of the Law – to obtain the relevant information from the target company. Nevertheless, the period of time after which the General Director must make a decision will not begin to run with the receipt of the merger notice from the purchasing party, but only from the date on which a merger notice is also received from the target company (if the General Director’s decision has not been issued by that time.)

⁶⁹ As distinguished from their shareholders. A shareholder in a company will have a duty to report if the merger is between that shareholder and the company (for example in the case of a transaction increasing the shareholder’s holding in the company). Although a shareholder does not necessarily have a **duty to report**, the law will impose liability on a shareholder if a transaction in which a shareholder is involved is actually carried out in violation of the law, since **the obligation not to consummate a merger in violation of the Law** is primarily imposed on the shareholders, as they are the parties implementing the merger transaction. Regarding this matter, see *Golkal 1992 Ltd. and Zovar Trading Company, Ltd.*, (Determination to be *de facto* corporate merger) 1998 Antitrust 3001329.

f.3 How is the merger notice form to be filled out?

Section 20 of the Law provides that the requirement to report a merger of companies can be fulfilled through the filing of a “notice . . . providing such details as shall be determined by regulations.” The new Mergers Regulations create two possible reporting tracks regarding a corporate merger: an expanded report in the context of a “**regular merger notice**” (form 2), or a summary report in the context of an “**abbreviated merger notice**.” Additionally, the regulations provide for the possibility of referring to a previous merger notice submitted by the merging company, if the details in it are accurate as of the time of the submission of the current merger notice (“**notice by reference**”).

The **abbreviated reporting track** is intended for use with regard to merger transactions in which all of the following conditions have been met: first, the merging companies’ aggregate share (including that of any person related to them) of the market for the product which is the subject of the merger transaction does not exceed 30%. Second, none of the merging companies (including any person related to them) is a party with a monopoly position in a product market which is tangential to the market for the product which is the subject of the merger transaction. Finally, none of the companies is a party to any arrangement with a third party competing with it in the market for the product which is the subject of the merger transaction.⁷⁰ As the IAA has explained in the past, the abbreviated track is not intended for transactions in which there is a problematic overlap between the operations of two substantial shareholders in the merging companies. This track is also not appropriate for transactions the determination of which requires dealing with factual complexity (for example a merger between concerns that are involved in intensive operations, even if there is no competitive complexity). In these cases, it is worthwhile to report the transaction through the regular track, in order to prevent a delay in the evaluation process.⁷¹

A merger transaction that does not meet one or more of the conditions listed must be reported through **the regular track**. The scope of the reporting required in the regular track depends on the type of merger. The antitrust laws distinguish between three types of mergers: **horizontal mergers** (mergers between competing companies), **vertical mergers** (mergers between consequent stages of the supply chain) and **conglomerate mergers** (the residual group in which all other mergers are included). Each type of merger raises concerns that are unique to it and requires different appropriate information for evaluation. Information required for a preliminary evaluation of a horizontal merger can be unnecessary if the merger is a conglomerate merger, and vice versa. The parties to

⁷⁰ The complexity of the merger is affected by the effective status of the parties to the merger in the relevant market. Therefore, the combined market share created by the structural connection between the merging firms is not a sufficient measure, and it is necessary to take into consideration any arrangements between each of the parties to the merger and their competitors in the market in which the merger is taking place. **The legal classification of the arrangement (i.e. whether or not it is a restrictive arrangement) will have no significance for this purpose – only the fact of its existence.**

⁷¹ For further discussion, see the *Q & A on Merger Reporting*.

a transaction are therefore required, in the Regular Form, to complete only those chapters that are relevant to the type of merger under discussion.⁷²

f.4. What is an incomplete merger notice and what is its effect?

As we have seen, a notice regarding a corporate merger is to be submitted to the General Director through the appropriate forms as established in the regulations. A complete merger notice is one that includes all the details required in the relevant form and all the documents and certificates that are to be produced along with the form. Thus, in the case of a regular merger notice (Form 2), the attachments must include the merger agreement and its appendices, audited financial statements for the previous two fiscal years of the party filing the merger notice, any prospectus published by the party submitting the merger notice during the five previous fiscal years, and any other document relevant to the examination of the competition implications of the merger.

A “merger notice” that does not comply with the requirements established in the regulations does not constitute a merger notice. This is the case, for example, if the merging companies notify the General Director of their intention to merge in the context of a letter, instead of submitting the appropriate forms in accordance with the regulations. This is also the case if a “merger notice” is submitted to the General Director without attaching a copy of the merger agreement or of its appendices, and it is also the case if the merger notice is not signed by a person who is authorized to do so.

Since an incomplete merger notice does not constitute a merger notice, its submission does not start the period established by the Law during which the General Director is required to reach a decision regarding the merger. The period of time established for the General Director’s decision regarding the merger will only begin upon the submission of **complete** merger notices by **all the merging companies**, as required by the Law and the regulations. Along with the statutory language, this is also the logical conclusion to be drawn, as there is no reason to set a time for the General Director to issue a decision until all the necessary information for the evaluation has been submitted for the review.

f.5. Requests for information and the significance of a refusal to supply data

A merger’s evaluation is carried out on the basis of information received from the merging companies and from third parties. The information provided in the context of the merger notice is important and central and the General Director begins his or her examination of the competition effects of the merger on the basis of this information. In many cases, the information provided in the merger notices is not sufficient, either because what is needed is relevant information of which the parties to the merger are not

⁷² For further discussion, see *the Q & A on Merger Reporting*.

aware or because additional detailed information is required from the parties to the merger.⁷³

In order to receive the additional information that is required for a decision, the General Director makes use of power granted to the General Director by Section 46(b) of the Law to ask any individual to provide the data and documents that the General Director requires to carry out the Law. Parallel to the General Director's power to request data required for the evaluation of a merger, any addressee of such a request is **under an obligation** to respond to it. A refusal to supply information that has been requested pursuant to section 46(b) of the Law constitutes **a criminal violation** punishable by a month's imprisonment or by a large fine.⁷⁴

Additionally, when a **party to a merger** refuses to provide data which is significant for an examination of a merger transaction (or delays in providing them), the party's behavior, in itself, can justify an objection to the merger.⁷⁵

f.6. The period of time in which mergers are reviewed

Section 20(b) of the Law provides that:

[w]ithin thirty days of the date on which the merger notice is received from all of the companies seeking to merge, the General Director shall notify such companies as to whether the General Director consents or objects to the merger and whether any conditions are stipulated therefor, which conditions shall be provided in such notification . . .

As explained above, the said period of time begins to run only on the date that complete merger notices are received from all the merging companies.

The Law provides that a merger regarding which the General Director has not issued a decision within this period of time is viewed as having been approved. In most cases, the General Director's decision is issued by the end of the period of time established in the Law or prior to then.⁷⁶ Occasionally, the General Director requires more time than thirty days in which to formulate a position. In order to allow the General Director to make an informed decision in these cases – and sometimes in order to allow for the possibility of removing the risk regarding competition by presenting appropriate conditions (instead of

⁷³ The Merger Notice Form does not purport to include all the details required for a decision in all mergers; instead, it includes those details necessary for beginning an effective evaluation of a merger.

⁷⁴ See Section 47(b) of the Law.

⁷⁵ Regarding this matter, see *Pan Medical Center (1994) Ltd. and Mor Medical Information Institute Ltd.* (Objection to merger), 2001 Antitrust 3010269.

⁷⁶ Thus, for example, in 2005, some 75% of mergers were approved within the thirty days established by the Law for the issuance of the General Director's decision regarding a merger.

through an objection to the merger) – a practice has developed over the years, according to which the parties to the merger reach an agreement with the General Director to the effect that the IAA’s evaluation process will continue and the General Director’s decision will be issued at a later date. This is of course with the merging companies’ understanding that they will not raise any claims based on the passage of the statutory period because of the delay in the decision. It should be noted that the thirty day period for the issuance of a decision is considered to be especially short in comparison to the time periods established in the European and American statutes.⁷⁷ This period of time is usually sufficient to identify the existence of an antitrust problem, but in many cases it is not sufficient to allow the IAA to examine all possible alternatives to an absolute opposition to the merger. Thus, the short period of time actually works against the interests of the merging companies in exhausting the complete administrative process and it also imposes unnecessary litigation costs on the IAA’s merger review system.

Of course, in cases in which the IAA is certain that additional time is required to complete the evaluations needed in order to reach an informed decision regarding the merger, and in the absence of an agreement with the parties to the merger, the IAA reserves for itself the right to appeal to the Antitrust Tribunal, in accordance with the provisions of Section 38 of the Law, for an extension of the period established in the statute.

Thus, this is the balancing provided for in the Law – the establishment of an especially fast schedule for the evaluation of mergers as a default position, alongside the opportunity for making this schedule more flexible in appropriate cases wither with the consent of the parties to the merger, or unilaterally, with judicial control being exercised over this unilaterally created flexibility.

f.7. The General Director’s decision: approval of the merger, objection or approval with conditions

At the end of the merger evaluation process, the General Director must decide whether to approve or oppose the merger or to condition its approval. In making this decision, the General Director receives guidance from the substantial test established in section 21 of the Law, according to which:

The General Director shall object to a merger or stipulate conditions for it, if he believes that there is a reasonable risk that, as a result of the merger as proposed, the competition in the relevant sector would be significantly damaged or that the public would be injured in one of the following regards:

- (1) the price level of an asset or a service;

⁷⁷ The normative framework in the United States and in Europe allows for an extension of time for the evaluation in accordance with the complexity of the merger, such that a complex evaluation process can sometimes continue for many months.

- (2) low quality of an asset or of a service;
- (3) the quantity of the asset or the scope of the service supplied, or the constancy and conditions of such supply.

If there is no reasonable risk for significant damage to competition or to the public, the General Director will approve the merger. On the other hand, it is not the case that the General Director will oppose a merger every time that a reasonable risk of damage to competition arises. In certain cases, the competition problem can be neutralized through appropriate conditions, in which case the alternative of stipulating conditions will be preferred to an objection to the merger.

The evaluation of the competitive effects that will be the probable result of a merger transaction is carried out through a methodical and complex process, which involves reference to a wide variety of influential parameters. A guideline regarding the circumstances in which a scenario of significant damage to competition arises can be found in the General Director's decisions that have been issued over the course of the years. This document is intended to provide guidance regarding other aspects – both legal and practical – with regard to the evaluation of mergers. Such guidance has until now not been provided in writing, in a collected fashion. An in-depth analysis of the parameters that the IAA uses in making a competition analysis of merger transactions will be provided in a different framework, at some time in the future.