

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Israel****27 November 2018**

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More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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## *Israel*

1. Under the Israeli Antitrust Law 5748-1988 (hereinafter: the "**Law**"), mergers that meet the reporting thresholds set forth under the Law must receive *ex ante* approval from the Director General of the Israel Antitrust Authority (hereinafter: the "**IAA**"). This merger control regime is intended to monitor and prevent structural links between corporations that may create, strengthen or protect market power in a manner that threatens competition in the market as a whole.
2. Alongside the clear importance of preventing mergers that may harm competition in the market, the IAA's approach is based on the understanding that a large portion of mergers may be positive for the market and the economy and lead to benefits and efficiencies, *inter alia*, by allowing firms to realize economies of scale.
3. This contribution highlights the IAA's views, including, the importance of an efficient merger examination process, in light of the IAA's abovementioned positive view of mergers, and presents the ways in which the IAA has acted to make the examination process more efficient. We will also describe the pre-notification and stand-still obligations incumbent on the merging parties according to the Law; we will further address the importance – according to the IAA's approach – in meeting these obligations; we will address the question of what constitutes "gun-jumping"; we will survey "gun-jumping" cases in the recent years in which the IAA has taken administrative enforcement measures; we will describe the IAA's position regarding the concerns that may arise in the course of due diligence procedures preceding mergers; and finally, we will present the steps taken by the IAA in order to insure responsiveness vis-à-vis the public, regarding mergers as well as to help parties to a merger to avoid violating the Law.

### 1. An Efficient Merger Examination Process

4. The economic benefits arising from many mergers mean that streamlining the merger examination process is extremely valuable. The IAA's approach in this regard is consistent with the provisions of the Law, which indicate that the legislator views an efficient merger examination process as important. In this regard, the Merger Chapter of the Law sets forth a short thirty-day time period for the Director General to examine a merger and publish a final decision. Failure to reach a decision within thirty days is equivalent to approving the merger.
5. In light of this understanding, the IAA invests significant efforts in examining mergers and reaching a final decision as quickly as possible.
6. Naturally, complex mergers require more in-depth examination, including gathering data. Such examination may take longer than the thirty days stipulated under the Law. In these cases, the IAA may approach the Antitrust Tribunal for an extension of the deadline. However, in most cases, the IAA receives an extension from the parties themselves.
7. Statistics compiled by the IAA for 2017 indicate that over the year, decisions were issued for 159 mergers, with an average examination period of around 21 days.

8. The "Bright Green" route for merger examination, which is discussed more broadly below, is a leading example of the efforts taken by the IAA to expedite the examination of mergers that do not raise competitive concerns.



## 2. The "Bright Green" Route for Expediting Merger Examination

9. In May 2016 the IAA published a procedure for examining mergers classified as "Bright Green" mergers. These are mergers that clearly raise no serious concerns of harm to competition and the public (the standard established in Section 21 of the Law), and which therefore can clearly be approved.

10. Examination of a merger classified by the IAA as "Bright Green" will be limited; the decision will be based primarily on information provided by the merging parties and will be reached in a period of time significantly shorter than the 30 days period set forth under the Law.

11. Approximately 20% of the 159 mergers examined by the IAA in 2017, were examined in the "Bright Green" route, with an average examination period of only 5 days.

## 3. Stringency in enforcing the pre-notification and stand-still obligations

12. As mentioned, alongside the efforts that the IAA takes to expedite the merger examination process, parties to a merger that meets the conditions of the mergers chapter of the Law, are subject to special obligations, regarding which the IAA is takes a stringent approach. The source of these obligations is Section 19 of the Law, which states:

*"Companies may not merge unless a pre-merger notification has first been filed and the consent of the General Director to the merger has been obtained and, if such consent is conditional – in accordance with the conditions stipulated, all as provided in this Part."*

13. This Section gives rise to two primary obligations applying to the parties to a merger: firstly the **pre-notification** obligation, which requires the parties to the merger to refer to the Director General, inform it of the planned merger and receive its prior consent to the merger – i.e. approval is an *ex ante* condition for the merger; and secondly the **stand-still** obligation, which is the 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 subject to the terms of such decision.

14. The IAA takes a stringent approach in ensuring that the pre-notification and stand-still obligations are met, given that they are the foundation for the merger control system and its goal of monitoring and reviewing mergers *ex ante*.<sup>1</sup> Violation of these obligations frustrates the statutory purpose and lead the IAA to take enforcement measures.

#### 4. What is Considered "Gun Jumping"?

15. The concept of "gun-jumping" is used to describe cases in which the parties to a merger that is subject to the reporting obligation begin to carry out the merger before receiving the Director General's approval, contrary to the provisions of section 19 of the Law (hereinafter: "**Section 19**").

16. The prohibition set forth in section 19 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.

#### 5. Administrative Enforcement Proceedings regarding "Gun-Jumping"

17. Below we will describe three cases in which the Director General conducted administrative enforcement proceedings for violation of the stand-still obligation, including a description of the actions found to have constituted gun jumping.

##### **Box 1. Michlol-Berman Merger**

On 24.8.2014 Berman (hereinafter: the "Purchaser") and Michlol (hereinafter: the "Seller") signed an agreement regarding operation of four stores located on the campuses of various educational institutions, selling books, school supplies, etc. (hereinafter: the "Stores"). Inter

<sup>1</sup> AT 49471-12-15 Berman v. Director General of IAA, section 20 (published on May 16, 2016 by the IAA).

alia, it was agreed that the operation of the Stores would be transferred from the Seller to the Purchaser for a period of seven years (with an option of extension for an additional seven years granted to the purchaser). In exchange, the Purchaser would receive all proceeds from the Stores, less yearly permit fees paid to the Seller.

The parties filed merger notifications, but in the course of the merger examination the IAA discovered that the parties had carried out certain actions in the period between signing the merger agreements and receiving the Director General's approval, which amounted to "gun-jumping", as will be elaborated below.

Prior to filing merger notifications, the parties signed a loan agreement and the Purchaser gave the Seller a sum of money at the signing.

Additionally, in the period between signing the agreement and receiving approval, the parties reached an understanding according to which the Seller would run the Stores in the interim period while the Purchaser took upon itself to purchase and pay the Stores' merchandise. At the same time, even prior to filing merger notifications, all of the revenues from the Stores were transferred, from time to time, in portions, to the Purchaser.

These actions, carried out prior to the merger approval, linked the decision-making mechanisms of the two parties and gave them common incentives; they thus amounted to "gun-jumping."

The loan was given in connection with the merger agreement, as was clearly indicated from the language of the agreements between the parties. The sum of the loan was exactly equal to the minimal yearly permit fee under the merger agreement and the two sums were intended to be deducted one from the other, when approval was to be received. Thus, de facto, the first payment for the merger was indirectly already paid to the Seller.

When parties to a merger decide to enter into a loan agreement that is clearly linked and connected to a merger agreement, this loan should be viewed as a way of payment of the remuneration set forth in the merger agreement, and therefore, such act, will be considered as a breach of the waiting obligation.

Regarding the operation of the Stores by the Purchaser, a significant part of the risk entailed in operating the Stores was transferred to the Purchaser, in a manner liable to impact its incentives and business practice. The Purchaser contracted with the Seller's vendors and purchased merchandise for the Stores. The Purchaser was thus given a real foothold in running the Stores. It should be emphasized that the purchase was not simply a technical operation. Carrying out the orders, in itself, gives the Purchaser extensive information about what the Seller is purchasing and even the ability to control and intervene in the purchasing process and selection of vendors and goods.

Finally, transferring the revenues of the Stores to the Purchaser strengthened the bond between the Purchaser and the Stores even more, giving the Purchaser a clear economic interest in the performance of the Stores. This is true even more if the revenues were intended, as claimed by the parties, to cover the debt created as a result of funding the orders.

While the merger examination indicated that the merger raised no competitive concerns and was approved by the Director General, an administrative sanction of 85,000 NIS was levied on the parties for the violation.

Berman appealed the decision to the Antitrust Tribunal. The Tribunal rejected the appeal and accepted the Director General's arguments\*:

*"...The loan (which was, de facto, the first payment of the minimal yearly permit fees) and the understandings under which Berman began to purchase merchandise for the stores and later to also receive the revenues from the stores, all created a link between the merging parties 'that was such as to influence the independence of the decision-making processes in each of those businesses' (Golka, p. 7). These actions are clearly located on the axis which is 'such as to unify, de facto, the decision-making processes in the merging firms' (Draft Restrictive Trade Practices Act, 1983)...and when the merger was approved, they were swallowed up into it. It seems that it would not be far from reality to say that de facto the merger was carried out during the waiting period (if not earlier, even before the first merger notifications were filed), even if there were certain actions still left to be completed, which were carried out after approval had been received."*

\* Ibid, Section 32.

### **Box 2. Imagine Media-Kardan Israel Merger**

On 17.2.2016 an agreement was reached under which Imagine (hereinafter: the "Purchaser") purchased 39% of the shares that Kardans' (hereinafter: the "Seller") shares in Kol Hai Radio. In parallel to signing the share purchase agreement, the parties also signed an agreement, under which the Purchaser would, at closing, purchase the shareholder loan that the Seller had made to Kol Hai Radio in a sum of 3,350,000 NIS; of this sum, one million NIS was transferred to the Seller at the time of signing and prior to submitting merger notifications.

According to the Director General, the agreement regarding the debt transfer did not stand alone, but was clearly linked to the share purchase agreement, such that this agreement and the share purchase agreement were both part of the overarching merger transaction, as clearly arose from the language and essence of the loan transfer agreement.

The Director General held that in light of the link between the agreements, the purchase of the debt should be viewed as the transfer of the remuneration for the merger agreement, by the Purchaser to the Seller, and was thus gun jumping prior to merger approval. After discussion between the Director General and the parties, and instead of initiating administrative enforcement proceedings, a consent decree was signed and approved by the Antitrust Tribunal under which the parties paid a total of 75,000 NIS.

### **Box 3. Tal Hel Yasca- Fresh and Smooth Part 2 Merger**

On 26.10.2017 Tal Hel (hereinafter: the "Purchaser") and Fresh and Smooth (hereinafter: the "Seller") signed an agreement under which the Purchaser purchased all the stocks in the Seller. At the time of signing, the Purchaser transferred 5 million NIS to the Seller, which was allegedly necessary for it to be able to continue operating. Afterwards, and

before filing merger notifications, the parties wrote a letter to the Director General describing the merger agreement and the funds that had been transferred.

The Director General held that providing some of the funding as part of the merger by the Purchaser, in itself, constituted gun-jumping prior to merger approval. After discussion between the Director General and the parties, and instead of initiating administrative enforcement proceedings, a consent decree was signed and approved by the Antitrust Tribunal under which the parties paid a total of 210,000 NIS.

18. It should be noted that in all cases surveyed, the infringements that were enforced did not raise any competitive concerns, and the Director General in fact approved all the relevant mergers. This fact is relevant to explaining the relatively low sums paid by the parties.

19. In addition, the following are acts that the Director-General has found to constitute "gun-jumping":

- Transfer of the acquired shares to trustee and the conduct of the company by trustee who is effectively the holders of control in the acquiring company;
- An acquisition agreement which 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 rather 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 agreed that the shareholders would refrain from distributing dividends for an unspecified period of time. The Director General was of the opinion that the combination of these conditions created a *de facto* merger.
- In liquidation cases, it is customary that the liquidator asks parties interested in purchasing the company to inject funds into the company which they wish to acquire. Such funding actions may violate the stand-still obligation, since they may affect the competitive activity of the company in liquidation, as well as the behavior of the financing party. The creation of this influence link requires the prior approval of the Director General – as will be expanded below.

20. Most of the enforcement cases regarding gun jumping in the recent years were concluded with consent decrees between the Director General and the parties. The consent decrees were approved by the Antitrust Tribunal.

## 6. Referrals to the Pre-Notification Team in the IAA

21. While the IAA sees it as important to stringently enforce the pre-notification and stand-still obligations, over the years it has taken, and it continues to take steps to insure certainty, consistency and transparency regarding the IAA's policy on merger control; to make it easier for parties to meet their pre-notification and stand-still obligations; and to provide concrete solutions concerning the particular circumstances of each case, while making merger control more efficient.

## 6.1. Questions Arising in the Course of a Merger

22. The IAA has a team responsible for providing answers for merging parties on questions concerning the IAA's policy and interpretation regarding the application and scope of the pre-notification and stand-still obligations set in the mergers chapter of the Law. The scope and nature of these questions has pointed towards an increasing need to consolidate the IAA's policy and interpretation positions into a guiding document that would be available to the public.

23. Thus, the IAA published guidelines regarding pre-merger notification,<sup>2</sup> borne of the cumulative experience over the course of many years. Over these years, the procedural format for merger notification and examination processes took shape and the IAA formulated policies and procedures regarding the provisions of the Law concerning pre-notification.

24. In parallel, the IAA allows a dialogue regarding general questions about mergers, and the public can refer to the members of the Merger Team to inquire whether the IAA has a stance on such questions (beyond what is set forth in the guidelines). In addition, the IAA has published on its website FAQ that were asked in various particular cases. All of these contribute to greater transparency and consistency in the IAA's position, as well increased certainty and more efficient ways for merging parties to act in accordance with the merger control process.

## 6.2. Approving Actions Subject to Individual Request

25. In appropriate cases, subject to its discretion and following an individual request made in advance, the IAA is willing to permit parties to a merger to carry out certain actions that would otherwise be considered violations of the stand-still obligation. Thus, for example, when the IAA finds that there is an urgent need to carry out the actions and there is a concern that the target company may not survive, it may permit the parties to take steps to protect the target company.

1. Injection of funds – as a rule, injection of funds by the purchaser to the seller, particularly when part of the remuneration of the merger, constitutes gun-jumping. However, in certain cases the target company may face a real cash flow issue, which may endanger its continued operations if it does not immediately receive funds. In such cases, the IAA will be willing to approve injection of funds by the purchaser, subject to prior referral to the IAA. The burden to prove the substantive risk to the continued operations of the target company rests on the parties. This may be the case, for example, in liquidation proceedings. In such cases, the IAA is ready to approve injection of funds so as to avoid a situation in which the target company collapses and the transaction is prevented simply because of the stand-still obligation. It should be noted that the IAA's willingness to approve such injection is also linked to its evaluation regarding the likelihood that the merger will be approved.

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<sup>2</sup> Guidelines of the General Director of the Israel Antitrust Authority for Reporting and Evaluating Mergers Pursuant to the Restrictive Trade Practices Law, 1988  
[www.antitrust.gov.il/eng/subject/177/item/33018.aspx](http://www.antitrust.gov.il/eng/subject/177/item/33018.aspx).

In some cases when injection of funds is approved, the IAA makes the approval conditional. An example would be a case in which the injection was needed to pay employees' salaries; in that case, the IAA required that the funds be paid directly to employee salaries, so that no other use could be made of the funds.

2. Appointing an observer on behalf of the purchaser – the IAA's stance is that appointing an observer on behalf of the purchaser in the target company's directorate may constitute "gun-jumping". In certain cases, the IAA has approved appointing an observer, subject to several conditions set in each case to prevent information being leaked and a possible harm to competition.
3. Real danger to the public – in one case that came before the IAA, a contractor collapsed after having won a government tender for highway construction, which was the bulk of its business. It was imperative that ongoing maintenance work continue to be done on the highway, in light of the real danger to the public. The IAA was convinced that in the individual circumstances, it was justified to allow the competitor that purchased the contractor to take its place and continue the construction, even before merger approval was received.