# Women & Antitrust

## Voices from the Field

Vol. II Curation & Foreword by Kristina Nordlander

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# Michal Halperin

*Israel Competition Authority*

## Tal Eyal-Boger

**Michal Halperin** is director general of the Israel Competition Authority (ICA). For the past 28 years Ms Halperin has been practicing law, specialising in antitrust law. On March 2016, she was appointed director general of the ICA. In the beginning of her professional career, she worked at a leading Israeli commercial law firm and after five years, became a partner. In 2000 she moved to Boston and served as special adviser in one of the leading law firms in Boston. After returning to Israel in 2002, Ms Halperin served for four and a half years as chief legal counsel and deputy director general at the ICA. In 2007, Ms Halperin joined a leading Israel law firm as a partner where she established and led the firm's antitrust department.

**Tal Eyal-Boger** is a partner and head of the Competition and Antitrust group at FBC & Co. She is internationally recognised as one of Israel's leading competition and antitrust practitioners, focusing on various competition related matters – cartels and restrictive arrangements, abusive behaviour by monopolies, regulation of oligopolies and merger of companies. She regularly represents clients before civil, criminal and administrative courts, including before the Competition Tribunal. Her expertise is widely based on vast experience in complex litigation cases, including in class actions (defence side) and investigations by the Israeli Competition Authority, acting for global multinational clients as well as local companies from an array of industries. Ms Eyal-Boger earned her LLB degree (cum laude, 1994) from the Tel Aviv University and is finalising her obligations for the Kellogg-Recanati International Executive MBA programme.

In recent years there has been much discussion about rethinking competition policy. Ever since the 1970s, the Chicago school and its economically minded view of antitrust has dominated. The focus has been about protecting "consumer welfare", which mainly means keeping prices low. But today companies (especially in the technology sector) deliver services and products at an extremely low price, if not for free. Do you think new competition policy is also required in Israel?

There is no doubt that the digital economy, which includes what is often referred as – "zero" price services and products – challenges competition authorities worldwide. However, the classic competition assessment tends to analyse prices, not because it considers an increase of prices as the only possible harm caused to consumers, but rather because it is an effective proxy for examining competitive concern. Clearly, competitive harm can be reflected in various aspects, including, inter alia, the quality of a product, the level of service, the diversity offered, and in aspects relating to research, development and innovation. The point is that these aspects may be harder to assess. In this regard, in the context of the digital economy, many competition authorities worldwide, including the Israel Competition Authority (ICA), will have to overcome the challenge of examining various competitive issues, in markets where competition is not conducted over prices.

The ICA has stated that it examines the "digital economy" sector and its possible effect on competition. In September 2018 it invited interested members of the public to submit their comments regarding competition issues in the digital economy. Where does the ICA stand with regard to the matter? Does the ICA focus on potential competitive concerns arising from the "digital economy"? Is the general concern that regulatory involvement may harm competition and chill innovation more prevalent with regard to the tech industry? What are the insights that have been crystallised in this respect?

The ICA's role in the context of the digital arena is twofold. First, to allow the entrance of advanced and innovative technologies to the Israeli markets

for the benefit of the Israeli consumer. Simply put, Israel is not where it should be in many industries, whereas advanced and new technologies should be much more prevalent in the local consumer's experience. This is the case, for instance in the fintech industry, in transportation, e-commerce and more. To this end, we invest efforts in removing barriers to allow the entrance of new technologies to the Israeli markets through various tools at our disposal, including advocacy. Second, and in parallel, ICA has an uncompromising responsibility to protect the Israeli consumer, including from the market power of the "Internet giants", to the extent that competitive harm is caused, or if competitors are prevented from entering or operating in the market. To this end, we have a duty to continue and acquire expertise and knowledge in this field. If there is a place where we believe the Internet giants, or any other company for that matter, harm Israeli consumers or prevent competitors from entering or operating in the market – we will certainly intervene.

It was recently announced that an interdisciplinary team of competition, privacy and consumer protection regulators was established to promote regulation, development and cooperation in major issues in digital economy. How is this going to work? What is the underlying vision with regard to the interdisciplinary team's work? Are we to expect a policy report?

On 18 September 2019, the establishment of an interdisciplinary team, including the Privacy Protection Authority, the Consumer Protection Authority and the Competition Authority, was announced. The team conducts joint meetings from time to time. It discusses issues, common to privacy, consumer protection and competition, notably issues which may draw mutual or opposing positions of the authorities. The underlying intention is to furnish joint position papers of various kinds on issues which the three authorities are entrusted with, and which interconnect with the digital economy. This may include legislative bills, best practices, guidelines and more.

In recent years we have experienced in Israel a trend of "follow-on" civil enforcement (class actions) following judgments of foreign courts and decisions of foreign competition authorities. What is the ICA's view on this trend?

The ICA supports this trend. Of course, each case should be grounded and justified in and of itself, and the burden lies with plaintiffs to prove their case. I believe that private enforcement complements public enforcement. Hence, class actions and other private civil enforcement, when justifiable, should be encouraged.

Will we see enforcement actions by the ICA following enforcement actions of foreign competition authorities (e.g. the European Commission, Federal Trade Commission or US Department of Justice)? In this regard, does the ICA have a specific approach with respect to the digital sphere and the big tech companies?

The ICA does not have a specific policy with respect to the digital sphere and the big tech companies. Each case is examined according to its own circumstances and merits.

On 28 July 2019, the ICA published new draft merger regulations for comments from the public. At first glance, the proposed amendments in the draft for increasing the sales turnover threshold may result in reduction of the regulatory burden. However, the other proposed changes raise the concern that the proposed amendments may significantly increase the regulatory burden both with regard to the increased scope of transactions that would require the director general's approval, and with regard to the increased scope of the disclosure obligation. This is especially burdensome taking into account foreign-to-foreign mergers. Can you share the thought process and considerations behind the suggested draft?

To be clear, there is no intention, on the ICA's part, to increase the scope of transactions which require the director general's approval. This cannot be done through an amendment to the merger regulations.

With regard to increasing the scope of the disclosure obligation in cases where filing is required, I will note the following: as a general rule, indeed, the disclosure obligation in the context of the merger review regime in Israel is much narrower than that which applies in leading developed countries. Peer competition authorities in leading developed countries require the submission of a significantly broader scope of information than does the ICA. One of our main goals in the proposed amendment to the merger regulations is to align the requirements set forth by the ICA, to those set forth abroad. In addition, we believe that for mergers that clearly do not harm competition – particularly "ultra-green" mergers, assessed through the ICA's fast track for the approval of mergers – this would mean a reduction in the time frame for the ICA's assessment and an easier decision-making process. This is the case, as the ICA's assessment in such mergers is based on the information provided by the parties. Thus, while it is true that the amendment may burden the parties in this respect, it will nonetheless allow them to receive approvals quicker. This is why we believe that, on balance, the business community will benefit from this proposed amendment.

With regard to foreign-to-foreign mergers, the claim according to which the obligations imposed on foreign parties are especially burdensome, compared with local parties, is not clear. As a matter of principle, we strongly reject the concept that foreign entities should be treated differently from local entities. Foreign entities which conduct business in Israel should comply with and are subject to same legal framework as local entities. We see no good reason to adopt a more lenient approach towards foreign entities in this regard or in any other aspect.

On 21 July 2019, the ICA published the final version of its guidelines on the matter of how to evaluate significant market power, following the broadening of the definition of a monopolist in the revised Israeli Competition Law (the revision establishes that a monopoly is not only an entity with a market share above 50%, but also any entity which has "significant market power").

Does this change arise from the ICA's difficulty to determine market shares in certain cases (for example in digital markets)? Will the future trend be to focus on "significant market power" rather than market share?

The amendment to the Economic Competition Law did not arise from any such difficulty to determine market shares. Rather, it arose from a deep understanding that there is no necessary connection between market share and market power. The phenomenon that is of real interest to the ICA is market power. Accordingly, the amendment to the law was enacted to allow treatment of this phenomenon. Indeed, looking forward, the ICA intends to focus more on significant market power, rather than on market shares.

In 2018 an amendment to the Israel Competition Law conferred on the director general of the ICA a new authority to instruct a direct importer of the concrete steps it must take, in instances where the director general considers that there is a risk of harm to parallel imports or personal imports, which will have a detrimental effect on competition in the relevant sector. Considering that direct import of international brands has many procompetitive advantages, when instructing a direct importer, how does the ICA ensure that it does not harm the benefits that direct importing brings to the Israeli public and economy?

As a matter of principle, we believe that blocking parallel import is not a legitimate action to protect the interest of an importer. That said, there can be specific circumstances where a parallel importer may act in a manner which may justify, to some extent, actions on behalf of a direct importer. As to your question, before we impose instructions, we conduct a hearing. To the extent that a direct importer has strong reasons explaining why it was justified in trying to block parallel imports, we will certainly take these under consideration. However, this does not change the main principle: blocking parallel imports is not a legitimate action to protect the interest of a direct importer.

In several recent decisions, the competition tribunal did not follow the ICA's approach, and overruled or limited the director general's decision. This was the case with respect to the *Price Squeeze* case (following the tribunal's remarks the ICA withdrew its decision against Bezeq, the largest telecom company); the *Colgate* case (in an interim decision the tribunal limited the scope of instructions the director general imposed on the direct importer of Colgate regarding its communication with Colgate); and the most recent decision in the banks sector (the tribunal overruled the director general's decision to block the merger between Bank Mizrahi-Tefahot and Bank Igud). What are the ICA's takeaways from these tribunal decisions?

Our most important takeaway is that we are very lucky and honoured to have an independent, expert competition tribunal, which does not always follow the ICA's position. This is how things should work. We are strong believers in the importance of judicial review. Even more so when it is conducted by a specialised tribunal, well equipped to engage in substantive deliberation on competition law and policy, such as the Israeli Competition Tribunal. The tribunal is a significant part of the competition regime in Israel. Over the years, it has acquired broad -knowledge and expertise in antitrust and competition law. Accordingly, it takes a major role in the creation of case law and the development thereof. Such a competition tribunal, which is able to oversee an agency's conduct, from a professional and knowledgeable standpoint – beyond the generally accepted administrative review standards such as due process, and correct administration – ensures that decisions made by a competition agency maintain their reasoned, well-founded and measured nature. Sometimes the ICA's positions are accepted, sometimes they are partially accepted, other times they are not. This is an inherent and important part of our well-balanced system.

How would you describe the cooperation between the ICA and specific industry regulators (e.g. communication, transportation, energy, banking etc.)? In areas subject to specific regulation, what is the weight of the insight provided by the relevant regulators in the ICA's work and in the director general's decisions?

The ICA invests considerable resources and efforts in advancing joint initiatives with many industry regulators in different fields. This includes, for instance the Capital Market, Insurance and Savings Authority, the Israel Securities Authority, the Israel Ministry of Environment Protection, and many more, all as part of ICA's attempt to create joint projects for the purpose of advancing competition and creating a procompetitive regulatory environment. Certainly, with reference to ICA decisions in areas subject to specific regulation, we conduct close dialogues with the relevant regulators, and significant weight is granted to their insight.

The ICA recently indicated that it is in the process of re-mapping regulatory failures in the Israeli economy, and requested public input to find solutions that will, on the one hand, protect the relevant regulators' interests and, on the other, reduce harm to competition. If possible, please share the background for this process, and did the ICA identify any "regulatory failures" which harm competition and require amendment?

The "Call for Contributions regarding Competitive Failures Originating in Regulation" was one of the very first initiatives of the ICA's newly established Markets Department. The Markets Department was established as part of the ICA's reorganisation process during 2018. This department – which is made up of sector-specific teams of economists and attorneys – was entrusted inter alia with the mission of overseeing the ICA's approval of transactions as well as with its advocacy mission, i.e., with advising the government and ministerial committees on regulatory

and legislative proceedings, as well as providing specific competition consultation to various government offices. This was the background for publishing the Call for Contributions.

Notably, we were very much surprised by the volume of responses and inputs received. Over 90 responses were contributed from over 50 different entities in a broad array of markets, including finance, food, transportation, communications, health, retail, energy and more. The ICA followed up with a process of mapping these contributions and examining them. To date, the treatment of 7 responses was terminated after an initial examination; 17 contributions were added to an already existing inquiry conducted at the ICA; the issues raised in 2 contributions are being advanced by the ICA; and an additional 26 contributions are classified as issues for future inquiry by the ICA.

What are the future priorities for the ICA's work in terms of enforcement measures and relevant markets?

Enforcement against cartels and bid-rigging will always remain top priority, and will continue to be enforced with criminal measures. In parallel, the ICA increased its enforcement efforts against monopolies, an effort which will continue to remain at the heart of ICA activity.

Following the comprehensive reform to the Israeli Competition Law from earlier this year – are there any additional amendments to the Israeli Competition Law that we might expect in the coming years?

Currently, we are not working on an additional amendment to the Israeli Competition Law.

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Vol. II

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by Kristina Nordlander

Leading competition professionals from around the world present reflections and forecasts on topical issues in antitrust and competition law and policy in this second volume of Women & Antitrust. Over a series of candid conversations, enforcers, in-house counsels, lawyers and academics take on questions about an extraordinary year. Nestled among the exchanges are insights into the professional paths of the women interviewed. Through personal anecdotes, they share perspectives on their chosen roles, if and how gender has informed their career choices, and offer advice to young practitioners interested in joining this field.

*This volume has been published in cooperation with Women's Competition Network (WCN). Another volume was previously published in cooperation with W@Competition.*

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