Response to Israel Competition Authority's Consultation on the Draft Merger Guidelines

Analysis Group

Authors:

Dr. Samuel Weglein

Dr. Zsolt Udvari

Dr. Gleb Gertsman

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I. Introduction and Overview

Analysis Group[1] ("we," "our") welcomes the opportunity to respond to the Israeli Competition Authority's ("ICA") call for input on the Draft Merger Guidelines ("Draft Guidelines") published on 26 April 2026.[2] This submission sets out our observations and recommendations on a number of aspects of the Draft Guidelines that, in our view, would benefit from further clarification or refinement.

The Draft Guidelines, in our view, represent a step forward in the ICA's stated approach to merger assessment. In particular, we welcome the expanded nature of the new Draft Guidelines relative to the 2011 guidelines ("2011 Guidelines").[3] We also believe the ICA should be applauded for the addition of a more nuanced discussion around

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[2] (English translation of) Israel Competition Authority, *Opinion 26/ Regarding Guidelines for the Competitive Analysis of Mergers*, available at https://www.gov.il/BlobFolder/legalinfo/draftopinion1-26/he/opinion_%D7%98%D7%99%D7%95%D7%98%D7%AA%20%D7%92%D7%99%D7%9C%D7%95%D7%99%20%D7%93%D7%A2%D7%AA%20%D7%94%D7%A0%D7%97%D7%99%D7%95%D7%AA%20%D7%9C%D7%A0%D7%99%D7%AA%D7%95%D7%97%20%D7%AA%D7%97%D7%A8%D7%95%D7%AA%D7%99%20%D7%A9%D7%9C%20%D7%9E%D7%99%D7%96%D7%95%D7%92%200426.pdf.

[3] (English translation of) Israel Antitrust Authority (2011), *Opinion 1/11: Guidelines for the Competitive Analysis of Horizontal Mergers,* available at https://www.gov.il/BlobFolder/legalinfo/opinion111/he/opinion_%D7%92%D7%99%D7%9C%D7%95%D7%99%20%D7%93%D7%A2%D7%AA%201_11%20%D7%9E%D7%99%D7%96%D7%95%D7%92%D7%99%D7%9D%20%D7%90%D7%95%D7%A4%D7%A7%D7%99%D7%99%D7%9D.pdf.

the topics of efficiencies, market power, dynamic competitive effects (such as nascent competition) and non-horizontal mergers.

That said, while the Draft Guidelines establish a framework under which competitive concerns may be identified based on a combination of structural indicators and theories of harm, in our view, they provide relatively limited guidance on the analytical tools and evidence (both quantitative and qualitative) that the ICA applies, or intends to apply, when testing the relevant theory or theories of harm.

Guidance regarding the analytical tools and economic evidence relevant to merger assessment is important to ensuring transparency, predictability, and rigorous enforcement. International merger control practice increasingly recognizes that findings of competitive harm should be supported not only by a coherent theory of harm, but also by scientifically sound economic analyses. This approach is reflected, for example, in both the 2023 U.S. Merger Guidelines[4] and the European Commission's recent draft Merger Guidelines,[5] which complement the discussion of theories of harm with guidance on the quantitative and qualitative evidence, analytical tools, and economic methodologies that may be relevant to their assessment. We encourage the ICA to provide, wherever possible, greater clarity regarding the types of economic analyses and relevant evidence that may be used to assess potential harm to competition.

This submission outlines several specific recommendations in light of the principles set out above, concerning a number of issues that are particularly relevant in the context of the Israeli economy. This response is structured as follows. Section II discusses two topics that can benefit from a more nuanced discussion around the potential benefits that can arise from mergers and acquisitions: nascent competition in the context of start-up acquisitions and conglomerate mergers. Section III provides recommendations about the discussion of efficiencies and benefits that are in line with international practices. Section IV discusses topics on the assessment of market power, such as the case of non-price factors, the role of entry or expansion plans in market power assessment, the proposed changes to structural presumption thresholds, and market definition and SSNIP test.

II. Start-up Acquisitions and Conglomerate Mergers

A. Nascent competition and start-up acquisitions

The Draft Guidelines added the discussion of nascent or emerging competitive constraints, the inclusion of which is in line with the recent developments in international merger practice. However, we encourage the ICA to consider a more nuanced discussion around nascent competition, including the discussion of "killer acquisitions" in the context of start-up acquisitions. In our view, start-up acquisitions are of central importance for Israeli merger

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[4] US Department of Justice and the Federal Trade Commission (2023), *Merger Guidelines*, available at https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf ("2023 US Merger Guidelines").

[5] European Commission, Draft communication from the commission: Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, available at https://competition-policy.ec.europa.eu/document/download/46dde10f-85c1-4590-a3f4-2b71f85685ef_en?filename=Merger%20Guidelines%20-%20final%20for%20public%20consultation.pdf ("Draft EU Merger Guidelines").

control given the role of the start-up sector in the Israeli economy. While the concern of shutting down innovative projects of acquired startups is well-understood, recent economics literature has emphasized the need to weigh risks of potential innovation suppression against the possibility that buyer resources may overcome constraints the start-ups would face absent an acquisition.[6]

Start-up acquisitions can enable potential new innovation by providing the financial, technical, regulatory, and distribution resources needed for successful commercialization and broader adoption. Such acquisitions may not only help overcome barriers that might otherwise prevent promising technologies from ever reaching the market, but may also foster the integration of complementary assets, skills, and expertise. The combination of these factors may accelerate innovation and increase the likelihood of new products or technologies benefiting consumers.[7] Additionally, acquisitions serve as a crucial exit route for founders and investors of start-ups, incentivizing venture capital investment and supporting the growth of a vibrant start-up ecosystems.[8]

These considerations are particularly important in the context of merger control in Israel, because start-ups originating in the high-tech sector, in particular in research intensive fields, such as AI, are a core growth engine for the Israeli economy.[9] Furthermore, recent empirical academic work casts doubt on the preconception that start-up acquisitions in the technology sector are typically "killer acquisitions." Such acquisitions often amplify diffusion and visibility of acquired technologies rather than suppress innovation.[10]

In light of the above, a broad and unreflective pursuit of "killer acquisition" theories could chill investment in the Israeli technology sector and unnecessarily block pro-competitive deals providing needed capital, scale, distribution, or commercialization capacity. Likewise, guidelines that do not present a balanced picture of the potential pro-competitive effects of start-up acquisitions, and instead overemphasize the potential anti-competitive effects of the "killer acquisition" theory of harm may have a deterrent effect for start-up acquisitions. We therefore encourage the ICA to explicitly recognize the existence of procompetitive startup acquisitions and set out a more balanced approach that considers both the pro- and anti-competitive effects of such mergers.

One practical approach would be the inclusion of an "innovation shield," similar to what appears in the Draft EU Merger Guidelines.[11] The "innovation shield" outlines special conditions under which an acquisition of a small

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[6] Caminade et al (2025), Acquihires in the Technology Sector: Antitrust Scrutiny Through the Lens of Economics pp. 4-5.

[7] See, for example, Chiara Fumagalli, Massimo Motta and Emanuele Tarantino (2022), *Shelving or Developing? The Acquisition of Potential Competitors Under Financial Constraints*, CEPR Discussion Paper, No. DP15113 .

[8] See, for example, Brian J. Broughman, Matthew T. Wansley and Samuel N. Weinstein (2025), *No Exit*, *NYUL Rev*. 100: 1481.

[9] See, for example, OECD (2025), *OECD Economic Surveys: Israel 2025*, pp. 13, 53, 55, available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/04/oecd-economic-surveys-israel-2025_18e45b04/d6dd02bc-en.pdf; Israel Innovation Authority (2025), *Annual Report: The State of High-Tech 2025*, pp. 2-3, 31, 47-48, available at https://innovationisrael.org.il/wp-content/uploads/2025/12/Annual-Report-The-State-of-High-Tech-2025.pdf.

[10] Ederer et al (2025), *Digital (Killer?) Acquisitions*, pp. 1, 3, 37.

[11] Draft EU Merger Guidelines, para 192.

innovative company is unlikely to be considered harmful for competition. This approach aims to provide greater predictability regarding mergers involving innovative firms and start-ups. The ICA might consider adding a similar conceptual framework to the new guidelines with the appropriate considerations of the realities of the Israeli high-tech sector. If adopted, such an innovation shield should be broadly applicable to research intensive industries and avoid being too narrowly focused on certain fields, such as, e.g., patent-intensive firms.

B. Conglomerate mergers

The Draft Guidelines include guidance regarding conglomerate mergers and the circumstances in which tying, customer targeting, and the combination of complementary products may contribute to foreclosure concerns. However, in our view, the discussion would be improved by presenting a more balanced perspective on the competitive benefits that conglomerate mergers can create. Currently, Section 3.C of the Draft Guidelines emphasizes situations where the merged firm might leverage its combined products, data, or customer information to hinder competitors or restrict access. While it is true that such outcomes may arise in some circumstances, the integration of assets and capabilities often serves a pro-competitive purpose, enhancing the merged entity's ability to compete fairly and effectively. Indeed, empirical evidence suggests that conglomerate mergers that plausibly harm competition appear to be rare.[12]

Similar to the potential benefits of start-up acquisitions, conglomerate mergers have the potential to generate benefits. Bringing together complementary products, technologies, data assets, distribution channels, and customer relationships may empower the merged company to introduce new products, improve existing offerings, tailor solutions more closely to customer needs, or provide more favorable commercial terms.[13] Similarly, the merger-driven ability to target offers using integrated information and capabilities may indicate the merged firm's enhanced competitiveness, rather than a manifestation of market power. In these instances, customers may choose the merged firm's offerings due to their greater value, not because competitors have been excluded from the market.

We therefore respectfully suggest adding a more balanced discussion of conglomerate mergers by clarifying that the potential for post-merger bundling, integration, or enhanced customer-targeting capabilities should not automatically be interpreted as evidence of competitive harm. Instead, the competitive assessment should concentrate on whether the merger is likely to create or reinforce a specific mechanism for foreclosure, rather than simply enabling the merged firm to win customers through superior products, services, innovation, or efficiencies unique to the merger.

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[12] OECD (2020), Roundtable on Conglomerate Effects of Mergers - Background Note by the Secretariat, paras 115, 117.

[13] Alexandre de Cornière and Greg Taylor (2024), *Data-Driven Mergers*, Management Science 70(9):6473-6482; Germain Gaudin and Niklas Nagel (2025), *Merger of complements: Empirical evidence from the eyewear industry*, International Journal of Industrial Organization, Volume 103, Part A.

III. Efficiencies and Benefits

We welcome the discussion of positive effects from mergers in the Draft Guidelines[14] and we note that it is in line with recent international practice. However, in our view, the guidance on efficiencies could benefit from further development including taking into account latest developments in the international practice, in particular the strong emphasis on efficiencies in the Draft EU Merger Guidelines.[15] The Draft EU Merger Guidelines introduce the concept of a "theory of benefit" to underpin the assessment of efficiencies in merger reviews.[16] In this respect, the EC states that "efficiencies will play a key role in the assessment of mergers going forward."[17] The introduction of such a structured framework for the assessment of efficiencies reflects the increasing importance of non-price dimensions of competition and a balanced assessment in merger analysis.

We encourage the ICA to similarly emphasize the important role of the efficiencies and merger-specific benefits in the merger review process. Even if the ICA chooses not to adopt a similar concept as the EC's "theory of benefit," we highlight three specific elements from the EC's framework that we encourage the ICA to include in its final Guidelines.

First, the Draft EU Merger Guidelines encourage the merging parties to communicate their views on merger-specific benefits early in the merger review process,[18] and we would recommend that the ICA do the same. In our experience, an early discussion of benefits helps ensure that they get an adequate assessment and avoids situations where benefits are an "afterthought" following the discussion of potential harms, which can in turn represent a significant saving of resources both for the ICA and for the merging parties.

Second, the Draft EU Merger Guidelines contain a flexible approach towards fixed cost savings, and we encourage the ICA to do the same.[19] Taking into account specific situations where even fixed cost savings can lead to material benefits for consumers could help merger control to stimulate sectors characterized by large investments into infrastructure, such as telecommunications.

Finally, we note that the discussion of efficiencies in the Draft Guidelines focuses primarily on efficiencies such as short-term cost savings and the elimination of double marginalization. By contrast, the Draft EU Merger Guidelines also explicitly recognize dynamic efficiencies that may generate consumer benefits over a longer time horizon, for example through innovation arising from the combination of complementary assets, improved access to critical

[14] Draft Guidelines, Section 9.

[15] Draft EU Merger Guidelines, Sections B.2, B.3, C.

[16] Draft EU Merger Guidelines, para 25.

[17] Draft EU Merger Guidelines, para 291.

[18] Draft EU Merger Guidelines, para 36.

[19] Draft EU Merger Guidelines, para 317 and fn 391.

inputs or financing, and a more efficient allocation of scarce research and development resources.[20] In our view, adopting a similar approach that explicitly recognizes these longer-term efficiencies and provides guidance on their assessment would strengthen Israeli merger control by facilitating pro-competitive transactions that enhance innovation and dynamic competition. We therefore encourage the ICA to expand its discussion of efficiencies accordingly.

IV. Assessment of Market Power

A. Non-price factors

The Draft Guidelines define competitive harm as worsening "terms of trade," which is an umbrella term that is used to include a "price increase, a reduction in quality, service, or any other commercial term, a decrease in innovation efforts, and more."[21] We understand that an umbrella term may be necessary to allow for some flexibility for merger control. However, such approach may also create ambiguity about the analysis of non-price parameters, such as quality, innovation and privacy, which are often more difficult to measure and assess than price levels.

We therefore encourage the ICA to provide further guidance on how it intends to identify and evaluate competitive levels of such non-price parameters. In addition, to promote a more transparent and efficient merger review process, we recommend the ICA to clarify the types of evidence it considers most relevant in establishing whether a merger will significantly harm competition and the public.

On a related note, we would like to highlight that while the Draft Guidelines only mention the non-price "terms of trade" elements as a potential source of harm, merger-specific benefits may also lead to an improvement in these factors. Consequently, we suggest the ICA to explicitly acknowledge in the final version of the Guidelines that merger-specific efficiencies and benefits may, in some cases, materialize in non-price factors instead of price-reducing cost savings.

B. Role of entry or expansion plans by rivals

We welcome the Draft Guidelines' more nuanced discussion of the entry by competitors as compared to the 2011 Guidelines.[22] However, in our view, the Draft Guidelines may benefit from the consideration of two additional elements related to entry: evidence used to substantiate entry and a more nuanced discussion of the role of imports.

First, the final text of the Guidelines may benefit from elaborating on the type of evidence that can be used to substantiate the role of entry by rivals. For example, clear, contemporaneous and verifiable evidence of concrete

[20] Draft EU Merger Guidelines, paras 296-301 and 324-338.

[21] Draft Guidelines, p. 3.

[22] Draft Guidelines, Section 8.

plans to enter or expand at a relevant scale may, in many cases, provide particularly probative value in terms of whether barriers to entry or expansion can in fact be overcome in the circumstances of a given merger.[23] Other types of potential evidence include the existence of competitors that possess the capabilities and assets needed for a successful entry.[24]

Second, the Draft Guidelines state that when considering entry through imports, that "absent regular imports at significant scale before the merger, the Authority will tend to assume barriers to imports even if they cannot be specifically identified."[25] Effectively, the lack of imports absent the merger implies an automatic existence of barriers to entry. In our view, assuming the presence of entry barriers without any observable source of such barriers is an overly strict approach. Economic theory suggests that supply through imports can, for certain products, be extremely elastic, that is, it may react strongly even to slight changes of underlying economic circumstances. This is especially likely for a small and open economy.[26] The absence of substantial pre-transaction imports does not imply the lack of constraining effects of potential imports on prices. For this reason, we encourage the ICA to reconsider its approach and not assume the presence of barriers to imports unless such assumptions are based on facts of the particular market.

C. Changes to structural presumption thresholds

We note that the Draft Guidelines provide helpful guidance on market concentration measures by explicitly identifying the HHI index as the most important measure relative to the X-firm concentration ratio and the number of significant competitors.[27] The Draft Guidelines further provide unambiguous guidance on structural presumptions and the thresholds used for these presumptions.[28]

The thresholds in the Draft Guidelines refer to the level of concentration above which there is a rebuttable presumption that the merger will significantly harm competition. In comparison, the 2011 Guidelines[29] provided concentration thresholds to indicate a level of concentration below which competition concerns were unlikely. In addition to this change in the articulation of the role played by the thresholds, the values of the thresholds have

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[23] Evidence on rivals' plans may also indicate that the firms concerned are particularly efficient or otherwise well positioned to overcome any existing barriers and to exert a meaningful competitive constraint post-entry or expansion.

[24] Draft EU Merger Guidelines, para 95.

[25] Draft Guidelines, p. 25.

[26] See, for example, Marc Melitz, Maurice Obstfeld and Paul Robin Krugman (2012), *International Economics: Theory and Policy*, 9ed, p. 254.

[27] Draft Guidelines, pp. 10-11.

[28] Draft Guidelines, p. 11.

[29] 2011 Guidelines, p. 15.

changed as well. In the 2011 Guidelines, the thresholds — based on "experience accumulated in recent years"[30] — were defined by a post-merger HHI of 2,000 and a change in HHI of 150. In the Draft Guidelines, these thresholds are 1,800 and 100, respectively. In addition, the Draft Guidelines introduce an additional threshold of 30% combined market share as another structural presumption.[31]

The new thresholds, together with the adjusted language, may be read to imply a more strict merger control regime. This will inevitably create a larger set of firms that will undergo scrutiny, increasing the administrative burden on both parties and likely creating a chilling effect for the M&A activity (but we recognize that this tradeoff may already have been considered). If the change in thresholds has a basis — whether it be recent experience or otherwise — we suggest that the ICA to describe that basis in the final Guidelines.

In the 2011 Guidelines, the section addressing concentration measures and structural indicators ended with the statement that "a comprehensive analysis of the competition concerns arising from horizontal mergers is not limited to estimating the concentration that would have been expected in the absence of the merger or that which would be expected immediately after the merger, because at times the market share held by the merged entity will not indicate its ability to exercise market power, either alone or jointly with others."[32] We agree — there are circumstances where market shares are not reliable indicators of market power — researchers have suggested that this may be the case in in markets with differentiated products,[33] in bidding and bargaining markets,[34] in zero-price markets,[35] and in markets with multi-sided platforms.[36] We recommend the ICA to reintroduce language to this effect into the final text of the Guidelines.

D. Market definition and SSNIP test

Section 10.C of the Draft Guidelines provides a more detailed and nuanced explanation of the SSNIP test methodology than was offered in the 2011 Guidelines. We welcome the inclusion of additional methodologies, such as the Aggregate Diversion Ratio and Critical Loss, which add further clarity and value. We further welcome that the Draft Guidelines make it clear that the SSNIP test is directly linked to a specific theory of harm and

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[30] 2011 Guidelines, p. 15.

[31] Draft Guidelines, p. 11.

[32] 2011 Guidelines, p. 15.

[33] OECD (2022), *The Evolving Concept of Market Power in the Digital Economy: OECD Competition Policy Roundtable Background Note*, pp. 17-18.

[34] OECD (2006), Competition in Bidding Markets: OECD Series Roundtables on Competition Policy Papers, p. 44.

[35] OECD (2022), The Evolving Concept of Market Power in the Digital Economy: OECD Competition Policy Roundtable Background Note, p.7.

[36] OECD (2022), *The Evolving Concept of Market Power in the Digital Economy: OECD Competition Policy Roundtable Background Note*, pp. 8, 23-24.

thoughtfully addresses complex situations, including hypothetical monopsony scenarios, emerging markets, and the importance of evaluating the SSNIP test based on competitive, rather than prevailing, prices.

That being said, we believe the guidelines should address situations where an empirical application of the SSNIP test may not provide reliable results due to the presence of zero prices, which appear in certain multi-sided platform markets and certain service sectors. The European Commission adopted the use of the Small but Significant Non-Transitory Decrease in Quality (SSNDQ) test to address challenges related to zero prices or other important non-price factors.[37] The 2023 US Merger Guidelines similarly extend the notion of the SSNIP test to a more general notion of Non-Transitory Increase in Price or other worsening terms ("SSNIPT"). This approach highlights aspects such as quality, service, capacity investment, product variety, features, and innovation.[38] Given the ICA's general acknowledgement of market power impact on non-price market outcomes, we recommend that the final Guidelines consider including these alternative tests and dimensions into the SSNIP framework as well.

In addition, we note that the Draft Guidelines appear to be rather inflexible in taking the position that the SSNIP test framework is inapplicable in circumstances where data is limited or unavailable.[39] The European Commission has taken a more flexible approach, suggesting that the SSNIP test conceptual framework can still be of value even when the quantitative implementation of the test is not feasible.[40] In our view, the benefit of such an approach is the analytical rigor it imposes on the assessment of the factors listed in the Draft Guidelines indicating boundaries of the relevant market.[41] For an example of the application of the SSNDQ test as a conceptual framework, rather than an empirical exercise, the ICA is referred to the European Commission's *Google Android* case where the European Commission considered a "non-transitory deterioration of the quality of Android app store (e.g. search functions within the store, presentation of the results, offer of special deals, update features, etc.)."[42]

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[37] European Commission (2024), Commission Notice on the definition of the relevant market for the purposes of Union competition law, para. 30 and fn. 54.

[38] 2023 US Merger Guidelines, pp. 41-44.

[39] Draft Guidelines, p. 29.

[40] European Commission (2024), Commission Notice on the definition of the relevant market for the purposes of Union competition law, para. 31.

[41] Draft Guidelines, Section 10.B.

[42] European Commission (2018), Case *AT.40099 Google Android*, paras 284-305, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.