CA 2082//09
CA 2414//09
And counter-appeal

Appellant in CA 2082/09 (Respondent 2 in CA 2414/09 and in the Counter Appeal):	**Eurocom DBS Ltd.**
	v.
Respondent 1 in CA 2082/09 and in CA 2414/09 (and Counter- appellant in CA 2414/09):	**Bezeq the Israel Telecommunications Corporation Ltd.**
Respondent 2 in CA 2082/09 (and Appellant in CA 2414/09 and Respondent 1 in the Counter-appeal):	**General Director of the Israel Antitrust Authority**

The Supreme Court sitting as the Court of Civil Appeals
[8 June 2009]
Before Deputy-President E. Rivlin and Justices E. Rubinstein, E. Hayut

Appeal of a ruling of the Antitrust Tribunal in Jerusalem in AT 706/07, issued on 3 February 2009 by the Honorable Judge M. Mizrachi, Professor R. Horesh and Mr. N. Lisovsky

Facts: Bezeq, the Israel Telecommunications Corporation Ltd., held 49.78% of the shares of “Yes” D.B.S. Satellite Services (1998) Ltd. Another 32.6% of the Yes shares are held by Eurocom D.B.S Ltd. Yes is one of only two providers in the multi-channel television broadcast infrastructure market and in the multi-channel television broadcasting market. The other multi-channel television provider in the market is “Hot”. Bezeq is a public company licensed to provide internal fixed line services, including fixed line telephony and Internet infrastructure. Bezeq also provides the public with a wide variety of communications services through its subsidiary and affiliated companies, including international telecommunications services and Internet service provision, cellular telephony, and endpoint equipment for telephony. On 27 June 1995, Bezeq was declared to be a monopoly in a number of communications markets, and on 10 November 2004, it was declared to be a monopoly in high-speed Internet service provision. On 2 August 2006, Bezeq and Yes submitted a notice of merger pursuant to the Restrictive Trade Practices Law, 1988, declaring Bezeq’s intention to exercise options that it held and that would give Bezeq 58.36% of the shares of Yes, making it the controlling shareholder of Yes. The General Director of the Israel Antitrust Authority objected to the merger as presenting a reasonable risk of significant harm to competition from both a horizontal and vertical perspective. Bezeq filed an appeal with the Antitrust Tribunal. Eurocom joined the proceedings in support of the General Director’s decision. The Tribunal overturned the decision of the General Director, ruling that the merger would be permitted subject to certain conditions. The General Director and Eurocom filed the current appeal against the decision of the tribunal. Bezeq filed a counter-appeal in regard to the amount of the bank guarantee that the tribunal required of it as one of the conditions for the merger.

Held: Justice E. Hayut (Deputy President E. Rivlin and Justice E. Rubinstein concurring) delivered the opinion of the Court. Companies may not merge without the consent of the General Director of the Antitrust Authority. The test for exercising the General Director’s authority under s. 21 of the Restrictive Trade Practices Law is the existence of a “reasonable risk” – i.e., estimation that there will be a significant damage to competition due to the proposed merger, or damage to the public with respect to one of the matters listed in the section. The basic assumption of the Law is that mergers are desirable, in that they increase business efficiency and benefit consumers. However, because mergers can harm competition due the increase in the power or market share of the merging companies, the legislature saw fit to review them, and in certain cases, even to limit them in order to protect the public against economic distortions resulting from excessive concentration of certain markets. Protection of competition in the communications industry is of special importance, as the media carries out an essential function for our existence as a democratic society, and serves to realize fundamental rights such as freedom of expression and the public’s right to know.

Historically, the Israeli multi-channel television industry has been characterized by a lack of direct, effective competition. In 2000, a satellite television company entered the market. The technological innovation changed the market from a monopoly to a duopoly. The current reality in the Israeli multi-channel TV broadcast industry is that there are only two players – Hot and Yes – in the infrastructure market and in the content market, and each of them maintains full vertical integration between the infrastructure and broadcasting levels. The merger under discussion is not a horizontal one because Bezeq itself is not currently a competitor in any of the markets that are relevant to this case (i.e., the infrastructure market or multi-channel TV broadcast the content market). Additionally, this is not a vertical merger between companies operating at different stages of production or marketing in the same industry, since Bezeq's activity in the multi-channel TV broadcast industry consists only of holding of the Yes shares that it currently holds. This merger, which is neither vertical nor horizontal, can be referred to as a conglomerate merger. Conglomerate mergers are not infrequently considered to be mergers whose effect on competition is neutral, and occasionally, even beneficial, but there are a number of dangers to competition involved in a conglomerate merger. The doctrine that is relevant to this case is that of actual potential competition. This doctrine refers to future harm that will be caused to the market because a potential competitor will be removed from it as a result of the merger. In our case, the General Director based her objection to the merger on this actual potential merger doctrine, and the essence of her argument in this context is that without a merger, Bezeq can be expected to enter into the infrastructure market and the content market for multi-channel TV broadcasts as an independent competitor. Therefore, according to the General Director, the merger's approval will lead to the loss of Bezeq as a potential competitor in these markets or in one of them, and will fix them as duopolistic markets. The Court found that two of the key conditions for establishing the potential competitor doctrine are present here – there is a reasonable likelihood that Bezeq, as a potential competitor, will enter into the multi-channel television infrastructure market and will provide IPTV services, and it has been proven that it has the technological ability and the economic incentive to do so in the short term. Additionally, it appears that Bezeq's entry into the multi-channel television infrastructure market presents considerable advantages over the situation that would develop in the market if the merger were approved.

The Tribunal, when adjudicating an appeal of a General Director's decision, does not have absolute discretion to order as it wishes and it cannot stipulate conditions of a merger's approval which, according to its own determination, does not give rise to reasonable risk of significant damage to competition in the relevant industry. The Tribunal therefore erred in subjecting merger to conditions after it found that the merger between Bezeq and Yes would not cause significant damage to competition. The Tribunal also erred in finding that the merger would not significantly damage competition. Such a risk does exist in this case. The main purpose achieved in preventing the merger is the addition of a competitor in the infrastructure market. This is a contribution to competition from a horizontal perspective through the weakening of the concentration in the existing duopolistic market, and it is hard to think of a structural condition in this case that would achieve this purpose. The behavioral conditions stipulated by the Tribunal cannot resolve the competition risk, because of the structural difficulty in ensuring such an arrangement where a single party (Bezeq) controls two out of three infrastructures in the market. The Court, therefore, cancelled the Tribunal's decision and restored the General Director's original determination opposing the merger.

Appeal allowed.

Legislation cited:

Restrictive Trade Practices Law , ss.21 (a) .

Insurance Contract Law, 5741-1981, chapter 1, article 6, ss. 33, 33-35, 35, 36.

Israeli Supreme Court cases cited:

[1] CA 2247/95 *General Director v. T'nuva* [1998], IsrSC 42(5) 213.

[2] CA 3398/06, *Israel Antitrust Authority v. Dor Alon Energy Israel (1988) Ltd* (2006)

[3] FHC 4465/98 *Tivol (1993) Ltd. v. Chef of the Sea (1994) Ltd.,* [2001] IsrSC 56(1) 56.

[4] HCJ 7200/02 *DBS Satellite Services (1998) Ltd. v. the Cable and Satellite Broadcasts Council*, [2005] IsrSC 59 (6) 21

[5] HCJ 508/98 *Matav Cable Communications Systems v. Knesset*, [2000] IsrSC 54(4) 577.

[6] CFH 4465/98 *Tivol v. Chef of the Sea* (1998), IsrSc 46 (1) 56,

[7] CA 6222/97 *Tivol v. Minister of Defense*, ISRSC42(3), 145

[8] LA 4224/04 *Beit Sasson v. Shikun Ovdim* (2004) IsrSc 59 (6) 625.
[9] CA 8301/94, *Assessing Officer for Large Enterprises v. Pi Glilot* (unpublished)
[10] CA 458/06 *Stendahl v. Bezeq International Ltd.* (unpublished)

District Court cases cited

[11] CA 1/00 (Jerusalem), *Food Club Ltd. v. General Director* (2003)

Antitrust Cases:

[12] AT 8006/03 *Yehuda Pladot Ltd. v. General Director*

American cases cited:

[13]*FTC v. Procter & Gamble, Co.*, 386 U.S. (1967) 568.
[14] *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973);
[15] *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974)
[16] *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981);
[17] *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982),*Mizuho*
[18] *Re El Paso Energy Corp.*, 131 F.T.C. 704 (2001);
[19] *United States v. AT&T Corp. and MediaOne Group, Inc.*, Proposed Final Judgment and Competitive Impact Statement, 65 F.R. 38584 (2000);
[20] *In re Applications of NYNEX Corp. & Bell Atlantic Corp.*, 12 F.C.C.R. 19, 985 (1997)).
[21] *BOC International, Ltd. v. FTC,* 557 F.2d 24, 25 (2d Cir. 1977) [ ];
[22] *FTC v. University Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991)
[23] *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, (4th Cir. 1977)).
[24] *United States v. Siemens Corp*., 621 F.2d 499 (2d Cir. 1980))
[25] *Mercantile Tex. Corp. v. Bd. of Governors*, 638 F.2d 1255, 1271-1272 (5th Cir. 1981))
[ ] *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer to Peer Applications*, 23 F.C.C. Rcd 13028 (2008)).

English Cases cited

[ ] Case T-5/02, *Tetra Laval BV v. Comm'n*, 2002 E.C.R. II-4381

JUDGMENT

Justice E. Hayut:

We have before us two appeals and a counter appeal regarding a ruling of the Antitrust Tribunal (the Honorable Judge M. Mizrachi, Prof. R. Horesh and Mr. N. Lisovsky) (hereinafter: "the Tribunal"), dated 3 February 2009, which had approved, subject to the conditions it established, the merger of Respondent 1, Bezeq, the Israel Telecommunications Corporation Ltd. (hereinafter: "Bezeq") and D.B.S. Satellite Services (1998) Ltd. (hereinafter: "Yes"), through the exercise of Yes options held by Bezeq. In this ruling, the Tribunal granted Bezeq's appeal against the decision of the General Director of the Israel Antitrust Authority (hereinafter: "the General Director"), dated 31 December 2006, disapproving the merger. (The grounds for the objection were published on 18 February 2007).

Background and the General Director's decision

1. Bezeq is a public company which, pursuant to the Communications Law (Telecommunications and Broadcasts), 1982 (hereinafter: "the Communications Law (Telecommunications and Broadcasts")) is licensed to provide the public with internal fixed line services, including fixed line telephony and an Internet infrastructure, through a national system of telecommunications facilities (hereinafter: a public telecommunications network). Bezeq also provides the public with a wide variety of communications services through its subsidiary and affiliated companies, including international telecommunications services and Internet service provision (through Bezeq International Ltd.), cellular telephony (through Pelephone Communications Ltd.), and endpoint equipment for telephony (through Bezeq Cal Ltd.). Further, on June 27, 1995, Bezeq was declared to be a monopoly in a number of communications markets and on November 10, 2004 it was declared to be a monopoly in high-speed Internet service provision. In the field of multi-channel television broadcasting, Bezeq currently holds 49.78% of the shares of Yes and 32.6% of the shares of Respondent 2, Eurocom D.B.S Ltd. (hereinafter: Eurocom). Yes is one of only two providers in the multi-channel television broadcast infrastructure market and in the multi-channel television broadcasting market, and it uses a satellite infrastructure. The other multi-channel television provider in the market is known to the public by the name "Hot," and it includes "Hot – Communications Systems Ltd." whose transmissions are provided through a cable infrastructure and "Hot Telecom Limited Partnership" (hereinafter,

jointly: Hot). Eurocom, which, as noted, holds 32.6% of the shares of Yes, is also involved in the communications field and provides telephony, data transmission and Internet services (through 012 Smile Communications Ltd.), and it also operates in the satellite infrastructure field with respect to multi-channel television broadcasts (through Spacecom Communications Company Ltd. - hereinafter: Spacecom Company), in the field of satellite services (through Satlink Communications Ltd. and Gilat Satcom Ltd.), and in the field of endpoint telephony equipment imports (the Nokia and Panasonic brands). It is also a partnership in portals and regional radio stations.

On 2 August 2006, Bezeq and Yes submitted a notice of merger to the General Director pursuant to the Restrictive Trade Practices Law - 1988 (hereinafter: Restrictive Trade Practices Law), with respect to a transaction (hereinafter: the merger) in which Bezeq seeks to exercise six options which it holds. The significance of the exercise of these options is that Bezeq would become the controlling shareholder of Yes and would hold 58.36% of the shares therein, as opposed to the 49.78% of the shares which it currently holds.

2. On 31 December 2006, the General Director announced her objection to the merger transaction and on 18 February 2007 she published the grounds for her objections. In her decision, the General Director noted that that her objection was based on an analysis of the competition map in the multi-channel television broadcasting field in [both] the infrastructure market and in the content field, in light of the expected entry of a third and new broadcasting technology (in addition to the cable technology used by Hot and the satellite technology used by Yes) – i.e., the IPTV (Internet Protocol Television) technology. The General Director noted that she saw this merger as giving rise to a reasonable risk of significant damage to competition from both a horizontal and vertical perspective. From a horizontal perspective, the General Director noted that the merger is expected to significantly restrict the possibility that Bezeq would in the future enter the multi-channel television broadcasting market as a third player using IPTV technology, either as a player in the infrastructure field only or in the field of the provision of broadcasts as well. The General Director noted that "the expansion of Bezeq's holding in the shares of the satellite company [Yes] up to the level of control, will inflict horizontal harm in two ways: first, it will exclude a potential significant competitor, such as Bezeq itself, from the content market, and second – it reduces Bezeq's incentive to upgrade its

infrastructure in order to support IPTV transmissions, and effectively delays the development of the infrastructure (development which would promote competition) in the coming years." In terms of vertical harm, the General Director went on to determine, the merger gives rise to a risk that Bezeq will supply Yes, which it will control, with the IPTV infrastructure that it owns and will make it very difficult for other broadcasters to enter into the market. The General Director noted that an investigation had shown that there was a very high likelihood that Bezeq would develop the IPTV technology in the short term, and that this is not a theoretical matter but rather a "competitive development which will happen soon." The General Director determined that the merger, "if it were to take place, would withhold another multi-channel television broadcasting platform from consumers and from the Israeli public." The General Director emphasized that beyond the economic-consumption damage involved in the merger, it was also likely to lead to the denial of a public platform for the expression of views and for delivery of messages to the public. She added that a merger should not be approved if one of its results will be the preservation of the existing structural situation in which there are only two platforms for multi-channel television broadcasting and no real chance that in the foreseeable future either the public or the content producers will see a third competitor in the industry. Under these conditions, the General Director determined that the merger creates a reasonable risk of significant damage to competition and to the public, and, for this reason, as stated, she objected to it.

To complete the picture, we note that two years earlier, in July of 2004, a notice of a merger was submitted in which Bezeq had sought to exercise its options so that its holdings in Yes would amount to some 55% in the first stage and some 60% in the second stage. This merger was conditionally approved on January 2, 2005, with the main condition being a prohibition against the transfer of financing from Bezeq to Yes in a proportion exceeding Bezeq's relative share in Yes, for a period of nine months. (Regarding this matter, see "Decision Regarding Conditional Approval of a Merger: Bezeq the Israeli Telecommunications Corporation Ltd. and DBS Satellite Services (1998) Ltd. (Decision 500045, dated 14 March 2005) (hereinafter: the 2005 Decision); Appeals 604/05, 605/05 and 606/05 which were filed against this decision were eventually withdrawn by the parties.) Bezeq was given a period of a year to complete the merger, but for its own reasons, it did not exercise the options at that stage.

The Antitrust Tribunal's Ruling

3. Bezeq filed an appeal against the General Director's decision to oppose the merger to the Antitrust Tribunal on 15 May 2007, an appeal that was allowed on 3 February 2009. It should be noted that Eurocom also joined the proceeding before the Antitrust Tribunal, at its request, and supported the General Director's position according to which the merger creates a reasonable risk of significant damage to competition.

In its ruling, the Antitrust Tribunal noted the fact that the multi-channel television market is composed of two markets – the broadcasting infrastructure market and the television broadcasts market, each of which are characterized by substantial barriers to entry (these barriers are even more significant in the infrastructure market). The Tribunal added that the two players currently operating in the multi-channel television market – Hot and Yes – both serve as broadcasters and as infrastructure providers. The Antitrust Tribunal further noted that Yes' satellite infrastructure is limited compared with the cable infrastructure (and compared to the IPTV infrastructure) and it therefore cannot fully compete with them. The Tribunal stressed that the General Director's position is based on the supposition that an additional platform for television broadcasts – with IPTV technology, to be established on Bezeq's ADSL infrastructure – will be added during the coming years. The Tribunal noted that the assumption, from both a technological and a feasibility perspective, that Bezeq would enter into the multi-channel television broadcasts market, was based on a series of assumptions that have not yet become reality. In this context, the Tribunal found that it had not been presented with sufficient evidence to establish that Bezeq had made a business decision to make the investment required for a significant upgrading of its technology that would enable the provision of IPTV services. The Tribunal further held that even if the General Director's assumption regarding Bezeq's technological ability to construct an IPTV network in the near future is a realistic one (noting that "there is a certain distance that must still be travelled"), the technological perspective is not the only relevant one, and that it is necessary to examine the existing regulatory restrictions in the communications field as well as the economic feasibility of the construction of the infrastructure, from Bezeq's perspective – particularly in light of its current holdings in Yes (49.78%).

The Tribunal rejected the General Director's position that there are no substantial legal or regulatory barriers preventing the realization of the main part of the forecast on which her objection had been based, and it noted that

Bezeq is faced with a number of legal restrictions, including the cross-ownership rules which prevent Bezeq from obtaining a broadcasting license in light of the size of its holdings in Yes. It further noted that each of Bezeq's subsidiaries is also prohibited from obtaining a broadcasting license so long as Bezeq holds more than 24% of the means of control in Yes. The Tribunal also noted that the likelihood of a change in the statutory provisions regarding cross ownership is very low, and that the power that the law grants to the Minister of Communications (with the approval of the Cable and Satellite Broadcasts Council of the [Knesset] Finance Committee) to issue a broadcasting license to a Bezeq subsidiary – so long as such a move furthers competition and variety regarding the supply of broadcasts to subscribers – creates a hurdle which will not be easily removed. The Tribunal noted that it is hard to imagine that a reasonable regulator would allow the subsidiary of a company which is the largest shareholder in one of the competitors in the market to enter into the content field and thus to effectively control two out of three content platforms. Regarding the question of whether the completion of the infrastructure is economically viable for Bezeq, the Tribunal noted that the General Director's position does not give appropriate weight to the fact that the critical starting point for the discussion is the situation regarding Bezeq's current holdings in Yes. The Tribunal emphasized that it appears that Bezeq will indeed continue to develop the NGN (Next Generation Network – a generic term for communication networks based on Internet protocol technology, the main characteristic of which is the possibility of integrating different types of telephony, Internet, contractual, etc. services in one network – hereafter: NGN) but it cannot be assumed that it will do the necessary work which will enable [the provision of] IPTV services on this infrastructure – work which involves additional costs. This would be the case even if the General Director's position that Bezeq's investments in Yes are sunk investments and that Bezeq therefore developed interests following such investment, it is not likely – the Tribunal held - that economic feasibility considerations will lead Bezeq to complete the infrastructure [for IPTV]. The Tribunal further noted that the General Director had not submitted economic calculations which would support the claim that under current conditions, it is economically worthwhile for Bezeq to compete with its subsidiary (Yes) in the field of multi-channel television because of the benefit it would achieve from this by holding on to its telephony and Internet infrastructure customers. An additional factor that makes it doubtful that Bezeq would, in the Tribunal's view, enter into the content market, is that the multi-channel television market is a saturated market and even if Bezeq could reduce the infrastructure costs, the content costs are ongoing and it would need to reach a very large number of customers to reach a balance between ongoing expenses and incomes – something that would be very difficult for Bezeq to do. The Tribunal held, therefore, that it was likely that Bezeq did not have a real interest in entering the digital multi-channel television market in its current condition.

The Tribunal added that the General Director assumed that in the foreseeable future only one infrastructure – i.e., the IPTV – would be joining the multi-channel television market, but that it appears that in the more long-term future, additional technologies (Internet television, DTT and WIMAX) could also constitute alternatives to the existing technologies (although the Tribunal also noted that in the coming two or three years, none of these technologies could constitute a real alternative). It further noted that a not insignificant amount of time would be required even for the purpose of establishing a full IPTV technology. The Tribunal went on to reject the General Director's position regarding the significance to be attributed to Bezeq's acquisition of control in Yes as a result of the merger, noting that even though the General Director's position that after the construction of the IPTV infrastructure Bezeq will (through the directors that it will appoint) raise the usage fees or the transfer fees that it will collect from Yes and from others even if open access conditions are established for the IPTV services (because in the case of Yes, the payment of such fees would be a transfer of funds from one pocket to the other) cannot be ruled out, this risk is not significant in light of the fact that raising such fees will not be worthwhile, and in light of the regulatory prohibition that the Tribunal had mentioned. The Tribunal further noted that this risk can be prevented through the drafting of conditions which would prevent Bezeq from having such a resolution adopted by the Yes board of directors, and which would impose controls on the prices that Bezeq will charge.

4. The Tribunal reached the conclusion that the "General Director's forecast according to which an independent competing infrastructure for television broadcasts will be established if the merger does not take place, is not sufficiently established." In this context, the Tribunal referred to the provisions of s. 21 of the Restrictive Trade Practices Law -1988 (hereinafter: the Restrictive Trade Practices Law), and to the case law, which holds that only a reasonable risk of significant damage to competition or to the public will justify an objection to a merger, adding that in its view, the burden of

proof regarding the existence of such a risk is to be imposed on the General Director, although this issue had in the past been left unresolved as requiring a review of the Supreme Court's rulings. The Tribunal held that in this case, it was necessary to determine whether the data regarding the relevant market provide a basis for "a reasonable risk" according to the civil law standard of probability, such that the merger would lead to significant damage to competition. According to the Tribunal, the economic analysis on which the General Director had based her position assumes future developments regarding at least some of which there was only a low probability of less than 50% and it was therefore not possible to determine that there was a reasonable risk that the merger would do significant damage to competition. The Tribunal nevertheless pointed out that if Bezeq had sought approval for the merger without having existing holdings in Yes, it would not have approved the merger. This was, in the Tribunal's view, due to the clear competitive advantages in Bezeq's independent entry into the market. However, the Tribunal held, in light of the current size of Bezeq's holding in Yes, that it is already not possible to ignore the level of Bezeq's interest in Yes' success and it is already difficult to imagine Bezeq acting as Yes' competitor. Therefore, the Tribunal noted, the competitive difficulty in the multi-channel television market lies in the current situation, and even if the merger could sharpen the problem, it would not create it.

5. The Tribunal further noted that even if it has not been proved that there is a reasonable risk of significant damage to competition, the occurrence of such damage cannot be ruled out given the fact that the increase in the size of Bezeq's holding in Yes strengthens its interests in Yes and will also grant it control of the company. For this reason, and because of the importance of the construction of the IPTV infrastructure and of its being made available to other entities which will compete with Yes, the Tribunal saw fit to establish conditions for allowing the merger. In this context, the Tribunal noted that during the course of the deliberation, the parties were offered a settlement proposal regarding the conditional approval of the merger and that Bezeq did not raise any difficulty in terms of the Tribunal's authority to order such and agreed that the merger would be conditionally approved. (The General Director objected to this, and Eurocom believed that the merger could be approved with the conditions which it had specified, which were different than those proposed by the Tribunal). The Tribunal further noted that there was a basis for the concern raised by the General Director, according to which technological and economic considerations could lead Bezeq to prefer the IPTV infrastructure for Yes, if it is constructed, rather than the satellite

infrastructure, which could cause that infrastructure to atrophy. But according to the Tribunal's view, this concern can be negated through the use of conditions which will inflict less damage on the primary property right involved in the exercise of the option. The Tribunal added that the conditions which it ordered are, primarily, behavioral conditions, which are directed at affecting the manner in which the relevant bodies operate, and not structural conditions. The imposition of structural conditions would not, the Tribunal stated, be proportionate, in light of the Tribunal's determination regarding the absence of a reasonable risk of significant damage to competition. The Tribunal further noted that additional goals can be reached beyond the prevention of damage to competition, through the outlining of behavioral conditions. The primary one of these goals would be the securing of the construction – within a short time - of a third infrastructure for multi-channel television broadcasts. This infrastructure would be open, at a reasonable cost, for use by content providers who wish to use it, and it would be properly maintained. The Tribunal noted that the conditions it was establishing would not only reduce the damage to competition, they would also serve to remove part of the competitive difficulties existing in the market even without the merger, and would bring the "market's condition to that of a market whose structure was good for competition." The Tribunal stressed, in this context, that the conditions dealing with the improvement of competition are accompaniments to conditions that prevent damage to competition and that they are not the primary conditions. For this reason the General Director's claim that the Tribunal acted without authority must be rejected. The Tribunal reasoned, with regard to the conditions to be attached to the merger, that Bezeq would have an interest in utilizing the IPTV technology it owned through granting usage rights for other broadcasters at a reasonable price which would take its investment [costs] into consideration. It is true, the Tribunal noted, that any such user would be a Yes competitor, but after the infrastructure is already constructed Bezeq would have an interest in taking advantage of it through the charging of usage fees. The Tribunal therefore believed that the imposition of a condition according to which the usage fees would be determined by a regulator would reduce the risk that as the party controlling the infrastructure, Bezeq would charge unreasonable prices. Nevertheless, the Tribunal added, Yes should be allowed to use the IPTV at the same price for the purpose of providing those services (such as VOD) which cannot be provided through a satellite, in order to allow it to compete with the others.

These are, in the main, the conditions that the Tribunal ordered: giving Bezeq the option of choosing, within 90 days, whether it wishes to carry out the merger. If Bezeq were to choose that the merger be carried out, it would be required to establish the IPTV infrastructure in full, such that it would be available to 30% of the population within one year, to 50% of the population within two years and to 80% of the population within three years. Bezeq was also prohibited from transferring Yes programming to the IPTV infrastructure, other than for the purposes of providing services that cannot be provided through a satellite infrastructure. This condition is to apply for six years from the approval of the merger, unless there is an additional competitor in the market for the transmission of television programming is on the Bezeq network – and that competitor has, together or with others, at least 100,000 active subscribers or its income from its broadcasts amounts to NIS 10,000,000 per month for three continuous months. Bezeq was also required to allow other parties in the market open access to the IPTV infrastructure that it owns, in exchange for usage or transmission fees to be determined by the regulators. It was also required to properly maintain the infrastructure that is established. (The definition of the word "properly" is to be determined by the regulator). The Tribunal further ordered that Bezeq is not to supply or provide service or products to Yes or from it unless a resolution regarding the receipt or provision of such services or products has been adopted by at least a 75% majority of the members of Yes' board of directors, and that a structural separation between Bezeq and Yes be maintained in accordance with the currently established conditions. Finally, the Court ordered that if Yes was to transfer to broadcasting on the IPTV infrastructure and does not use the satellite infrastructure, Bezeq would be required, by virtue of its holdings in Yes, to cause that infrastructure to be leased out for satellite television broadcasts, and to maintain it at a price and in a manner to be determined by the regulator. (Bezeq would be entitled to ask the Tribunal to be released from the maintenance requirement if no new user is found). The Tribunal also ordered Bezeq to provide an irrevocable bank guarantee, to be approved by the General Director and to be provided to her, in the amount of NIS 200 million, in order to ensure the fulfillment of the conditions, until the end of the current agreement between Yes and Spacecom (with which Yes had contracted for the purpose of the Spacecom's segments required for the maintenance of the satellite broadcasts), but for no longer than eight years.

For the reasons specified above, the Tribunal granted the appeal, cancelled the General Director's ruling and approved the merger subject to the conditions it had established.

6. After the ruling was issued, the General Director, on 5 February 2009, filed a petition to stay its implementation, but the Tribunal rejected the petition. In its ruling of 18 February 2009, the Tribunal noted, *inter alia*, that its key holding that the merger does not give rise to a reasonable risk of significant damage to competition had been based on considerations of logic and on the evidentiary material presented to it, and not on its position regarding the burden of proof. The Tribunal further noted that the granting of the petition for a delay in the implementation would damage the public interest in that it would delay the fulfillment of the conditions, which include the construction of the IPTV infrastructure, and the Tribunal believed that the delay of the exercise of the options held by Bezeq would cause financial damage to it. On 22 February 2009, even before filing this appeal, the General Director submitted an additional petition for a stay of implementation (Civil Petition 1665/09) to this Court. At the Court's recommendation, the parties reached an agreement on 23 March 2009, which was given the force of a ruling, dealing with the delay of the implementation of the ruling, and on 3 May 2009, Bezeq gave notice, as required by the Tribunal's ruling, that it intends to carry out the merger (although on its part, it had appealed the amount of the bank guarantee it had been required to provide).

The appeals before us were submitted by Eurocom (Civil Appeal 2082/09) and by the General Director (CA 2414/09) (hereinafter: the Eurocom appeal and the General Director's appeal, respectively), and the counter-appeal filed by Bezeq refers, as noted, to the amount of the bank guarantee that the Tribunal had required that it provide (hereinafter: the *Bezeq appeal*). The deliberation of the appeals was combined in this Court's ruling dated March 23, 2009 (CApp 1665/09).

The parties' arguments

The General Director's appeal

7. The General Director argues that the Tribunal's ruling denies the Israeli public a significant competition benefit with respect to the loss of a third infrastructure for the transmission of multi-channel television broadcasts and that the circumstances in which a company that has the ability to become the owner of a multi-channel infrastructure takes control of a company with a different multi-channel infrastructure, in a market in which there is only one additional infrastructure (the cable infrastructure) impairs

competition in a manner that cannot be negated by way of imposition of behavioral conditions. The General Director insists on the supremacy of “facility-based competition” as compared with “competition over the same infrastructures” in infrastructure based markets , and she further argues that competition between infrastructures gives rise to a substantial benefit for consumers, not only from the perspective of the price for consumers but also in terms of other perspectives such as the quality of the broadcasts, the variety thereof, the adoption of technological innovations and the correlation between consumer demand and supply - all of which are dependent on the infrastructure’s technology and on its capacity. The General Director believes that the solution proposed by the Tribunal – the opening of the IPTV infrastructure to competitors, which assumes that the competition that will develop between the broadcasters would be equal to the competition which would have developed between broadcasters with different infrastructures – is an artificial one that seeks to imitate free competition through regulation. The General Director further argues that the relevant considerations with respect to mergers are established in s. 21(a) of the Restrictive Trade Practices Law, which distinguishes between two types of mergers: mergers that raise a risk regarding competition, which can be made conditional or which can be opposed, and mergers that do not give rise to a competition risk, which are to be approved. She notes that once the Tribunal determined – erroneously in her opinion, - that this merger does not give rise to a reasonable risk of significant damage to competition, then at all events it was not authorized to impose conditions on an approval of the merger, even if Bezeq had agreed to such. The General Director further stressed that the sole purpose for which, according to the Law, conditions may be imposed with respect to a merger is for the removal of a risk that the merger creates with respect to damage to competition, and the Tribunal is not authorized to set conditions for a merger only for the purpose of promoting industry-wide reforms, if it believes that no risk of damage to competition exists. The General Director stresses that there is no parallel within comparative law among merger review regimes to such a proceeding in the Tribunal, and it fundamentally changes the set of balances established in the Restrictive Trade Practices Law and deviates from the Tribunal’s own previous rulings.

The General Director emphasizes what she views as a logical defect in the Tribunal’s decision: The Tribunal held that it is not reasonable for Bezeq to construct an IPTV infrastructure when it is a minority shareholder in Yes, and it therefore allows Bezeq to acquire control of Yes; at the same time, the Tribunal chose to condition the merger on the implementation of that very expensive and not worthwhile process, which in the Tribunal's view, lacks competitive significance. In this connection, the General Director notes that the Tribunal went even further in the context of its decision regarding the application for a stay of the implementation of its ruling, in which it noted that a stay of its implementation would harm the public interest because of the delay it would cause in the construction of the IPTV infrastructure. But according to the General Director, the Tribunal did not derive the necessary conclusions from this with respect to the implications that the construction of this infrastructure would have for competition. The General Director also noted that accumulated experience indicates that new providers receive only minimal cooperation from infrastructure owners who are themselves service providers, and that in this case, and if the merger does take place, any additional broadcaster that uses the IPTV infrastructure will not only compete with Bezeq's subsidiary, but will also threaten Bezeq's monopoly in the areas of telephony and Internet. This is an especially bad starting point for implementation of an open access model such as the Tribunal had sought to design. The General Director further argues that the Tribunal erred in placing the burden of proof on her, since even though this Court has left this issue as one that requires further review, it has more than once noted that there are good reasons for imposing that burden on the parties seeking a merger. She also argues that, like any administrative authority, she enjoys a presumption of propriety regarding her actions.

8. The General Director argues that in order to properly estimate the economic feasibility for Bezeq to construct the infrastructure, a broader picture needs to be examined. This would include a review of the variety of markets in which Bezeq competes with other communications groups, including the telephony and Internet markets, in which it is a declared monopoly. According to the General Director, the construction of an IPTV infrastructure constitutes, for Bezeq, a defensive strategy for the purpose of preventing the loss of Internet and telephony customers, and following the merger, Bezeq will be able to market "communications packages" to its customers – packages which also include multi-channel television broadcasts. The General Director further notes that even though the Tribunal accepted the main position that she presented in this context, it rejected her claims themselves, holding that they were not proven through appropriate economic calculations, an approach that testifies to a mistaken reversal of the burden of proof. Essentially, the General Director argues that internal Bezeq

documents were presented to the Tribunal which describe the process of the construction of the IPTV infrastructure as a “defensive process.” She claims that the Tribunal dismissed these documents rather casually, and she further argues that these documents prove that a financial consulting firm hired by Bezeq had presented Bezeq with only one option in the event of the merger not being approved –the construction of an IPTV infrastructure and entry into the content market. Under these circumstances, the General Director argues, it is unclear how the Tribunal reached the conclusion that the possibility of Bezeq competing with Yes is “one of a number of likely options” regarding which it had not been determined whether the investigation was complete. The General Director further claims that the Tribunal should have dealt with the objective economic feasibility of the construction of an IPTV infrastructure – a subject regarding which Bezeq brought no evidence – and should not have focused on the subjective question – i.e., the mode of action which Bezeq had decided or would decide to follow At any rate, [she argued,] and to the extent subjective evidence is required, the Court should have attributed significant weight to the fact that Bezeq itself, at the start of 2007, had submitted a position paper to the commission established by the Ministry of Communications (see: “Report Regarding the Formulation of Detailed Recommendations Regarding Israeli Competition Policy and Rules in the Field of Communications”, headed by Professor Reuven Grunau, March 2008, hereafter: the *Grunau Commission*), in which Bezeq noted the significance of the construction of the IPTV infrastructure for competition, while relying on the position presented by the General Director to the Tribunal in this connection. The General Director further argued that Bezeq made a false presentation regarding the technological ability of its infrastructure. She added that Bezeq is currently at the height of a significant and expensive process regarding the upgrading of its existing infrastructure into an advanced NGN type of infrastructure that can be used for the implementation of the IPTV technology after an additional investment is made, which is ten times smaller than the investment already made in that infrastructure. The General Director also notes that according to the case law of this Court, if there is a doubt regarding the damage that a merger will inflict on competition, the doubt is to be resolved in favor of competition and the public and against the merger, and she argues that the Tribunal ignored her supposition that if Bezeq is not allowed to exercise its options and purchase the control of Yes, another party will acquire such control – for example, Eurocom – which had even declared its wish to do so in the context of its petition to be joined in the proceeding. The General Director also argues that the Tribunal's expert did not analyze the size of the investment involved in adjusting Bezeq's network to the IPTV technology, and the Tribunal's determination that this adjustment "involves a significant financial investment" has no foundation.

The General Director notes that the Tribunal's position that the merger can be approved given the already difficult situation in the multi-channel television market is not consistent with the rule established by this Court in CA 2247/95 *General Director v. T'nuva*, [1], at 240-241 (hereinafter: *General Director v. T'nuva*), according to which an entity which is at any rate dominant in a particular field nevertheless does not enjoy immunity from the General Director's control. Regarding the regulatory restrictions that the Tribunal noted in its finding that the likelihood of the damage to competition is low, the General Director argues that the Tribunal ignored the fact that in the infrastructure field, there is no regulatory restriction preventing Bezeq from establishing a third infrastructure. She further noted that regulation, by its nature, can be subject to frequent changes (especially, she claims, in the communications market), and she repeated that no change in the statutory situation is required for granting of a broadcasting license to a full Bezeq subsidiary as the matter is within the authority of the Minister of Communications in situations in which competition considerations justify it. Regarding the existence of additional alternative technologies other than the IPTV technology, the General Director argues that the Tribunal's holding regarding the abilities of the DTT and Internet television technologies to constitute infrastructures for multi-channel television broadcasts is inconsistent with the findings of the Tribunal's expert's findings - and that at any rate, Internet television does not constitute an additional infrastructure for multi-channel television broadcasts, as these are broadcasts that are transmitted on one of the two currently existing broadband infrastructures. According to the General Director, there are also defects in the conditions stipulated by the Tribunal [for the merger], including the fact that these conditions lack a minimal specification regarding the manner in which the purpose for which they have been imposed will be achieved. The General Director further noted that in effect the Tribunal has removed its own discretion and transferred the main legal determination – the regulation of the establishment of the IPTV infrastructure – to the Ministry of Communications, which the Tribunal is not authorized to do and which should not be done in light of the fact that the Ministry of Communications weighs other considerations in addition to that of guaranteeing competition in the economy. Finally, the General Director asks for the cancellation of the awarding of legal expenses of NIS 20,000 against her in the context of the petition for a stay of the ruling's implementation.

Eurocom's appeal

9. Eurocom's appeal is directed at the [Tribunal's] failure, allegedly, to impose effective structural conditions for the approval of the merger. Eurocom argues that the ruling attributes a central place to Bezeq's right to acquire the control of two out of the three multi-channel television infrastructures in Israel and it believes that in light of the concentration of control of competing infrastructures under a "single hand" as a result of the merger, the Tribunal should have given Bezeq the choice of either one of the infrastructures and should have then required it to abandon the other one. Eurocom argues that this merger has unique characteristics, including: Bezeq being the largest communications group in Israel, having been a declared monopoly in the field of telephony and Internet for many years; Yes, which broadcasts to more than 500,000 households in Israel, being the only company using a satellite broadcast infrastructure and being contractually bound to this technology until 2016; the fact that no additional competing infrastructures are expected to enter the market, other than the IPTV infrastructure which has special competitive abilities that the Grunau Commission recognized as "the most significant competitive threat to the multi-channel television companies"; and the fact that the Grunau Commission found that the level of competition in the multi-channel television market is unsatisfactory and that the market is not a sophisticated market, which is reflected in the price paid by the consumer and in the absence of competition between the content which is broadcast to the public. Eurocom emphasizes that an approval of the merger paves the way for Bezeq to obtain 100% control of Yes without requiring any additional approval from the General Director and that under these circumstances, the approval of the merger contains some degree of a direct and significant increase of the concentration in the infrastructure field, a raising of the barriers to entry into the multi-channel television market and likely significant damage to the potential competition between infrastructures. In this context, Eurocom notes that the ability not to develop a specific technology and, at the least, to use it to harm other competitors, constitutes control.

Eurocom argues that the behavioral conditions imposed by the Tribunal are ineffective since Bezeq has been given the ability to operate on the basis of two infrastructures and to transfer between them as it wishes, that the obligation imposed on Bezeq to establish an IPTV infrastructure lacks specification regarding the required professional standards, and that the Tribunal left the work for the Ministry of Communications, which had not been a party to the proceeding, did not undertake to carry out this task and is also guided by different considerations than those by which the Tribunal is supposed to be guided. Eurocom also argues that these conditions are opposed to basic principles of antitrust law, that they enable Bezeq to carry out a "targeted killing" of the satellite infrastructure, that no substantive arrangements were established regarding enforcement and that the Tribunal limited itself to requiring that Bezeq post a bank guarantee, the size of which Bezeq is appealing to this Court. Eurocom emphasizes in its arguments that the fact that Bezeq is now "volunteering" to establish the IPTV infrastructure in accordance with the conditions established by the Tribunal – a measure which Bezeq had, during the deliberation before the Tribunal, termed an "hallucinatory scenario" on the part of the General Director – itself indicates that that merger involves a risk of damage to competition. Eurocom further argues that the construction of the infrastructure will continue for a number of years and that therefore the condition requiring that Bezeq itself can transmit on the IPTV infrastructure only six years from the approval of the merger by the Tribunal does not provide any protection to new competitors. According to Eurocom, this situation constitutes "competitive overlap" following a merger, and it necessitates the involvement of the competition authority through opposition to the merger or, as stated, through the imposition of a structural condition, such as a requirement that the merging companies sell one of the "overlapping" assets to a third party (divestiture). According to Eurocom, the imposition of a structural condition such as this is to be preferred to alternative behavioral conditions that are inferior in their nature and which cannot, under the circumstances, lead to a solution of the competitive difficulty. In its appeal, Eurocom therefore asks that the following structural conditions be imposed with regard to the merger's approval: (1) Bezeq should be required to choose, before the merger takes place, between [a] obtaining full control over Yes and operating it on the basis of the satellite infrastructure or [b] operating as a broadcaster external to Yes, on the IPTV infrastructure, without being allowed to transfer between the two infrastructures; (2) the establishment of a significant "protective period" for new competitors in the market (longer than the six years set by the Tribunal) which will apply only from the day that the IPTV network is fully launched.

10.On its part, Bezeq supports the Tribunal's ruling. According to Bezeq, the ruling is based on the evidence presented to it and on factual findings resulting from such evidence, and it stresses that even now it is the largest shareholder in Yes, noting that over the years it has transferred substantial capital to Yes even though Yes is not yet a profitable company, and under these circumstances it is clear that it has no interest in damaging Yes through the construction of a third multi-channel television infrastructure. Bezeq claims that the said merger is not a horizontal one between competitors, since as of now it is not a competitor either in the infrastructure field or in the programming field, and it is not a vertical merger between a party that sells infrastructure services and a broadcasting party, and it therefore gives rise to no competition risk. Bezeq argues that the Tribunal's holding that there is a low probability that it will establish an IPTV infrastructure if the merger is not approved is one which is based on objective factual findings. These include the legal prohibition preventing Bezeq from being a multi-channel television broadcaster; the regulatory prohibition against a Bezeq subsidiary becoming a multi-channel television broadcaster; the additional investments that Bezeq would be required to carry out in order to establish the IPTV infrastructure; the lack of economic feasibility for its entry into a saturated market as an independent competitor alongside Yes; and the fact that none of the telecommunications companies that have, throughout the world, established such an infrastructure, have been prohibited from transmitting on it or from providing discounted "service packages" through such an infrastructure. Bezeq further points to the second factual finding on which the Tribunal based its ruling, according to which it can be estimated that within three years there will be additional platforms for multi-channel television other than the existing ones and the IPTV infrastructure, and it notes that this supposition is based on the Tribunal's experts opinion, and it is to be expected in a dynamic market such as the communications market. Bezeq further argues that even on the assumption that it will establish an IPTV infrastructure in any case, it is not clear how the merger will damage competition – noting that at any rate there will not be any competition in the infrastructure area, as the satellite infrastructure serves Yes exclusively, and satellite infrastructure services cannot be sold to additional broadcasters. In the area of content, Bezeq argues that there will be no competition as it and its subsidiaries are prohibited from being a content provider and from broadcasting and even the General Director herself had argued, in her objection to the merger, that so long as Bezeq has holdings in Yes, there will be no competition between infrastructures even if Bezeq chooses to develop an IPTV infrastructure. In this context, Bezeq further notes that a vertical merger is perceived, in the literature and in the case law, as a "desirable economic phenomenon" and that in any event, in light of the fact that the IPTV technology has no limit in terms of capacity, once the merger is approved and the said infrastructure is established, other competitors as well as Yes will be able to make use of it, without a risk that the market will be foreclosed. Bezeq also argues that there is no risk of an oligolopic coordination in this case, because the large disparity between the market share held by Hot - a declared monopoly in the area of multi-channel television and the holder of a small telephony market share - and the low market share held by Yes (and Bezeq) in multi-channel television along with Bezeq's large market share in the field of telephony, negates (and at least significantly reduces) the risk of such coordination.

11.Bezeq argues that the General Director's sweeping objection relies entirely on the thesis of the potential competitor – an exceptional doctrine in antitrust law that has never been used in the manner that the General Director seeks to use it, and which has been rejected in Israel in the few cases in which it has been argued. Bezeq further argues that three days before the General Director's announcement of her objection to the merger, the General Director sought an extension for the purpose of formulating conditions for the merger's approval, and in this context, she pointed out that she intended to establish conditions that were similar to those that were eventually established by the Tribunal, and that it was only when Bezeq objected to granting the requested extension that the General Director announced her objection to the merger. According to Bezeq, the General Director's authority to condition the approval of a merger is left to discretion, and where the injured party agrees to the Tribunal's imposition of the conditions, as it has, the question of the Tribunal's authority to impose such conditions does not arise at all, and at the most, what is being discussed here is a mistake of law and not an *ultra vires* act [on the part of the Tribunal]. Alternatively, Bezeq argues that even if the Tribunal's imposition of conditions is tainted as an *ultra vires* act, it is not necessary to strike the ruling for that reason, as the doctrine of relative invalidity can be implemented. Bezeq argues that its agreement to the merger being made conditional was given in order to have the matter concluded quickly, to ensure certainty and to lessen the General

Director's concerns, and at any rate, in light of Bezeq's being subject to a regulatory regime that applies to the entire industry, it is in any event obligated to carry out most of the conditions that were established. Bezeq further argues that an analysis of its interests in light of its existing holdings in Yes is one consideration out of several that were weighed by the Tribunal when it rejected the General Director's position and in light of the stipulation reached at the Tribunal, according to which Bezeq's holdings in Yes will not change even if the merger is not approved, the General Director was required to prove that in terms of the economic interests, of the regulations applying to it and of the future state of competition in the market, a situation in which Bezeq holds more than 49% of the shares in Yes is equal to a situation in which Bezeq holds no shares whatsoever in Yes, and the General Director would not have been able to prove this.

Bezeq also notes that its option rights regarding Yes shares will not expire even if the merger is not approved, and it will in any event be able to decide to whom to sell such rights. Bezeq points out that there is no global precedent for a situation in which a telecommunications company has been prohibited from using an IPTV infrastructure that it constructed to broadcast or to provide a "services package"; that the market shares held by IPTV throughout the world are minimal and that it is not clear how well it will succeed in Israel; and that factors relating to the Israeli economy such as the relatively small number of households, the especially high penetration of multi-channel television, the high degree of digitization, the especially high number of people per household and the high percentage of households with two television sets all serve to render the General Director's claim that "Bezeq will in any event construct the IPTV infrastructure" completely erroneous. Bezeq further argues that it has been proven that there is no party in the Israeli market that is seeking to provide IPTV services and that the General Director did not question Bezeq's witnesses regarding the "internal documents" on which she now wishes to base her appeal. According to Bezeq, the position paper that it submitted to the Grunau Commission conditions its willingness to establish an IPTV infrastructure on a series of conditions, including the cancellation of the regulatory restrictions and the exclusivity regarding use of the infrastructure and the provision of services – conditions which currently have not been met. Bezeq also argues that the presentations that were prepared at its request by an outside consultant do not constitute financial opinions, that one of them was never even presented to the company's board of directors and that they never served as a basis for the adoption of any operative resolution – yet, nevertheless, the General Director relied on these presentations, and did this only at the stage of presenting closing briefs to the Tribunal and primarily at the appeals stage.

Regarding the General Director's argument that the Tribunal deviated from the rule of laid down in General Director v. T'nuva [1], Bezeq notes that unlike the situation in that case, the Tribunal here has not approved a small addition to the damage to competition that exists in any event – instead this is a situation in which the Tribunal has not been persuaded that there is any damage, large or small, which is being done to competition, in comparison to the situation without the merger. Bezeq further argues that there is no basis for the General Director's claim that the Tribunal decided the appeal on the basis of burdens of proof, and Bezeq insists that this question is only relevant where the evidence produces a "tie" result – which did not happen here. Bezeq argues that the Tribunal's holding relies on "a set of logical considerations and an examination of the reality in light of the evidentiary material" and not on burdens of proof, as the Tribunal itself noted in its decision of February 18, 2009 regarding the stay of implementation. Bezeq further argues that the Tribunal was aware of the fact that there are no regulatory restrictions on the establishment of an IPTV infrastructure, but according to Bezeq, the prohibition against broadcasting on the infrastructure undermines the rationale for constructing it, and an objection to a merger cannot be based on future scenarios that are conditional upon changes in the statutes and regulations, when the chances for those changes taking place are non-existent or at best, low. In this context, Bezeq argues that the General Director's objection relies on a claim regarding a future change in the market's structure - a change regarding which there is no indication of the likelihood of its occurrence - and that the Tribunal was persuaded that the choice it faced was between one inferior infrastructure (the satellite) and two infrastructures that are restricted by conditions, if the merger is approved.

12. Bezeq further argues that additional technologies are expected to enter the market shortly and that all the parties and the Tribunal's expert attributed some importance to these technologies as potential competitors. Bezeq further argues that past experience shows that where it has been allowed to establish an infrastructure that is open to other users under open access conditions, competition is not damaged and that the General Director acknowledges that she did not carry out an economic analysis that indicated a vertical risk, which would not exist as Bezeq is not a monopoly regarding infrastructure for multi-channel television programming. Bezeq argues that

the General Director does not clarify what "reform" the Tribunal was allegedly advancing through the conditions it imposed on Bezeq, and that the conditions are closely tied to the risks that the General Director had indicated: the risk of the non-construction of an IPTV infrastructure and the risk that the satellite infrastructure will "atrophy." According to Bezeq, the General Director did not hesitate in the past to impose conditions that "promote competition" (in contrast to conditions that are meant to rectify damage done to competition) and according to Bezeq it is accepted in European antitrust law as well. Bezeq argues that there is no normative hierarchical ranking among different types of remedies and the matter is dependent on the facts and circumstances of the particular case. However, in Bezeq's view, in light of their rigidity, structural conditions the last resort and behavioral conditions are to be preferred to them, to the extent possible. This is especially true, Bezeq claims, in a small economy such as Israel's, which is any event characterized by massive industry regulation. Bezeq further points out that the principle of open access is an accepted one in the communications industry and has been recognized in this Court's decisions, and that in the absence of an ability to ensure the construction of an additional infrastructure, the Grunau Commission also determined that the way to ensure competition is through [the preservation of] transmission rights on existing infrastructures. According to Bezeq, the significance of a delay in the merger until the completion of the construction of the infrastructure is that Yes and the entire multi-channel television industry will be left "hanging in the air" for a period of a number of years – and this is against the [recognized] interest in promoting certainty in the market. It also argues that the Tribunal had established the outline of the conditions and that it only left the determination of specific-professional details to the Ministry of Communications – details which at any rate are within the jurisdiction and expertise of that Ministry. Bezeq notes that the Tribunal even determined that if the Ministry of Communications does not establish such conditions, the General Director is to establish them. Bezeq notes that the General Director preferred not to assist with the drafting of the conditions and thus created great difficulty for the Tribunal in their formulation. Finally, Bezeq argues that the industry regulator's involvement in the establishment of technical-professional conditions and in supervising their implementation presents many advantages in light of the regulator's knowledge, experience and expertise in this area.

13.Regarding Eurocom's appeal, Bezeq argues that Eurocom's position is flawed in the same way that the General Director's is, and it further argues that Eurocom joined the proceeding at a late stage, did not present evidence and did not question witnesses. Therefore, it does not have a right, at the appellate stage, to argue against factual findings determined by the Tribunal. According to Bezeq, no significance should be attributed in this context to the affidavit that Eurocom attached in the framework of the interim proceeding regarding its joining the appeal to the Tribunal as a party. Bezeq argues that Eurocom is attempting to bring about a situation in which Bezeq is required to engage in price negotiations regarding its shares in Yes, but Eurocom does not have a right to [force] such [negotiations], pursuant either to the Yes by-laws or the agreements between its shareholders. Bezeq also points to the fact that Eurocom is the controlling shareholder in the Spacecom Company, from which Yes leases the segments required for its satellite broadcasts, and that Eurocom therefore has a clear interest in Yes continuing to broadcast through a satellite infrastructure under any conditions and at any price – whether or not that is economically efficient. Bezeq also notes that in its notices of appeal, Eurocom asked to have Bezeq permanently prohibited from transmitting on the IPTV infrastructure (other than with respect to VOD services), but in its summary, it withdraws that request as well as the demand it made in the notice of appeal, to obligate Bezeq to train the employees of competing companies in the use of the IPTV infrastructure and to allow them access to the infrastructure in order to maintain it and repair it. Finally, Bezeq argues that the purpose of the six year restriction imposed on Yes regarding the use of the IPTV infrastructure is not to protect a new competitor in the market, and that it is [actually] intended to respond to the risk of the satellite's infrastructure's early erosion. According to Bezeq, the period established by the Tribunal ensures that Yes will remain committed to its existing agreements with the Spacecom Company, which will end in the year 2016 – agreements from which Yes cannot at any rate free itself without the consent of the Spacecom Company.

The Bezeq appeal

14.Bezeq's appeal is directed against the size of the bank guarantee (NIS 200 million) which it has been required to produce pursuant to the Tribunal's ruling in order to ensure the fulfillment of the merger conditions. According to Bezeq, there is no need at all for a bank guarantee to ensure the fulfillment of the merger conditions, as their fulfillment can be ensured through remedies established in the penal code, in tort law and in administrative law, but in light of its agreement to provide such a guarantee it does not appeal the fact that it is being required to provide a guarantee, but only the amount thereof, and it proposes to provide the guarantee for NIS 50 million. It argues that the amount established for the guarantee is not proportionate or reasonable, and that it ignores the variety of alternate means of enforcement that are available in this case, the ongoing cost of providing a guarantee of this amount, and the costs of the significant investments that Bezeq is required to make as part of the merger conditions – which could affect its ability to raise the required guarantee, in light of the Israeli banking system's limitations. Bezeq further notes that it is required to provide a ten million dollar guarantee for the purpose of complying with the terms of its general license, that the merger of the cable companies which created a monopoly was conditioned on a bank guarantee of fifteen million dollars (and that after time the amount was reduced to two million dollars), and that under these circumstances the amount that was imposed on Bezeq is unprecedented. Finally, Bezeq proposes that if the NIS 200 million amount is left in place, that an alternative arrangement be established, such as [the deposit of] a company check or a promissory note – instead of the bank guarantee which it has been ordered to provide.

15.The General Director, on her part, argues that Bezeq seeks to detract from the effect - limited as it is - of the mechanism established by the Tribunal in its holding. The General Director notes that the open access model established by the Tribunal does not constitute a solution to the horizontal risk that she had noted, which deals with the loss of a competing infrastructure, and only deals with the vertical risk - the risk that Bezeq, as the controlling shareholder of Yes, will use economic measures to block Yes' competitors from making use of Bezeq's new infrastructure. According to the General Director, the guarantee mechanism seeks to create a deterrence mechanism in the face of Bezeq's large scale interests and ability to disrupt any attempt to compete with Yes, which Bezeq will control. In this context, the General Director argues that the control over the infrastructure creates an absolute and problematic dependence, for each of Yes' future competitors, on Yes' controlling shareholder. This will be due to Bezeq's ability to damage the quality of their broadcasts through the infliction of damage to the infrastructure – which will lead to significant flaws in the product provided by the Yes competitors. The General Director notes that damage of this type is very difficult to locate and even took place recently in the United States. Nevertheless, the General Director believes that the guarantee mechanism which has been set up is significantly flawed in that it does not refer to the limitations of supervision and, primarily, not to the significant costs of supervision created by the conditions established by the Tribunal; it does not provide a solution to the technical difficulties in locating the occurrence of a breach; and it ends specifically at the time at which Bezeq is expected to transfer Yes from the satellite infrastructure to the IPTV system. The General Director also notes that in other circumstances, and as a product of a criminal investigation conducted against Bezeq, it has already been revealed that Bezeq has an organizational culture which is not sufficiently careful with respect to preventing improper harm to competitors that use its network. Under these circumstances, the General Director believes that if the appeal is denied, then at the least, the partial deterrence measure established by the Tribunal should be left in place.

16. Eurocom claims that the character of the conditions that have been imposed on Bezeq – a complicated behavioral arrangement which requires long-term regulatory supervision requires an "appropriate deterrence incentive" and an immediate and significant sanction which is not dependent on a legal proceeding, which conforms to the scope of Bezeq's obligations and the "cost of an error" that the public will pay if it transpires that Bezeq is not meeting those obligations. Eurocom further argues that the Tribunal chose one security for the fulfillment of the conditions – the presentation of a bank guarantee – and that in these circumstances the amount is reasonable and even necessary, as legal proceedings will not be able to lead to a rectification of [a breach] situation in real time, and Bezeq's arguments in its appeal serve as a warning signal regarding the [potential for the] erosion of the Tribunal's conditions. Eurocom also argues that the conditions established by the Tribunal constitute "a single block" and that not one of the conditions in this set should be changed without opening up the entire conditions framework. Finally, Eurocom argues that, without obtaining permission to do so, Bezeq included in its closing briefs several factual arguments regarding its contacts with various banks and that these arguments should be ignored.

Discussion

The normative framework: the Israeli regime of merger supervision

17.Section 1 of the Restrictive Trade Practices Law defines a companies merger as follows:

> "Companies Merger" - 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 by

> 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;

It is undisputed that Bezeq's exercise of the options in this case will constitute a "companies merger" in accordance with that term's definition in the Restrictive Trade Practices Law, described above – since due to the said exercise, Bezeq, which currently holds 49.78% of the shares in Yes, will cross the line of 50% of the holdings in Yes and become the owner of 58.36% of the Yes shares. As an aside, we note that the Israel Antitrust Authority does not generally require a notice of merger from a party that holds more than half of the rights in a company and which seeks to increase its holdings of any right whatsoever to a level exceeding 75%. This is because the Restrictive Trade Practices Law will in any event view a firm and a person holding more than 50% of the rights in that firm as constituting a "single substantive entity," which leads to the perception that in these circumstances there is no real change in the relationship between the decision making mechanisms of the parties involved in the transaction. (See: The Antitrust General Director's Instructions Regarding the Reporting and Review Processes for Companies Mergers pursuant to the Restrictive Trade Practices Law – 1988 (hereinafter: *General Director's Instructions*)). Therefore, the crossing of the 50% line regarding the holdings in a company, as in our matter, is generally the last point of supervision in this area, in accordance with the General Director's Instructions.

Chapter C of the Restrictive Trade Practices Law establishes the regulatory framework for merger review, and it applies only to companies mergers in which one of the conditions established in s. 17 of the Restrictive Trade Practices Law is present – conditions which relate primarily to the size of the merging companies' sales turnovers; to the fact that one of them is a monopoly as defined in s.26 of the law; and to the creation of a monopoly as a result of the merger. (See also s.18 of the Law, which establishes conditions regarding a merger with a company that conducts business both in Israel and outside of Israel.) Section 19 of the Restrictive Trade Practices Law prohibits the implementation of a companies merger if the conditions listed in the above-mentioned s.17 are present, unless a notice of merger has been sent and the General Director's consent has been obtained. The section provides as follows:

> Companies may not merge unless a Merger Notice is issued and the consent of the General Director to the merger is obtained and, if such consent is conditional- in accordance with such conditions, all as provided in this section.

Section 21 of the Restrictive Trade Practices Law lists the situations in which the General Director will object to a merger or will condition its approval, and provides as follows:

> „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;
>
> (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.'

The test for exercising the General Director's authority is thus the existence of a "reasonable risk" – i.e., an estimated likelihood, which is determined *ex ante*, that there will be significant damage to competition due to the proposed merger or damage to the public with respect to one of the matters listed in the section. (See CA 3398/06, *Israel Antitrust Authority v. Dor Alon Energy Israel (1988) Ltd* par. 30.[2] (hereinafter: *Antitrust Authority v. Dor Alon)* The examination of the merger is thus a two stage one: first, the market which is relevant to the matter under discussion must be identified and defined; second, it is necessary to determine whether there is a reasonable risk that the proposed merger will lead to significant damage to the public in that market or that it will lead to such damage to the public (*General Director v.* Tenuva) [1] at 229.

This statutory arrangement for merger review is a late development in Israeli law (as in United States antitrust law and European Union competition law – see, regarding this matter, Y. Yagur, *Antitrust Law*, 411-412 (3^{rd} ed., 2002) (hereinafter: *Yagur*). The Restrictive Trade Practices Law, 1959, in its original version, did not contain any provisions regarding company mergers, but during the first half of the 1970's it became clear that the attempt to encourage mergers through government incentives, together with the absence of a review mechanism, had led to a high level of concentration in many areas within the Israeli economy, and in 1975 a Committee For the Review of the Restrictive Trade Practices Law was established, headed by Professor Joseph Gross, whose recommendations were the basis for the enactment of the new Restrictive Trade Practices Law in 1988. (See: Barak Orbach, "Objectives of Antitrust Law: Practical Rules" *Legal and Economic Analysis of the Business Antitrust Laws* 83-85 (Vol. 1, Michal (Schitzer) Gal and Menachem Perlman, ed. 2008) (hereinafter: *Legal and Economic Analysis of the Antitrust Laws*); Report of the Committee on Mergers and Conglomerates, 6, (1978)). The basic assumption at the foundation of the new 1988 law was that mergers are primarily desirable, to the extent that they relate to business efficiency and benefits of size, and that they can have the effect of lowering prices for consumers. Nevertheless and because in certain circumstances mergers can lead to damage to competition as a result of the increase in the power or market share of the merging companies, the legislature saw fit to review them and in certain cases even to limit them. (See: Explanatory material for the Proposed Restrictive Trade Practices Law, 1983, Proposed Bill 1647, 39-40; *General Director v. T'nuva* [1], at 227; *Antitrust v. Dor Alon* [2] paras. 29-31). This review is intended to realize the objective that is the basis of the Restrictive Trade Practices Law, which is "protecting the general public against economic distortions the source of which is in excessive concentration in certain markets." (*General Director v. T'nuva* [1], at 229). This is done through protecting and promoting competition in order for it to constitute an incentive for development and innovation and in order to increase the efficient use and utilization of resources and to secure the best quality product for the end consumer at the most reasonable price. Free competition, as a value which the Restrictive Trade Practices Law is intended to protect, is also perceived as "a foremost sign of the individual's freedom to realize his autonomy," (*ibid*, [1] at 229), which contributes to the dispersion of centers of power and decision-making, prevents excessive concentration of power in the hands of a few entities and protects additional fundamental rights including freedom of occupation (*ibid*. [1], 229-230; *Antitrust Authority v. Dor Alon* [1] para. 29); FHC 4465/98 *Tivol (1993) Ltd. v. Chef of the Sea (1994) Ltd.*, [3] at 56, 79-80 (2001). In the communications industry, the protection of competition has special importance. It would appear that no one disputes the fact that in a free society, the media serves as a key platform for the expression of views and opinions and as a critical tool for the delivery of information and the disclosure of details that are of public importance. In this way, the media carries out a function which is essential for our existence as a democratic society and serves to realize fundamental rights such as freedom of expression and the public's right to know. (See HCJ 7200/02 *DBS Satellite Services (1998) Ltd. v. the Cable and Satellite Broadcasts Council* [4] (hereinafter: *DBS Services v. Cable and Sattelite Broadcasts*) at 34-35; Dafna Barak-Erez, "Freedom of Access to the Media Balancing of Interests in the Areas of the Right to Freedom of Expression," *Iyunei Mishpat* 12, 183 (1987). The existence of competition in this industry thus contributes to the development of a varied and pluralistic public discourse and reduces the risk that information with public importance will remain undisclosed because of the economic or other interests of any party whatsoever.

Does this merger give rise to a reasonable risk of significant damage to competition?

18. Section 21 of the Restrictive Trade Practices Law which was cited above authorizes the General Director to object to a merger or to condition its approval if, in his opinion, there is a reasonable risk that the merger as proposed will significantly damage competition in that industry (market). A determination of the damage is carried out in relation to the relevant market – i.e., the market in which the control of a particular firm (according to the hypothetical monopoly test) can allow that firm to restrict production and raise the price beyond the marginal cost, while reaping a profit. (*General Director v. T'nuva* [1] at 232; M. Perlman, "Definition of Markets," *Legal and Economic Analysis of the Antitrust Laws,* 167). The delineation of the relevant market at the first stage is therefore critical for the purpose of determining the existence of a reasonable risk of significant damage to competition, and we will now turn to this matter.

Definition of the relevant markets

19. Two markets in the area of multi-channel television are relevant to our case: the infrastructures market (the technology through which content is transmitted) and the content market (the services and content transmitted on the infrastructure). These markets are part of the vertical chain in the field of multi-channel television, which is, according to the General Director's definition, composed of four factors: (1) the producers of content who create the broadcasted content and who contract for this purpose with relevant professionals and manage the production, (2) the producers of channels who construct a programming schedule, brand and market the channels (some of

whom also produce the content that they broadcast); (3) broadcasters who acquire the various channels, “package” them as broadcast packages, market the brand to end customers and who are responsible for providing the service to customers; and (4) the providers of the infrastructure on which the content is transmitted from the broadcasters’ base to the customers’ home.

Historically, the Israeli multi-channel television industry has been characterized by a lack of direct and effective competition, since for many years this industry was controlled by regional monopolies – cable companies – who had been given exclusive franchises to provide television broadcasts via cable in a specific geographic region. (See the Monopoly Declaration Pursuant to s.26 of the Restrictive Trade Practices Law, 1988 for the cable franchises in Israel, dated November 8, 1999). This exclusivity led to the fact that the competition in the market was limited to yardstick competition, which is characterized by the fact that a low price level and a high level of programming in a particular region can create public pressure on broadcasters in other regions. But this competition is, by its nature, limited, since the only risk from the perspective of the franchisees is that the consumer will stop consuming the product (a measure which will bear a cost from the perspective of the individual consumer) and there is no risk that the consumer will transfer to a different company (such a transfer would involve in a change of residence). During the second half of 2000, an additional player with national deployment entered the market – a satellite television company. The technological innovation led the market from a condition of perfect monopoly to a condition of a duopoly. The activity of the satellite television company required an amendment of the legislation and was even scrutinized by the Supreme Court. (See HCJ 508/98 *Matav Cable Communications Systems v. Knesset* [5] (hereinafter: *Matav v. Knesset*) at 577. The entry of this additional broadcasting platform was accompanied by beneficial competition effects and significant improvements regarding the offerings to consumers. In 2002 the regional cable companies applied to the General Director for approval of a merger, which was given subject to conditions that included the maintenance of a structural separation within the Hot company, between the infrastructure company (“Hot Telcom Limited Partnership”) and the broadcasting company (“Hot Cable Communications Systems Ltd.”). Appeals filed against this ruling were primarily rejected by the Tribunal (See *DBS Services v. Cable and Sattelite Broadcasts* [4]) and the full merger of the cable companies was completed on December 31, 2006.

As a practical matter, the reality in the current Israeli multi-channel TV broadcast industry is that there are only two players - Hot and Yes - in the infrastructure market and in the content market, and each of them maintains full vertical integration between the infrastructure and broadcasting levels. (Hot holds between 55% and 65% of the market and was declared to be a monopoly in November of 1999. The rest of the market is held by Yes.) With respect to Hot, the Grunau Commission noted that despite the structural separation that Hot was required to create in the framework of the approval of the cable companies' merger, in actuality, both Hot's infrastructure company and its broadcasting company (the latter of which operates pursuant to a license given to it by virtue of Chapter B-1 of the Communications Law (Telecommunications and Broadcasting) are controlled by identical shareholders and they operate as a single commercial-financial entity (see the Grunau Commission Report, 110-111). Yes, as noted, holds and operates a satellite infrastructure (purchasing the space segments from the Spacecom Company controlled by Eurocom) and it also operates under a single corporate roof as the broadcaster on that infrastructure (by virtue of a license given to it for this purpose by Chapter B-2 of the Communications Law (Telecommunications and Broadcasting)).

20.The market for the multi-channel TV broadcast infrastructure is characterized by high barriers to entry, of which the primary ones are: the especially high cost involved in establishing an infrastructure for a broadcast center; a distribution system; the provision of converters which decode the broadcast signal. In Israel there are two technologies through which multi-channel TV broadcasts are transmitted: an infrastructure based on satellite broadcasts and a cable line infrastructure. The technological abilities of these two technologies are not identical. The satellite broadcast method does not allow for broadcasted content to be differentiated in accordance with the geographical location of customers. Therefore, this technology does not support repeat channel broadcasts, which is an essential condition for the provision of video on demand (VOD) services – i.e., the broadcast of a dedicated channel according to the customer's request, out of a store of programs that are maintained on the broadcast company's servers. Yes, which operates on the satellite infrastructure, is therefore unable to offer VOD services and these are provided to the market only by Hot, which – as noted – operates on a cable infrastructure. (As an aside, we note that Yes is able to offer a similar service called Push-VOD, which is based on a converter with a given memory capacity). On the other hand, the satellite technology has its own advantages which include the relative ease with which the satellite can broadcast to sparsely populated distant areas, without incurring the costs involved in laying a line-based infrastructure.

An additional technology which has been used throughout the world since 2004 for multi-channel TV broadcasts is the IPTV (Internet Protocol Television) technology, which has been mentioned above. This technology operates on the basis of a stationary network. The home viewer operates a converter through a remote control which connects to the IP address of the source of the broadcasts through a managed closed network. The technology allows for the transmission of a large number of channels on the infrastructure without a particular collection of channels being sent at the expense of a different collection (unlike the limited capacity that can be offered by the satellite or cable infrastructures), and it has the ability to block certain channels and to not broadcast the same signal to all subscribers. These advantages are made possible by the efficient utilization of a broadband access infrastructure on which differentiated broadcasts are transmitted to the customer, who watches them in accordance with his or her choice. In contrast, on the cable and satellite infrastructures, the same signal is broadcast at all times to all subscribers, and the channels that the customer cannot view are blocked by a conditional access management system. Worldwide, the IPTV services are supplied by telecommunications companies, in light of the deployment of the infrastructures they own, or through sub-operators who lease the infrastructure from the telephony companies. This technology does not currently exist nor is it currently operated in Israel.

21. The content market is also characterized by barriers to entry, although these are significantly lower than those that characterize the infrastructure market. These include the need to establish a brand-name and to maintain it; the entry into agreements with content [producing] parties in Israel and abroad; the need to obtain a general broadcasting license and the regulatory rules that apply to this field. (See *DBS Services v. Cable and Sattelite Broadcasts* [4] at 37-38). As noted, there are only two players operating in the content market – Hot and Yes – and the full vertical integration that each of them maintains between the infrastructure and broadcasting levels makes the barriers to entry in the content market even higher. Note that the Communications Law (Telecommunications and Broadcasting) makes it possible to obtain a special license for cable broadcasts on the cable infrastructure for the purpose of transmitting single channels (through the open access method). But demand for such a license has been, until now, very limited, and there has been no successful business model in this field, in

light of the regulatory and technological restrictions that are imposed on such a broadcaster.

Damage to competition and the actual potential competitor doctrine

22. The merger under discussion is not a horizontal one because Bezeq itself is not currently a competitor in any of the markets that are relevant to this case (i.e., the infrastructure market or multi-channel TV broadcast the content market). Additionally, this is not a vertical merger between companies operating at different stages of production or marketing in the same industry, since Bezeq's activity in the multi-channel TV broadcast industry consists only of holding of the Yes shares that it currently holds. The merger under discussion involves the merger of six option warrants in Yes that Bezeq holds, upon the exercise of which Bezeq will increase its holdings in Yes from 49.78% today to 58.36%. This merger, which is neither vertical nor horizontal, can be referred to as a conglomerate merger. (In this context, see, *DBS Services v. Cable and Sattelite Broadcasts* [4] para. 12; CA 1/00 (Jerusalem District), *Food Club Ltd. v. General Director* [11], para. 71 (hereinafter: *Food Club v. General Director*). Regarding conglomerate mergers, see also *FTC v. Procter & Gamble, Co*. at 568, 578 (1967) [13] (hereinafter: *FTC v.Procter & Gamble*)). That is, it is a merger which relates to a party – in this case, Bezeq – which holds economic power and is composed of various business units that operate in a variety of markets and specialize in the production of products or the provision of services which do not necessarily have a common element and which are not similar or related to the acquiring company's area of specialization. (See *Food Food Club v. General Director* [11] para. 72. See also Keith N. Hylton, *Antitrust Law: Economic Theory And Common Law Evolution*, 344 (Cambridge Univ. Press 2003) (hereinafter: Hylton, Antitrust Law)). There are a number of dangers to competition involved in a conglomerate merger. (See: Phillip Areeda & Donald F. Turner, *Antitrust Law: An Analysis Of Antitrust Principles And Their Application*, Vol. 5, s.1100 et Seq. (1980) (hereinafter: "Areeda & Turner, Antitrust Law"); Earl W. Kintner, *Federal Antitrust Law*, Vol. 4, s.36.4 (1984)). Generally, the conglomerate structure enables each company in the group to benefit from the advantages of size and from convenient sources of financing. A conglomerate merger can therefore have pro-competition effects, such as the utilization of the conglomerate's financial strength in order to prevent the elimination of an acquired company and to increase its efficiency, and thus to prevent its removal as a competitor from

the market. Conglomerate mergers are not infrequently considered to be mergers whose effect on competition is neutral and occasionally even beneficial. See Case T-5/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-4381 [25] at para. 155; *Food Club v. General Director* [11]para. 73; but see *Yagur*, 502-503.)

23.A typical risk of damage to competition arising due to a conglomerate merger is the risk of damage caused by such a merger to potential competition.)See United States Department of Justice Non-Horizontal Merger Guidelines 1984, s.4, s.4.11 (hereinafter: U.S. Non-Horizontal Merger Guidelines)) American law distinguishes in this context between two doctrines: perceived potential competition and actual potential competition. Damage to perceived potential competition exists when the fact that a potential customer exists, even if it is not currently in the relevant market, restrains the market power of the firms that are active in that market. Damage to perceived potential competition is, thus, damage which takes place in the present time and which results from the removal of the threat of the entry of the potential competitor into the market. In the absence of other potential competitors, the entry of such a potential competitor in the framework of a merger with a different company which is in the relevant market (rather than an entry as an independent competitor) can reduce the competitive pressure which the competitors that are active in the market feel due to this threat. (See *Food Club v. General Director* [11], para. 47; *DBS* , para. 13; U.S. Non-Horizontal Merger Guidelines, s.4.111; ABA Section of Antitrust Law, Antitrust Law Developments, 354 (5th Ed., 2002) (hereinafter: Antitrust Law Developments)). In order to establish the presence of perceived potential competition, it is necessary to prove that the existing competitors in the market do see the merging company as a potential competitor, and that its existence restrains their business behavior. (See *Food Club v. General Director* [11], para. 47; Areeda & Turner, Antitrust Law, at s.1116a).

In the case before us, no claim has been made regarding damage to perceived potential competition, and at any rate, no such claim has been proven. The doctrine which is relevant to our case is that of actual potential competition, and we will discuss it below.

24.The actual potential competition doctrine deals with competition which is likely to develop in the market in the absence of the merger's occurrence, because one of the merging companies, which is not currently a competitor in the market, enters into the market, independently, in the future.

This doctrine therefore refers to future damage which will be caused to the relevant market because a potential competitor will be removed from it as a result of the merger. The doctrine is recognized in the United States (See: U.S. Non-Horizontal Merger Guidelines, s.4.112; *United States v. Falstaff Brewing Corp* [14] (hereinafter: *U.S. v. Falstaff*); *United States v. Marine Bancorporation, Inc.* [15](hereinafter: *U.S. v Marine Bancorporation*); *Yamaha Motor Co., Ltd. v. FTC,* [16] ;*Tenneco, Inc. v. FTC,* [17], and it has been used there by the Federal Trade Commission, the Department of Justice and the Federal Communications Commission, in accordance with the distribution of powers among them regarding the approval of mergers. (See, for example *In re El Paso Energy Corp.*, [18]; *United States v. AT&T Corp. and MediaOne Group, Inc.*, Proposed Final Judgment and Competitive Impact Statement, [19]; *In re Applications of NYNEX Corp. & Bell Atlantic Corp*., [20]). The question as to whether the actual potential competitor doctrine can be the sole ground for opposition to a merger has been left as a question for further review by the United States Supreme Court. (*Falstaff* [14] at 537; *Marine Bancorporation* [15] at 639).

The view that the loss of a potential competitor as a result of a merger constitutes damage to competition is also recognized in Canada (Canadian Competition Bureau Merger Enforcement Guidelines, part 2 (2004)) and in the European Union (EU Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2008/c 265/07, article 7 (2008); EU Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004/c 31/3, articles 58-60 (2004)) and in Great Britain (Mergers: Substantive Assessment Guidelines, Enterprise Act 2002, article 4.8 (Office of Fair Trading 2003). (See also, Consultation Document, s.4.24, April 2009). The actual potential competition doctrine has been mentioned by the Antitrust Tribunal in Israel. (See *Food Club v. General Director* [11] paras. 49-51; *DBS*, paras. 14-15) and the Tribunal has recently even approved the General Director’s opposition to a horizontal merger because of, *inter alia*, grounds that were based on the doctrine by way of analogy. (AT 8006/03 *Yehuda Pladot Ltd. v. General Director*) [12] (hereinafter: *Yehuda v. General Director*). In relating to the doctrine and on the tests for its application, the Tribunal held there that:

> In this situation, we believe that there is nothing to prevent the inclusion of a consideration of potential damage to competition as one of the considerations for opposing a merger. This can be compared, by way of analogy, to the potential damage to competition doctrine in non-horizontal mergers. The Tribunal has dealt with this doctrine in the past when separating between actual damage and potential damage to potential competition.
>
> „[. . .] *In our case, the relevant issue is damage to actual potential competition, i.e, the competition that would have developed in the market but for the merger, upon one of the merging companies entering into activity in the relevant market.* In order to disqualify a merger on the basis of this doctrine, it is necessary to prove that a competitor that enters the market by way of a merger has the financial ability, interest and motivation and practical ability to enter into the market other than through the merger. It is necessary to present objective proof of such a possibility, and in addition to show that this possibility presents competition-related advantages as compared to the merger (Appeal 1/99 *Food Club v. General Director* [11] at s.49).
>
> In accordance with our case, *Hod is an actual potential competitor* which sought to enter the market in the place of Mapam.'
>
> (Paras. 60-61, emphases added).

25. In the United States, the courts have pointed to a number of criteria in the presence of which the doctrine can be applied: first, the market in which the merger is taking place must have a concentrated structure. (See:*BOC International, Ltd. v. FTC,* 557 F.2d 24, 25 (2d Cir. 1977) [21]; *Marine Bancorporation,* 418 U.S. at 625 [15] Second, it must be shown that the company that is not in the industry has the characteristics, the ability and the economic motivation to enter into the industry by itself and not through the merger. (*Marine Bancorporation,* 418 U.S. at 633.) Third, it must be shown that the independent entry of the company which is not in the industry is expected to significantly reduce the concentration in the market or to lead to other significant pro-competition advantages as compared to the merger. (*Ibid.*) The U.S. Non-Horizontal Merger Guidelines add additional considerations, that are not unique to the above-mentioned doctrine, and they include the size of the barriers to entry into the relevant market, the number of additional potential competitors that are likely to enter into the market in

the future, and the acquired company's market share. (Sections 4.132-4.134, and see also Areeda & Turner, Antitrust Law at s.1119c-f; Antitrust Law Developments, 355). An additional consideration which is relevant according to the U.S. Non-Horizontal Merger Guidelines which is also not unique to the above-mentioned doctrine examines the question of whether the efficiency involved in the merger exceeds the competition dangers that it presents. (s.4.135 of the U.S. Non-Horizontal Merger Guidelines; Revised s.4 Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission (April 8, 1997); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991) [22]; *Yehuda Pladot* [12], para. 64). In light of the requirements established in the United States for the application of the doctrine there are those who believe that this is an endangered doctrine which cannot be implemented. (See Herbert Hovenkamp, *Federal Antitrust Policy: The Law Of Competition And Its Practice* s. 13.4b (West Publishing Co. 1994); Andrew S. Joskow, *Potential Competition: The Bell Atlantic/NYNEX Merger* , Review of Industrial Organization, 185, 189 (2000); Darren Bush & Salvatore Massa, "Rethinking the Potential Competition Doctrine," 2004 Wis. L. Rev. 1035, 1037 (2004) (hereinafter: Bush & Massa, *Rethinking the Potential Competition Doctrine*.)

26. Indeed, it is a doctrine that if incautiously implemented could lead to damage to the efficiency achieved through mergers and in certain circumstances could even lead to damage to competition (to the extent that the analysis carried out regarding the independent entry of the merging company in the market is erroneous). The use of the doctrine can increase the cost of entry into new markets (as independent entry is generally more expensive) and thus deter companies from attempting to enter them. The doctrine also has a significant ability to impose on companies in the market a positive obligation to "improve competition" as distinguished from an obligation to refrain from damaging competition, and this is a non-negligible expansion of the merger review regime. (See Hylton, Antitrust Law, p. 345-346; Areeda & Turner, Antitrust Law at s. 1118).

In our case, the General Director based the grounds for her objection to the merger on this actual potential merger doctrine, and the essence of her argument in this context is that without a merger, Bezeq can be expected to enter into the infrastructure market and the content market for multi-channel TV broadcasts as an independent competitor. Therefore, according to the

General Director, the merger's approval will lead to the loss of Bezeq as a potential competitor in these markets or in one of them, and will fix them as duopolic markets. In referring to the General Director's comments, the Tribunal did not examine the question of the conformity of the actual potential competitor doctrine to Israeli law and to the relevant provisions in the Restrictive Trade Practices Law relating to the approval of mergers. The Tribunal examined the application of the doctrine itself, and the lion's share of its ruling is dedicated to an examination of the likelihood that Bezeq will enter into the infrastructure market or into the content market if the merger does not take place. For this reason, it can be assumed that it did not object to the principle of the approach presented by the General Director, according to which this doctrine should be adopted in the Israeli law. It seems to me that the assumption that the doctrine applies under Israeli law is not a trivial one, and that before we do so we should first examine whether it is consistent with the provisions and purpose of s.21 of the Restrictive Trade Practices Law, which establishes the criteria for the approval or disqualification of a merger to which Chapter C of the law applies. More specifically, it is necessary to determine whether the damage to competition or to the public discussed in the above-mentioned s.21 also refers to *future* damage in that industry, due to the loss of a potential competitor that would have entered the market but for the merger. Justice Naor, in her introduction to the first volume of the treatise *Legal and Economic Analysis of the Antitrust Laws,* edited by Michal Gal and Menachem Perlman, dealt with the need to adjust doctrines and rules taken from comparative law in the field of antitrust (and in general), before they can be adopted in Israeli law. She noted that a wealth of literature and many rulings can be found in comparative law relating to antitrust law, but she also added that "in seeking to implement in Israel what has been read and learned from American or European law, one necessarily encounters an barrier. The question necessarily arises as to whether the solution found in another location is appropriate for "the conditions in Israel and of its residents" and to the Israeli law?" (*Ibid.*, 15).

The potential competitor doctrine and Israeli law

27.In the *Dor Alon* [2] case, Justice Procacia noted that "given the purpose of the Restrictive Trade Practices Law to encourage competition and to protect the consumer, a substantial expectation of a future change in the relevant market should have some importance in the context of an estimation of the competitive nature of this market in the coming times." (*Dor Alon*, para. 56). In that case, it was held that according to the market's condition at the time of the petition's adjudication, the horizontal merger that was under discussion, between Dor Alon Energy in Israel (1988) Ltd. and Sonol Israel Ltd., presented a reasonable risk of significant damage to competition in the fuel industry (in markets that had been defined for this purpose). However, the companies seeking to merge made the argument that future developments (the privatization of the refineries) which were expected to take place in the fuel industry, having no connection to the merger, would be able to reduce this damage and even to eliminate it because of, *inter alia*, the benefit that the merger would create for them in terms of the ability to compete in an effective manner and for the consumer's benefit against parties that were stronger than them, following the change that was expected to take place in the system of powers within the industry. The Court was ready to take these future changes into consideration as part of the necessary considerations for determining the damage to competition and the likelihood of its occurrence, but regarding the matter itself, the Court believed that these were changes regarding which there was uncertainty as to the fact of their occurrence, their size, and the range of time in which they would take place, and the Tribunal therefore believed that these changes were not sufficient to affect the conclusion regarding the existing reasonable risk regarding significant damage to competition, which justified the disqualification of the merger.

The argument made by the General Director in our case differs from the one made by the petitioning companies in the *Dor Alon* case. The main part of her argument is that *future damage* is expected to take place if the merger is approved, because of what she claims is the high probability that without the merger Bezeq will enter the multi-channel television broadcast infrastructure market and content market and that this will improve the competition in the industry. At the same time, I believe that s.21 of the Restrictive Trade Practices Law can, both in terms of its language and the goal that it seeks to achieve, be interpreted so as to make it possible to take into account the reasonable risk of future harm to competition, as stated. The common denominator between the claims raised by the General Director in this case and the claims raised by those seeking the merger in *Antitrust v. Dor Alon* [2] relates to the fact that in both cases, in order to achieve the purpose at the basis of the antitrust laws – encouragement of competition and protection of the consumer – future developments are taken into account, developments the probability of which can be estimated, and which impact on the General Director's decision as to whether the merger should be approved or opposed. (Regarding the estimation of future developments as an integral part of the economic analysis of mergers and of the effects on competition that such developments involve, see and compare: Menachem Perlman "Merger Review in Israel: An Examination of the Dor-Alon –Sonol Decision," *Ta'agidim* 5/2, 98, 105-107 (2008); Grounds for the General Director's Objection to Merger Between Orlight Industries (1959) Ltd. – Inbar Reinforced Polyester Ltd., Chapter D.1 (November 9, 2006)). As we have now held that the actual potential competitor doctrine can be applied in Israeli antitrust law, we need to add that this should be done with the necessary caution, keeping in mind that this is a doctrine that expands the scope of the supervision of mergers and the damage to the fundamental rights of the merging entities, and further keeping in mind the local market conditions and the fact that the Israeli economy is primarily a small and concentrated one. In this type of economy, a too strict merger control may overshoot its purpose and lead to the loss of the efficiency benefits that can be inherent in mergers. (See, Michal S. Gal, *Competition Policy For Small Market Economies* 195 (Harvard Univ. Press 2003)).

28.Because we cannot immediately reject the General Director's reliance on the actual potential competitor doctrine, we will now examine whether the conditions for the application of the doctrine are present here in this case and whether they justify the disqualification of the merger, or whether, as the Tribunal saw, the existence of such conditions have not been proven and the merger should therefore be approved. (Later, we will refer to the fact that the Tribunal established conditions [for the merger] even though it concluded that there was no reasonable risk in this case of damage to competition, and to the difficulty presented by this establishment of conditions [for the merger]). But before we examine the existence of the conditions for the application of the doctrine in this case, we must first note that the condition relating to the company's characteristics, ability and economic incentive to enter into the relevant market but for the merger is a condition that needs to be examined in accordance with objective evidence and an economic analysis of the company's relevant conduct under market conditions. It is therefore unnecessary in this context to introduce the testimony of the company's senior officials or its internal documents which indicate that it intends to enter the market as an independent competitor if the merger is not approved. At the same time, to the extent that such subjective evidence does exist, it can assist the Court in making a determination regarding this issue. (See: Bush & Massa, *Rethinking the Potential Competition Doctrine*, Wis. L. Rev. at 1069 (2004); *FTC v. Atlantic Richfield Co*. [23] at 297-298. We also need to point out that the probability that needs to be proven with respect to the firm's independent entry into the market must be at the level of a reasonable probability (see and compare, *United States v. Siemens Corp*. [24] at 506-507 (2d Cir. 1980)), and in my view it is not necessary to use an insurmountable threshold, given that this is an estimation of future developments. The period of time in which, according to the estimation, the potential competitor could enter the market is another significant detail, which is derived to a substantial degree from the characteristics of the market under discussion. (See and compare: Orit Farkash-HaCohen "Technological Innovation Considerations in Examining Reviews according to the Antitrust Laws – the Bezeq-DBS Case," *Ta'agidim* 5/3 135, 165 (2008) (hereinafter: Farkash-HaCohen)). Thus, for example, the United States Court of Appeals for the Fifth Circuit found that if it had been proven that a company seeking to merge would have been able to enter the market within a period of two to three years, the Court would have been willing to see it as an actual potential competitor (*Mercantile Tex. Corp. v. Bd. of Governors* , 638 F.2d 1271-1272 (5th Cir. 1981) [25]). In another case, the United States Court of Appeals for the Fourth Circuit stated that the potential for entry into the market within a period of 10 to 19 years, did not, *inter alia,* transform a company into a potential competitor (*FTC v. Atlantic Richfield Co*) [23] at 295.

Finally, I will point out that I tend towards the view that a General Director who seeks to object to a merger because of a reasonable risk of damage to competition bears the burden of proof that such a risk does exist (see: Michal Halperin, "Dor Alon-Sonol Case – How Should a Litigation in the Antitrust Tribunal Appear" *Ta'agidim* 5/2, 60, 75-82 (2008); Shlomi Prizat, "The Dor-Alon Decision: The Right Result – Dangerous Rationale," *Ha'aretz* (December 11, 2006)) It appears to me that this approach is appropriate and even more so when the General Director seeks to apply the actual potential competitor doctrine, which relates to future damage to competition. And note – in the *Dor Alon* case, the Court tended towards the approach that the burden of proof was imposed on the party seeking to the merger to show, through its estimations, that in light of the market's future condition, the merger *will benefit* competition and this is a burden of proof of the positive estimations that support the position of the party seeking the merger. In contrast, in our case, the General Director claims that the disqualification of the merger will benefit competition in the future, and it appears to me that the burden of proving this claim is imposed on her. Either way, this case, like its predecessors, does not justify a rigid determination of the matter of the burden of proof, which has more than once been held to be "a matter that goes both ways" (*General Director v T'nuva* [1] at 231; *Antitrust Authority v. Dor-Alon* [2] at para. 27), since, unlike the Tribunal's holding and as shall be described below, the General Director did present sufficient evidence which establishes that, as she claims, there is a reasonable risk of damage to competition.

Can Bezeq be seen as an actual potential competitor in the multi-channel TV broadcast market?

29.The Israeli multi-channel TV broadcast infrastructure market and content market are, as stated, duopolistic markets and in effect, Yes and Hot currently compete while each maintaining an integration between [their operations in] these two markets. In this situation, the markets are characterized by high barriers to entry and the Grunau Commission noted this as follows:

> „The multi-channel TV broadcast sector is controlled by a duopoly. This control is reflected by high prices for service as compared to the rest of the world, and by barriers to entry faced by independent content providers
>
> [. . .]
>
> Consequently, the duopoly in the infrastructure area becomes a duopoly in the multi-channel TV broadcast area. The owner of the infrastructures determines not only the content of the channels that it produces, but can also impact on the content of independent producers while damaging the range of choice available to the consumer.'
>
> (*Grunau Commission*, pp. 76, 103).

In the terms of the infrastructure market, Bezeq is currently the only company in the Israeli economy which has the ability to construct, within the foreseeable future, an additional infrastructure (in addition to the cable and satellite infrastructures) using Internet Protocol Television technology and using its fixed telephony network, which, because of the scope of that network's deployment, gives Bezeq access to most households in Israel. Such an infrastructure requires the laying of copper and/or optic fiber cables reaching each household and it therefore constitutes a firm barrier to entry into the infrastructure market in the communications field. Bezeq does not face this barrier. In addition, Bezeq owns the longest public optic fiber network in Israel and it has a customer base which already consists of almost a million customers who constitute two thirds of the subscribers to broadband access infrastructure services, which is used throughout the world for the transmission of IPTV broadcasts. Thus, Bezeq has unique starting data which allow it to advance the implementation of the IPTV technology. The Tribunal reached a similar conclusion, noting that "from a technological perspective, there is nothing preventing Bezeq from constructing a public broadband network which allows for the transmission of IPTV broadcasts or even the construction of a full IPTV infrastructure." The expert appointed by the Tribunal, Engineer Daniel Rosen (hereinafter: *Rosen*), noted in this context, in his opinion dated May 27, 2008, that Bezeq can already enter the infrastructure market at the current time and provide IPTV services at Standard Definition (not High Definition) quality, along with high speed Internet access at the rate of 1.5 to 2 MB, although the provision of services at this quality will make it necessary to deal with the bandwidth limitations of the access network and with the fact that the network will be required to provide additional services that will weigh it down. The expert further noted that if Bezeq wishes to provide IPTV services based on Multicast at a significant level, together with high speed Internet access at the speed of 5 to 8 MB, Bezeq will need to make a certain investment in upgrading the infrastructure (including upgrading the network, construction of access networks, an appropriate core and attachments, and the establishment of service provision centers). And in contrast to Bezeq's claim, Rosen noted in his opinion dated July 23, 2008, Bezeq had, in a notice which it delivered to the Israel Securities Authority on June 29, 2008 and in a press release dated June 20, 2008, stated that it had made a decision to continue with the NGN project, and this shows that Bezeq had made a strategic decision to "take the path of significant change in the access network, which will lead to a significant improvement in its operation, and not to take the path of small scale upgrades and improvements," noting that it will be possible to use this network for the purpose of providing IPTV services. Rosen does not indicate an estimated date on which Bezeq is expected to be able to provide IPTV services in the context of this model, but his expert opinion [statement] indicates that this will be, at the latest, within a few years. This estimation is strengthened by the fact that according to the conditions established by the Tribunal in its ruling, Bezeq is required to construct an infrastructure that will make it possible to provide IPTV services to 80% of Israeli households within three years, and Bezeq announced on May 3, 2009 that it accepts the conditions set by the Tribunal, including this one. This indicates that in terms of technology, Bezeq is able, within three years, to construct the necessary infrastructure and to provide IPTV services at a level that covers most Israeli households. The Tribunal's findings also indicate that within this time period, there will be no other technology which would be able to serve as a real alternative to the IPTV technology. As a side point, I note that I highly doubt that it would have been correct, to begin with, to define two out of the three additional technologies examined by the Tribunal in this context (DTT and Internet television) within the markets that are the subject of the merger ([i.e.,] paid multi-channel TV broadcasts).

Thus, Bezeq has the technological ability to provide IPTV services within three years, and there is no other party in the Israeli market that has the ability, within the said time period, to provide these services or other infrastructure services that can compete with cable or satellite infrastructures. Therefore, it is necessary to further examine, in terms of economic feasibility and of other matters, the likelihood that, but for the merger, Bezeq would constitute a potential competitor in the relevant markets. It is also necessary to determine whether Bezeq's entry into these markets is expected to significantly reduce the concentration in those markets or to lead to other substantial pro-competition advantages, as compared to the merger.

30. The Tribunal noted in its ruling that but for Bezeq's holdings in Yes, there is no doubt that it would not have approved the merger, "even if the issue was [Bezeq's] reaching a much lower share than 58% . . . *a fortiori* in a situation of acquiring control." The Tribunal also noted that in a situation in which Bezeq would have sought to first acquire the shares in Yes, the existence of an alternative buyer that is not the owner of an additional infrastructure, such as Eurocom which declared its interest in the context of the petition to join the proceeding that it filed on August 11, 2008, would have simplified the decision not to approve the merger because of the clear pro-competition effects of the control over Yes by a purchaser that does not own an additional infrastructure and without having the potential to construct such an infrastructure. Nevertheless, the Tribunal noted, this is not the case that was put before it when asked to deal with the merger under discussion. This is because the matter here is not, in the Tribunal's words, an "ideal" one in which Bezeq seeks to acquire shares in Yes for the first time, but rather a situation in which Bezeq already has a serious interest in Yes. According to the Tribunal, "the competitive difficulty has already been planted in the current situation. Even if the merger increases the problem, it does not create

it." Therefore, and even though it accepted the General Director's key position that "such a control situation in a market of this type is worse, in terms of competition," the Tribunal reasoned that the competition map described by the General Director without the merger is not a realistic one.

Indeed, the fact that Bezeq currently holds 49.78% of the shares in Yes creates a unique situation which is different than the regular case in which the actual potential competitor doctrine would apply. This is because even though Bezeq is not currently a competing party in the multi-channel television broadcasts infrastructure market or content market, the size of its current holdings in Yes certainly positions it, already, as an interested party in these markets. However, this fact does not, in my view, automatically negate the possibility of seeing Bezeq as a potential competitor in the markets in which we are dealing, nor does it justify the approval of the merger. This Court has, in the *T'nuva* case, rejected the view that in a market which is already defective in terms of competition, there is no ground for objecting to a merger, when it held as follows:

> „The Tribunal held that in this case there has been no significant damage to competition because of, *inter alia*, the fact that the competition in the relevant industry is at any rate flawed and defective because of, *inter alia*, the respondent's power and strength, and the proposed merger is therefore nothing more than a small addition of to a large degree of concentration. Such an addition, the Tribunal determined, does not constitute "significant damage" to free competition. We cannot accept his determination. Its practical significance would be that the controlling entity in a particular industry, or the entity which constitute a dominant component thereof, is "immune" from the General Director's control because of the market power it holds. Such a conclusion is in absolute opposition to the goals of the antitrust laws, which we have noted above. Indeed, the General Director's authority and the power granted to him do not refer only to the prevention of control in a particular industry as such, but also to the prevention of the *strengthening* of existing control, if such strengthening can lead to significant damage to competition. Thus, for example, it could be that a certain merger will not bring about a significant increase in the

> concentration in the relevant industry – because there is a significant level of concentration in that industry at any rate, prior to the merger – but it will nevertheless create significant damage to competition due to the existence and creation of significant barriers to entry for new competitors, barriers that will arise as a result of the strengthening of the dominant power in the market, and not necessarily only as a result of the creation of such a power.'
>
> (*General Director v. T'nuva* [1] at 239-240. Emphasis in the original.)

The rationale at the basis of these remarks applies to our case as well. Nevertheless, the fact that Bezeq currently holds 49.78% of the Yes shares is certainly a significant detail for the purpose of analyzing the degree to which it would be economically worthwhile for Bezeq, absent the merger, to enter into the markets under discussion as an independent competitor, and we will discuss this below.

31. The Tribunal's holding that the competition map described by the General Director without the merger is unrealistic is based on two key foundations: one relating to the legal and regulatory prohibitions that apply to Bezeq in the content market, as a party holding shares in Yes, and to the view that Bezeq has no economic interest in constructing an IPTV infrastructure without the possibility of becoming a broadcaster. The other deals with the degree to which it is economically worthwhile for Bezeq, as a party holding shares in Yes, to establish an independent broadcasting arm or separate infrastructure. In this context, the Tribunal points out, *inter alia*, that Bezeq would need a critical mass of subscribers in order to justify direct competition with Yes, which is a difficult matter [to achieve] in the saturated Israeli market. The Tribunal further noted that the General Director did not present economic calculations which indicate that despite its current holdings in Yes, it would still be worthwhile for Bezeq to compete with Yes, even if one takes into consideration the incentives that Bezeq has, given its activities in additional markets (the telephony and Internet markets).

The Tribunal attributed significant weight to the existence of statutory and regulatory restrictions that apply to Bezeq in the content market in light of its holdings in Yes' broadcasting platform, and noted the smalll probability that the statutory restrictions would change and that the ability to overcome the regulatory restrictions is unclear. I believe that in this regard, the Tribunal was correct. Indeed, s.6H4(a)(2) of the Communications Law

(Telecommunications and Broadcasts) prohibits the granting of a general broadcasting license to a party that owns means of control in another broadcasting licensee:

> „A general cable broadcasting license or a video on demand license will not be granted to a corporation regarding which one of the following is true, whether such condition is met directly or indirectly:
>
> . . .
>
> It is a corporation in which another broadcasting licensee holds any type of means of control, or which controls any type of means of control in another broadcasting licensee or in a newspaper.
>
> A party owing means of control is defined at the definitions section of the Communications Law (Telecommunications and Broadcasts) as follows:
>
> "means of control" in a corporation means any one of the following:
>
> (1) A right to vote in a company's general meeting or in a comparable body in another type of corporation;
>
> (2) The right to appoint a director or general manager;
>
> (3) The right to participate in the corporation's profits;
>
> (4) The right to share, at the time of the corporation's dissolution, in the surplus of its assets after its debts have been discharged.'

This definition indicates that nowadays, and prior to the merger, Bezeq is an "owner of means of control" in Yes, which is a satellite broadcasting licensee by virtue of Chapter B-2 of the Communications Law (Telecommunications and Broadcasts), and under these circumstances, Bezeq is indeed prevented from obtaining a *broadcasting license.* The General Director claims that the many amendments (42 in all) that have been made to the Communications Law (Telecommunications and Broadcasts) since its enactment in 1982 show that a legislative amendment in this context cannot be ruled out even in the short term. . However, this approach is difficult to accept, especially in the short term in light of the absence of any indication whatsoever of an intention to make such an amendment. (See and compare the *Dor Alon* [2] case, paras. 56-63). Section 6H4(a)(5) of the

Communications Law (Telecommunications and Broadcasts) provides that the subsidiary of a company which is an interested party in another corporation which has obtained a broadcasting license is also prevented from obtaining an additional broadcasting license, but the Minister of Communications, with the consent of the Cable and Satellite Broadcasts Council and with the approval of the [Knesset] Finance Committee, may grant such a license if it is persuaded that [such a license] can benefit competition and the variety of the broadcasts offered to subscribers, in the following language:

> „. . . A corporation that an interested party in which is also an interested party in another corporation which has obtained a general cable or video on demand broadcasting license, or regarding which a party holding more than 24% of any means of control whatsoever in it also holds more than 24% of any means of control in a corporation that has obtained a satellite television broadcasting license, *unless the Minister has determined, with the consent of the Council, that it will benefit competition in the area of broadcasts and the variety of the broadcasts offered to subscribers, all in accordance with the provisions, conditions and restrictions established by the Minister after consulting with the Council and with the Committee's approval.'*
>
> (Emphasis added.)

The General Director argues that the Tribunal erred in determining that it is unreasonable that the regulator in the field of communications would allow a Bezeq subsidiary, which is the largest shareholder in another company that has a broadcasting license, to enter into the content field and have substantive control over two out of three content platforms. According to her, the grant of a broadcast license to a Bezeq subsidiary does not involve a legislative amendment and such a grant is within the authority of the Minister of Communications, subject to the conditions established in the section. According to the General Director, there is thus no barrier blocking the receipt of such a broadcasting license, if the Minister of Communications is persuaded that this would mean the entry of a competitor into the content market, an entry which would be pro-competitive and would add to the variety of the broadcasts. Indeed, where the Minister of Communications is given the authority to use his discretion in deviating from the statute's prohibition against granting a license to a subsidiary, with the approval of those bodies listed in the statutory section, it cannot be said that there is no probability that such a license will be given, but this is not sufficient for purposes of applying the actual potential competitor doctrine and it is necessary to show that there is a reasonably likelihood that such a license will be granted to a Bezeq subsidiary. Such a probability has not been proven in this case.

Thus, the Tribunal's conclusion that there is only little likelihood that, due to the statutory and regulatory restrictions, Bezeq will, either itself or through a subsidiary, compete in the content market is a well-founded conclusion and we should not interfere with it.

32.However, the General Director's emphasis regarding the concern for competition is, to begin with, in the area of infrastructure. Mr. Roy Rosenberg, the deputy director of the Israel Antitrust Authority Economics Department noted this in his testimony:

> „Q: In order for it, theoretically, to obtain a broadcasting company license, it is necessary to amend the law, correct?
>
> A: Correct, but I would again state, *the concern regarding competition is not from the content side, it comes from the side of the infrastructure for transmitting the content.'*
>
> (Transcript of the May 11, 2008 session, pp. 83-84. Emphases added.)

In the area of infrastructure construction, Bezeq is not subject to any statutory or regulatory restrictions. Therefore, it is necessary to determine whether, as the General Director argues, the Tribunal erred in holding that there is little likelihood , in terms of its economic feasibility, that Bezeq would compete in the infrastructure market, using the IPTV technology.

In making her arguments, the General Director points out that the degree to which it is worthwhile for Bezeq to compete in the infrastructure market results from, *inter alia*, the benefit that the construction of the IPTV infrastructure will give it in additional markets, such as the Internet and telephony markets, and she notes that it is worthwhile, in this context, to look at a broad picture which includes the varieties of markets in which Bezeq competes with other communications companies. According to the General Director, Bezeq's most significant competitor is Hot, which offers its customers a "triple play package" of Internet, telephony and multi-channel television broadcasts. This marketing option results from technological developments in the communications field as a consequence of which there has been a trend towards "product convergence" – i.e., the transmission of various products and services on infrastructure platforms which in the past had been dedicated to only a single product. This trend allows for the marketing of "packages" to consumers, and economic benefits to infrastructure owners because of the access to a variety of sources of income, while achieving benefits of scale and variety and savings in costs. The benefit that the market receives, from a competition perspective, results from the fact that the number of players operating in each branch can be increased and can lead to change in their relative weight.. This trend necessarily impacts on an analysis of the market in terms of competition, because of, *inter alia*, the increasingly significant importance attributed to business decisions made by players in the communications industry and to the impact of these decisions in a broader prism. (See, in this context: *The 2005 Decision*). In this context, it should be recalled that in the telephony and Internet field, Bezeq is a declared monopoly and the General Director believes that Hot's increasing strength, which results primarily from its ability to offer the above-mentioned type of attractive "packages" comes, in these markets, at Bezeq's expense, and Bezeq therefore needs a substantial television branch that it can control. The General Director also pointed to the additional incentives that Bezeq has for competing in the infrastructure market in this case. (For example, the differentiation offered through its infrastructure, as compared to the cable infrastructure). However, although the Tribunal accepted the General Director's position in this matter at the level of principle, it found that "this claim was not proven through appropriate calculations or through an appropriate economic analysis." The Tribunal therefore held that the "General Director has not carried the burden of proof on this topic."

I cannot accept this conclusion. Indeed, the General Director did not present an economic analysis at the level of calculations and numbers regarding the economic feasibility for Bezeq of entering into the infrastructure market without the merger, given its holdings in Yes, and it may certainly be that if the General Director had not been able to present detailed subjective proof in this case showing Bezeq's intentions in this context, it would not be possible to be satisfied with a general presentation of the benefits and economic incentives that Bezeq would receive from independent competition in the infrastructure market. But even if we start with the assumption that the burden of proof was on the General Director (and as noted above, I tend towards accepting that view), it appears to me that the subjective proofs that the General Director did present in this case, along with her economic analysis, were sufficient to shift the tactical burden to Bezeq to show that despite such proof, it is not, in this case and in light of its holdings in Yes, have been economically worthwhile from Bezeq's perspective to compete independently in the infrastructure market with the IPTV technology. In other words, the party that was required to present calculations and numbers regarding the lack of economic feasibility in this case was Bezeq, and it did not (present such calculations and numbers).

33. The extent to which Bezeq is do so interested in entering the infrastructure market with the IPTV technology can be learned from the position paper that it presented to the Grunau Commission in March of 2007, and in which the following, *inter alia*, was stated by her:

> Bezeq is prepared to be recruited to the cause of promoting the consumers' benefit regarding this important subject as well, and to commit to and to invest the significant amounts required to establish the IPTV services. Bezeq is prepared to invest significant amounts in the construction of the IPTV system for the transmission of content to the customer's home, including the hardware, and it will be willing to allow any content provider to transmit content on this platform on the basis of income sharing (or on any other transactional basis). . . .
>
> Bezeq sees the investment in upgrading of its infrastructures and the expansion of its operations in the content area through the IPTV platform as an act that will expand the possibilities offered to the content and multi-channel television broadcasts consumer. In the presence of appropriate conditions for investment, Bezeq believes that the addition of a third multi-channel television broadcast platform will help to significantly improve the Israeli consumer's welfare, for the following reasons, *inter alia*:
>
> „The IPTV technology has a technological advantage over the cable and satellite platforms in that it allows many content providing entities to offer their contents alongside each other on this infrastructure, with relative ease . . . their entry will contribute to increased competition in the multi-channel

> television broadcast market and will lead to a reduction in the costs of the services that are currently offered in this market.
>
> In addition, it is reasonable to assume that those providing content on the IPTV network will launch a wide variety of commercial offers and channel packages at varying prices. It is also reasonable to assume that the launching of the IPTV services in this spirit will force the existing competitors to respond and offer more "basic" packages of multi-channel television broadcast services . . .'
>
> (Bezeq's preliminary position regarding policy and competition rules in the field of Israeli communications, March 2007, pp. 170-18 (hereinafter: the *Bezeq Grunau Commission position*)).

Furthermore, Bezeq, for the purpose of presenting its position to the Grunau Commission, relied on the General Director's approach in this context and noted the following:

> "The Israeli Antitrust Authority [the IAA] has also recognized the importance of the IPTV platform for competition in the multi-channel television broadcast market in Israel, and has also recognized the fact that Bezeq is the only entity in Israel that has the ability to provide these services. This is also the ground on which the IAA based its objection to Bezeq's application for an approval of a proposed merger with Yes, noting that this merger could affect the penetration of the IPTV services".
>
> (Bezeq Grunau Commission position, p. 17)

Thus, Bezeq's position to a government committee dealing with the communications market was that Bezeq would, without the merger, construct an IPTV network that would compete with the existing players in the market and would thus contribute to a reduction in prices, to an improvement of the variety and quality, and to the integration of additional players in the multi-channel television broadcast market. The conditions that Bezeq listed for this purpose in its position paper refer primarily to the regulatory horizon, but unlike its position before us today, the position paper does not mention the approval of the merger as a condition for the Bezeq's construction and operation of the IPTV network. To the contrary, its discussion there of the

General Director's position, and its reliance on that position, indicates the opposite. The Tribunal did not see fit to attribute any weight to this clear position taken by Bezeq before the Grunau Commission and was satisfied with finding that "there [when facing the Grunau Commission], Bezeq exalted the importance of the IPTV infrastructure's implication for increasing competition in the multi-channel television broadcast field." It seems to me that the Tribunal erred in doing so and that in light of the correlation between the estimations presented by the General Director regarding the competition map without the merger and the position taken by Bezeq regarding this subject before the Grunau Commission, it was appropriate to attribute greater weight to these comments than the Tribunal did. Similarly, and as noted above, Bezeq is already currently at the peak of an expensive upgrading process to the NGN network, without it having been promised the regulatory horizon which it sought to receive in the position paper that it had presented to the Grunau Commission. Under these circumstances, I do not believe that Bezeq can rely on the conditions that it had presented to the commission (which, as stated do not include the approval of the merger) as the basis for an argument that it will not carry out another process that will put the NGN into use as an infrastructure for the provision of IPTV services as well.

34. Additional subjective proofs that were presented, indicating that there is reasonable likelihood that Bezeq will compete in the infrastructure market by providing IPTV services without the merger, can be found in the two presentations made by the TASC consulting firm (hereinafter: the *consulting firm*), which summarize an economic paper that it prepared for Bezeq without any connection to the proceeding being conducted in the Tribunal. The presentations are dated May 2006 (a year before the submission of the position paper to the Grunau Commission and some three months before Bezeq's application to the General Director for approval of the merger). The first presentation is entitled "Bezeq's IPTV Strategy" (hereinafter: the "*first presentation*) and the second presentation is called "Bezeq and Yes: Future Ownership Alternatives (hereinafter: the *second presentation*). The first presentation analyzes the share of paid multi-channel television broadcast in Israel compared with other markets in the communications field, and it notes that the trend in the market is beginning to indicate a turn in the direction of Hot. It also states that there is an urgent need to provide a solution to Hot's abilities concerning VOD service, triple play service packages and content. The presentation further indicates that many fixed communications

companies throughout the world have begun to enter into the multi-channel television broadcasts market through IPTV technology, primarily in order to protect their market share in the fields of telephony and Internet. The presentation describes Bezeq's need to establish a television branch and Bezeq's business possibilities in relation to Yes. The presentation reviews three possibilities in relation to Yes - the possibility of selling off the Yes holdings; the possibility of moving up to control of Yes; and the possibility of preserving the existing situation in the short run and taking action within a range of several years. In each model, the proposal is that Bezeq should establish an IPTV infrastructure and enter into the content field – either through the purchase of full control of Yes or through its independent entry into the market, in accordance with the strategy that Bezeq seeks to follow in relation to Yes. Regarding the last possibility - i.e., the preservation of Bezeq's current holdings in Yes (the situation with is relevant for this matter in light of the stipulation reached by the parties regarding the possibility that the merger is not approved) - one option is presented, which is the establishment of an IPTV infrastructure along with independent entry into the content market with or without Yes – ("create retail TV operation (with or without) Yes." The conclusion set out in the first presentation is that "a physical and commercial connection" between multi-channel television broadcasts and broadband services can improve and strengthen Bezeq's share of the general market in the areas of its operation, and provide a solution to the encroaching of other communications companies on Bezeq's market shares in telephony and Internet, even though the second presentation states that Bezeq's activity in relation to its holdings in Yes will not have any impact on the telephony or Internet markets: "Under any of the options we don't foresee a major impact to the telephony or broadband market share." (Page 28 of the second presentation.) These documents, which were prepared for Bezeq from the strategic-economic perspective and not for the purpose of conducting the legal proceeding, can serve to indicate that according to the consulting firm, the logical economic option for Bezeq, if the merger is not approved, is to enter the field of multi-channel television broadcasts independently – both as the owner of the IPTV infrastructure and as a broadcaster.

The Tribunal did not attribute any evidentiary weight whatsoever to these presentations and noted: "We have not been persuaded that the presentations from Sh'chori (the CEO of the consulting firm) represent a decision made by Bezeq to do what is alleged, since we have not been shown any decision made by the Bezeq board of directors as a consequence of the presentation." It added: "It has not been clarified that from Bezeq's perspective, Sh'chori was the party that exhausted the examination of economic feasibility, and that following his examination, a positive decision was made by the board of directors. As I noted above, this demand made by the Tribunal to find a "smoking gun" among the documents of the companies seeking to merge is unreasonable and unnecessary. There is no need and no obligation to show that the board of directors of a company seeking to merge has made a decision to carry out an independent competition move which was certainly not, at the stage of the submission of a notice of merger, its preferred option. There could be cases in which subjective evidence will not be found at all but it will still be possible to show, through objective proof, a reasonable likelihood of the existence of an actual potential competitor absent the merger. In the present case, the presentations that were brought to the Tribunal – especially in light of the position taken by Bezeq regarding the same matter one year later before the Grunau commission – do indicate the fact that Bezeq carried out a serious economic analysis and examined, *inter alia*, the possibility of entering into the infrastructure market, and to the extent possible, into the content market as well, and it later on even adopted a position that promoted such a process, which it saw fit to present to the government commission dealing with the subject. (Regarding the existence of a serious examination of the possibility of entry into the market by an actual potential competitor as proof of the ability to apply the doctrine in a concrete case, see Areeda & Turner, Antitrust Law, s.1121b). In my view, all of these, along with Bezeq's actions in promoting the construction of the NGN network, are enough to indicate a reasonable likelihood that without the merger, Bezeq is an actual potential competitor in the market of infrastructure for the provision of IPTV services, even given its current holdings in Yes. Since Bezeq did not, through any of its evidence, contradict the existence of this probability (and its general argument regarding the market's being saturated is not sufficient for this purpose), the Tribunal should have held that such a likelihood did exist.

35. An additional condition presented by the [application of the] actual potential competitor doctrine is that an alternative entry into the market, other than through the merger, is preferable to the merger from a competition perspective. In our case, the General Director indicated that Bezeq's independent entry into the infrastructure market presents remarkable

competition advantages: (a) it is expected to increase the number of the relevant players from two to three in the near future, and this is a real development in terms of reduction of concentration in this market, given that the entry of a different technology other than IPTV into the infrastructure market, in addition to cable and satellite, is not likely to happen in the short term; (b) in general, competition between infrastructures is preferable to competition on the infrastructures (even the Grunau Commission noted that this model naturally restricts the number of the relevant players to the number of infrastructure owners, and that in a saturated market characterized by a small number of competitors, it is not clear that this is the most effective model of competition, and according to the Commission the desirable solution in these markets is the development of a wholesale market in the context of which providers can lease or operate on other parties' infrastructures – see: Grunau Commission Report, pages 5-6, 77; Rosen's testimony on June 18, 2008, p. 58); (c) an additional independent infrastructure with new technology can contribute to the improved quality of the broadcasts (which is dependent on the capacity of the infrastructure and on the technology which it uses), improved variety of broadcasts (which is dependent on the capacity of the infrastructure and on the number of channels which it can bear), and the correlation between consumer demand and supply (uniform broadcasting, channel packages, a VOD channel, consumption of isolated channels, and more); (d) Bezeq's independent entry into the *infrastructure market* only, using the IPTV technology, has advantages for the *content market* as well; to the extent that Bezeq will construe the IPTV network and will not be able to broadcast on it itself because of the statutory and regulatory restrictions discussed above, there is potential for an additional expansion of the number of broadcasters who can broadcast at the same time, in light of the technological abilities of the IPTV network, and this would reduce the barriers to entry into the content market; (e) Bezeq's independent entry into the infrastructure field as a third and independent competitor can bring about a reduction in Hot's and Yes' market power in terms of purchasing contents from content and channel producers.

In contrast, if the merger is approved, Bezeq will become the controlling shareholder of Yes as the party holding 58.36% of the shares in it, and it will hold the right to appoint most of the members of the board of directors, compared to its current right as the owner of 49.78% of the shares to appoint only 5 out of 11 members of the board of directors. Bezeq's crossing of the 50% holding line with respect to its holdings in Yes has a far-reaching significance in terms of its ability to steer Yes' business' program and to make use of it as a tool for promoting its own interests, compared to the current situation in which Yes is free to be conducted according to its own economic interests, as distinct from Bezeq's.

Section 278 of the Companies Law, 1999, provides as follows regarding this matter:

> „(a) A director who has a personal interest in the approval of a transaction, other than a transaction as referred to in s.271, that is brought before the audit committee or the board of directors for approval, shall not be present during the deliberation and shall not take part in the voting of the audit committee and of the board of directors.
>
> (b) Notwithstanding the provisions of subsection (a), a director may be present at a deliberation of the audit committee and may take part in the voting if the majority of the members of the audit committee have a personal interest in the approval of the transaction; likewise, a director may be present at the deliberation of the board of directors and may take part in the voting if the majority of the directors of the company have a personal interest in the approval of the transaction.
>
> (c) Where the majority of the directors on the board of directors of a company have a personal interest in the approval of a transaction as aforesaid in subsection (a), the transaction shall also require the approval of the general meeting.'

Therefore, in the current situation, Bezeq's directors [on the Yes board] could not take part in a vote relating to a transaction between Yes and Bezeq. However, an increase to control of beyond 50% of Yes and the appointment of the majority of the directors by Bezeq – upon the exercise of the options and the occurrence of the merger – would lead to a cancellation of the obligation to abstain pursuant to the above-mentioned s. 278 (b). It should be mentioned in this context that after the 50% holding line is crossed, Bezeq can increase up to a holding of 100% of Yes, apparently without an additional point of control on the part of the General Director (according to the guidelines that she follows). One possible scenario in this situation is that Bezeq will work to make the IPTV technology, instead of the satellite infrastructure, available to Yes. In terms of the relevant market, this does not change the number of players in the market – the market in this situation was and will remain a duopoly, but instead of a satellite infrastructure, Yes will operate as a content brand on the IPTV infrastructure and this situation could lead to the atrophying of the satellite infrastructure. (Regarding this matter, see Farkash-Hacohen, 164-165). Even if it can be said that the exchange of one infrastructure (satellite) for a more advanced one (IPTV) has advantages in terms of the quality of the broadcasts and the level of customer service (a definite advantage is the possibility of adding VOD service on this infrastructure), the scenario described above will establish the current duopolostic structure of the market, as compared to the competition advantages that we noted above which the market will gain in the absence of the merger, upon Bezeq's entry as an additional competitor with the IPTV technology.

An additional possible scenario that could take place if the merger is approved, which would have consequences from a vertical perspective (in contrast to the competition advantages we noted above regarding what would happen if the merger were not approved), deals with the foreclosure of content providers competing with Yes, who will seek to "ride" on Bezeq's IPTV infrastructure. This would happen even if Bezeq were to open this infrastructure to third parties ([based on the] open access [model]) after the merger's approval and the construction of the infrastructure. We refer here to substantive foreclosure in the form of damaging the quality of the broadcast (compare *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer to Peer Applications*, 23 F.C.C. Rcd 13028 (2008)) or by way of the cost set for the service (a price squeeze) [- practices that Bezeq could adopt] in order to preserve the duopolistic structure of the multi-channel television broadcast market vis-à-vis the end consumer and in order to preserve the market power of Yes, which will be controlled by Bezeq following the merger, vis-à-vis the content producers and the independent channel producers. Although Bezeq already has an incentive for foreclosing the market given the size of its holdings in Yes, this risk will grow in the face of the proposed merger, which will give it control over Yes and will increase its ability and its interest in carrying out such a process.

To sum up: two of the key conditions for establishing the potential competitor doctrine are present here – there is a reasonable likelihood that Bezeq, as a potential competitor, will enter into the multi-channel television infrastructure market and will provide IPTV services, and it has been proven that it has the technological ability and the economic incentive to do so in the short term. Additionally, it appears that Bezeq's [independent] entry into the multi-channel television infrastructure market as stated presents considerable advantages over the situation that would develop in this market if the merger is approved.

We still need to examine whether such a similar result could be achieved through the approval of the merger with conditions. As may be recalled, the Tribunal stipulated conditions for the merger in this case, even though it believed that there had been no proof that there was a reasonable risk of significant damage to competition. The General Director and Eurocom as well both correctly noted in their appeals the difficulty that the ruling raises in this context, and I will discuss this below.

The Tribunal's authority to stipulate conditions for a merger which does not create a reasonable risk of significant damage to competition

36.The Tribunal, as stated, found that the merger under discussion does not give rise to a reasonable risk of significant damage to competition, as the Tribunal noted:

> „After examining all the material before us, including the testimony of the expert Rosen, we have reached the conclusion that the General Director's vision that if the merger is not approved, an independent competing television broadcast infrastructure will arise is insufficiently grounded . . .
>
> The economic analysis at the basis of the General Director's position assumes future developments for at least some of which there is only a low probability of their taking place. In our view, all together, even if it is possible to see a risk of significant damage to competition, it cannot be said that this is a risk for which the likelihood of its realization exceeds 50%. Therefore, *we cannot agree with the General Director's position that the merger will significantly damage competition.'*
>
> (Emphases added, paras. 9 and 11 of the decision.)

Nevertheless, the Tribunal saw fit to stipulate conditions for the merger's approval, for a situation in which the assumptions that are at the basis of the General Director's position are realized, even though, as stated, it found that the chance that these assumptions would be realized is low, stating as follows:

> „We accept that increasing the percentage of Bezeq's holding in Yes strengthens Bezeq's interests in Yes, and we agree that it is important to first ensure the construction of the IPTV infrastructure, and if it is constructed, to ensure that it is made available to other entities that compete with Yes. *Therefore, in the event that all suppositions at the basis of the General Director's position – the probability of which we have held is low – are indeed realized,* we have seen fit to establish conditions for the approval of the merger, based on our view that the significance of the process of Bezeq's achievement of control over Yes can be significantly reduced. Furthermore, the appellant has agreed to the principle of their imposition, and has even agreed to several of them concretely.
>
> . . .
>
> At the basis of the conditions which we intend to stipulate for the merger is, therefore, our evaluation that even without the merger, there are competitive restrictions in the market with which we are dealing, due to Bezeq's existing holdings in Yes. Therefore, the imposition of conditions – which is made possible by the fact that Bezeq and Yes need the Tribunal's approval – makes it possible to prevent significant damage to competition, and even to improve competition in the market, *even if, in the unlikely event, all of the General Director's concerns are realized.'*
>
> (Emphases added, paras. 11 and 69 of the Decision.)

The Tribunal was aware of s.21 of the Restrictive Trade Practices Law, which provides as follows:

> "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;

(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".

Nevertheless, despite the section's language, the Tribunal believed that it could impose conditions for the merger, for which it was necessary to presume "significant damage to competition for the purpose of imposing them." It further believed that where the Tribunal does not completely rule out the possibility of the realization of risks that the General Director has pointed out, conditions can be presented for the merger's approval which can promote a reform that benefits competition, provided that they "basically prevent the damage to competition."

I believe that the Tribunal erred in doing this.

Section 21 of the Restrictive Trade Practices Law clearly distinguishes between a merger that does not raise a risk of significant damage to competition, which the General Director is required to approve and a merger that does raise a reasonable risk of significant damage to competition or to the public interest regarding one of the matters listed in the section, and in such a case, the General Director may act in one of two ways – she can approve the merger while stipulating conditions that remove the risk of significant damage to competition; and if such conditions cannot be established, the General Director must oppose the merger. Section 22(c) of the Restrictive Trade Practices Law provides that "the Tribunal may reaffirm the General Director's decision, revoke it or amend it," but its authority to do so is also subject to the provisions of s.21 of the Law and to the normative framework established there (see *Yagur*, 639). In other words, the Tribunal, when adjudicating an appeal of a General Director's decision, does not have absolute discretion to order as it wishes and it cannot stipulate conditions of a merger's approval which, according to its own determination, does not give rise to reasonable risk of significant damage to competition in the relevant industry. Any other approach changes the balances of clashing interests as established in the Restrictive Trade Practices Law that relates to them, and changes the statutory arrangement created in s.21 of the Law which expresses these balances. These interests are the encouragement of competition and the protection of the consumer on the one hand, and the preservation of freedom of occupation and the property rights of companies seeking to merge, on the other hand. Bezeq's agreement to the imposition of the conditions under the circumstances that developed is not sufficient to grant the Tribunal authority in a case in which it has not been given that authority. However, in light of the conclusion we have reached according to which, unlike the Tribunal's determination, there is in this case a reasonable risk of significant damage to competition according to the actual potential competitor doctrine, I did not see a need to decide what would be the legal fate of the conditions established by the Tribunal if we had reached a different conclusion (given the fact that Bezeq has not filed an appeal against the stipulation of the conditions).

37. The principle that we follow regarding the remedy was well defined by the Tribunal, by the honorable Judge M. Shidlovsky-Or in *Yehuda Pladot v. General Director* [12] , in the following words: "It is necessary to exhaust the possibility of stipulating conditions for the merger before concluding that it should not be approved, by virtue of the principle of proportionate harm to basic rights – in this case, the [right to] freedom of occupation and freedom of property." (*Yehuda Pladot v. General Director* [12] at para. 70.) Therefore, we need to examine whether it is possible to avoid the result of a merger disqualification through the imposition of conditions for its approval and we also need to examine whether, for this purpose, the conditions set by the Tribunal can be adopted. As a rule, there is a tendency among antitrust authorities throughout the world to prefer structural conditions over behavioral ones as a response to the risk of damage to competition. (See: UK Merger Remedies: Competition Commission Guidelines, para. 2.14 (Nov. 2008); EU Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98; U.S. Department of Justice Antitrust Division Policy Guide to Merger Remedies at III.A (2004)). But this is not a rigid rule. (See: Katri Paas, *Implications of the Smallness of an Economy for Merger Rememdies,* Juridica International XV (2008)). In the *DBS v. Cable and Satellite Broadcasts Council* [4], the Tribunal noted that the regulatory policy and the standard remedies in the communications industry are based on open access for independent content providers to subscribers, and on restrictions on the scale of ownership of channels, and not on absolute separation between transmission and content (*DBS v. Cable and Satellite Broadcasts Council* par. 60 [4]). In the case before us, the main purpose which is achieved in preventing the merger is the addition of a competitor in the infrastructure market. This

is a contribution to competition from a horizontal perspective through the weakening of the concentration in the existing duopolistic market, and it is hard to think of a structural condition in this case that will achieve this purpose. The behavioral conditions imposed by the Tribunal in this case raise significant difficulties, and not only because they require continued supervision regarding the activities of the merging companies and because the supervisory mechanism established in these conditions is complex and inefficient and relies to a great degree on future regulatory determinations by "the parties authorized by the Communications Law" who are supposed to give it substance even though these parties were not at all involved in this proceeding and it is doubtful whether it is possible, in this way, to impose on them powers and duties to determine "regulatory conditions for an entity which is broadcasting television broadcasts to have open access to Bezeq's infrastructure" and to determine "uniform and reasonable usage fees." The General Director expressed her position to the Tribunal and before us, that under the circumstances of this case, the competition risk cannot be resolved through the imposition of behavioral conditions that seek to ensure open access, because of the structural difficulty in ensuring such an arrangement where a single party (Bezeq) controls two out of three infrastructures in the market (the IPTV and the satellite infrastructures, following the merger and the purchase of control of Yes). After examining the conditions stipulated by the Tribunal and all the arguments made by the parties in this context, I have not been persuaded that we can avoid disqualifying the merger in this case through the imposition of conditions. I therefore propose to my colleagues that we grant the General Director's appeal, order that the Tribunal's decision be cancelled and restore the General Director's determination opposing the merger. I also propose to cancel the order charging the General Director with expenses, which was included in the Tribunal's ruling dated March 23, 2009 regarding the petition submitted by the General Director for a stay of the decision's implementation. In light of the result that I have reached, Bezeq's counter-appeal against the size of the bank guarantee it was charged to present as part of the Tribunal's conditions has become irrelevant, and I recommend to my colleagues that we order its denial. Finally, I propose to my colleagues that we do not issue an order concerning expenses in this case.

Deputy President E. Rivlin

I join in the clear, comprehensive and thorough decision of my colleague, Justice E. Hayut. I also believe that once the Antitrust Tribunal found that the merger between Bezeq and Yes does not do significant damage to competition, it was not authorized to subject the merger to the conditions which it had stipulated.

I also believe that the Tribunal erred in its said conclusion that the merger does not significantly damage competition and I agree that for the purpose of determining this damage in this case, we need to take into consideration the potential competitor in the market doctrine.

Once we take into account the likely potential damage to competition due to the merger, we tend towards, in this case, a disapproval of the merger. It appears that the Israeli economy's unique characteristics force us to add additional weights onto the scale – the scale that represents the burden of proof which is imposed, in my view, on the party seeking approval of an action which is suspected of causing damage to competition.

Indeed, certain mergers can contribute to a small-sized economy such as Israel's, but it seems that specifically because of the harsh consequences involved in the reasonable possibility of damage to competition in such an economy, it is appropriate to increase the weight of the potential or actual damage to competition test, as an appropriate means of measurement with regard to an approval or disapproval of mergers. In this matter, I accept the position taken by the scholar Barak Orbach ("Practical Objectives of Antitrust Law" in *Legal and Economic Analysis of the Business Antitrust Laws* 84-85 (Vol. 1, M. Gal and M. Perlman, ed., Nevo 2008). The Restrictive Trade Practices Law of 1988 expressly adopted the business competition principle as a guiding criteria for examining company mergers (s.21 of the Law). Thus, alongside the damage to competition measurement, the Law also uses the damage to the public test, this damage being defined in the law as damage to price levels, product quality and the quantity of the asset or of the service provided – i.e., damage to specific competition characteristics. In this context of company mergers, the Restrictive Trade Practices Law did not adopt the economic efficiency measurement, and it is doubtful that it can be seen as a competing means of measurement as compared to the "membership principle". (See B. Orbach, *ibid.*, pp. 106-107.)

As my colleague Justice E. Hayut wrote, there was sufficient evidence before the Tribunal to establish that the merger in this case could lead to future significant damage to competition, because it would take a potential competitor out of the market as a result of the merger. The purpose of the merger here is suspect because of its potential for damage to competition and the burden which is imposed – in my view, on the appellant – to remove this reasonable suspicion has not been met. At any rate, as my colleague held, the positive evidence brought in this case proves the said likely damage – wherever the burden of proof is placed and however heavy it is. I agree, therefore, with the decision of my colleague Justice E. Hayut, that the IAA General Director's decision should be re-instated.

Vice President

Justice E. Rubinstein

a. After review, and not without some ambivalence, I join the comprehensive and scholarly opinion of my colleague Justice Hayut, both regarding the result that she reached and the main part of her reasoning, other than with regard to one subject which will be described below and which does not change the general picture. I wish to add several comments.

b. As litigants who do their job, the parties did not leave any stone unturned, and for this purpose, freedom of expression, among other things, was recruited for the cause. I will first say that the subject before us is an economic one by nature - Bezeq's efforts to earn profits, Eurocom's efforts to make a claim for itself and the General Director's efforts regarding the maintenance of competition so that the public can pay less. Not for nothing did my colleague Justice Naor write in the introduction to the book, *Legal and Economic Analysis of the Business Antitrust Laws* (Hebrew), Vol. A, 2008 at p. 15, that "in the field of antitrust, the legal analysis is entwined in the economic analysis, which will serve as a guide in examining the impact of business behavior on competition in the market, in light of the market's structure and its conditions." To the extent that we are dealing with economic entities, we are dealing with a war which although it does not involve a clash or swords, with the firing of shells, or the launching of fighter planes, it is nevertheless drenched in money, and it goes as a war does. The regulator's function is not always a beloved one, and he is frequently presented as being heavy-handed, as placing burdens on businessmen, etc. However, it was the legislature that imposed on the regulator – in our case, the General Director – the job of the Flemish boy who put his finger in the dam – [i.e.,] the defense of the public interest, regarding either the area of competition or the additional areas listed in s.21 of the Restrictive Trade Practices Law, 1988. As my colleague the Vice President noted, "the Israeli economy's unique characteristics force us to add additional weights onto the scale – the scale that represents the burden of proof which is imposed, in my view, on the party seeking approval of an action which is suspected of causing damage to competition." In using the phrase "the Israeli economy's unique characteristics," my colleague did not specify [the characteristics to which he referred], but as Justice Naor wrote, (*ibid.*) and as was also cited by Justice Hayut, we have to deal with "the conditions in Israel and of its residents." "I sit among my people." (Kings II, Chapter 4, Verse 13). "The conditions in Israel and of its residents" here mean that even if we do not use analyses from the social sciences, the Court must take a broad view regarding the public interest.

c. My hesitation come from the fact that the lower Tribunal did very thorough work and gave detailed reasons for its decision, and the balancing effort it engaged in based on its belief that the setting of conditions for the merger and for Bezeq's control of Yes would reduce the danger for competition, against which the Director was struggling, even though the Tribunal did not believe that a danger for competition had been sufficiently proven. I will note already here that in my view – and in this my view is different from my colleague's, to a certain degree – the Tribunal could have established conditions such as this for the merger. In my view, sections 21 and 22 of the Law are to be interpreted broadly – i.e., where the Tribunal seeks to meet its responsibility regarding a doubt and to add an extra layer of security and thus to pacify the Director who believes there is a danger for competition, it should be allowed to do so, within the language of s.22(c): "The Tribunal may reaffirm the Director's decision, revoke it or amend it." We should recall that the Tribunal has acquired expertise over the years which could certainly constitute a legitimate and appropriate source for constructive changes in decisions, as needed. In my view, the decision in *Director v. T'nuva* [1] at 213 supports this (see the comments of President Barak at page 228); as may be recalled, in that case as well, the Tribunal also held that there was no significant damage to competition in the proposed merger, and the Tribunal nevertheless stipulated conditions and its decision was upheld. In this case, however, as we have found that there is a risk of damage to competition, it is not necessary to expand this point further, but I saw fit to note my opinion, and I believe that this does not contradict the position of the scholar Yitzchak (Tzachi) Yagur (Hebrew), in *Antitrust Laws* (Hebrew)(3rd ed. 2002), at 639, according to which it stands to reason that the

Tribunal should consider, in this context, those matters listed in s.21 of the Law.

d. Why did I choose to join my colleague regarding the matter itself? Because of competition, in its purest form, the danger to which I do not believe the Tribunal's decision sufficiently resolves.

e. Indeed, different considerations are involved in the laws of mergers; see the recent discussion by Professor Michal (Shitzer) Gal of the substantive test for examining the approval of a merger, in her article, "Justinian's Lesson: Required Reforms in the Restrictive Trade Practices Law," *Hamishpat* 13 (2009) (Hebrew), 67, at pages 83-87; the author supports (at pages 84-85) a broad interpretation regarding the subject of mergers, like the position taken by the Antitrust Tribunal as headed by Judge (previous title) Naor, in *General Director v. T'nuva* [1] . According to this approach, competition is not the only aspect [to be considered], and the General Director and the Tribunal may look at the economic advantages of the merger. In AT 2247/95, *supra*, this Court left this issue as requiring further review (at page 231 of the ruling). According to the author (at page 86), this interpretation should also be adopted in a statutory amendment. I mention this in order to point out the complexity in this matter. See as well, the words of the scholar B. Orbach, "Objectives of Antitrust Law: Practical Rules" in *Legal and Economic Analysis of the Business Antitrust Laws* (Hebrew), *supra*, 63, 84-85, which my colleagues referred to, and his discussion (at page 79) of the report of the 1975 Commission on Mergers and Conglomerates, chaired by Prof. Joseph Gross, but it is clear that the Law's main road, the first of its actions, and the core of the policy in these matters, is competition, and sometimes because of the public good, it is placed in preference to other subjects with important values. For example, I recall how, as Attorney General, I had great doubts in determining the State's position in CFH 4465/98 *Tivol v. Chef of the Sea* [6] at 56, when in my heart I began with the traditional values noted by Justice Tirkel in CA 6222/97 *Tivol v. Minister of Defense*, [6] at 167-68 - and see his comments in the rehearing at p. 112 - but I deferred to the principle that the legislature had preferred in this issue, that competition promotes the public good (and see the opinion of then Justice M. Cheshin in the majority opinion in the rehearing, at page 108 and at page 111.)

f. And therefore, as the authors Gal and Menachem Perlman noted in their article "The Importance of Legal and Economic Analysis of the Restrictive Trade Practices Law," in the book cited above, at page 22, "there is no shortage of examples of the benefits of competition for the Israeli economy. Thus for example, when the international telephone service market opened to competition, Bezeq's prices dropped by some 70% – Bezeq having been the only entity operating in the industry until competition opened up." And see also the comments of President Barak in Civil Appeal 2247/95 *supra*, at page 231 (cited by the authors Gal and Perlman at page 26), that "free competition is a clear public interest . . .it is a cornerstone of the democratic legal system . . . antitrust laws are the „Magna Carta' of consumer rights and free competition." The standard of damage to competition was, at its core, adopted in the Law's s.21, which placed this subject as the first and foremost matter to be considered in providing a ground for objecting to a merger, even though additional considerations were added such as damage to the public, which the author Gal proposes should be eliminated ("Justinian's Lesson," at page 86) as they are at any rate a part of damage to competition. In any event, the considerations involved in economic efficiency, which Professor Gal mentions in her article as part of the balancing picture, are not, at their core, relevant to this case. We are dealing with an issue of *competition.*

g. In my view, as an end-of-the-day judicial policy, if there is a real risk of damage to competition, this must be expressed in the relevant decisions in order to be consistent with the legislative intent. And I dare to say that even where the scales are balanced or are close to being balanced – it could be that in this case they are close (given the lower's court's stipulated conditions but the risk nevertheless remains – the decision must be for the benefit of the interest of competition. Certainly, according to the actual potential competitor doctrine, which I will allow myself to join in supporting upon the fulfillment of its conditions, as my colleague wrote in paragraph 35 of her opinion, human nature does not change for the better, including when the matter under discussion is money. And we are dealing with a company, Bezeq, which has been declared a monopoly more than once – as my colleague described. I would add that in my view as well, the burden to prove that the merger will not benefit competition is imposed on the General Director, and in this case, the General Director has met that burden. I also do not believe that the expert opinion of Daniel Rosen contradicts this. I add a value-based perspective to this; even if we do not speak of the high value of freedom of expression and the impact on that value, it is easy for anyone with intelligence to see that the more competition there is, the better chance there is for freedom of expression to flourish.

h. A key point of course in this matter is the construction of an IPTV infrastructure. After reviewing the material, I believe that it is indeed of great importance that Bezeq enter the multi-channel television market through that infrastructure. I myself was persuaded that Bezeq's position paper for the Grunau Commission (even if we do not attribute determinative weight to the presentation from the expert Sh'chori, although it should not be written off) speaks for itself. The position paper, as my colleague cited it, states that "Bezeq is prepared to be recruited to the cause of promoting the consumers' benefit regarding this important subject as well, and to commit to and to invest the significant amounts required to establish the IPTV services. Bezeq is prepared to invest significant amounts in the construction of the IPTV system . . .." Indeed, fairness requires us to point out it is also stated that there is a need for a "regulatory safety net" for this purpose – something which any cautious entity would have said, and which expresses a deep desire, if not an especially realistic one. However, I believe that the *strength of the commitment regarding IPTV in the position paper certainly overcomes the reservation regarding the regulator,* a reservation which is slightly similar to the "subject to the tender rules" language that we see in many advertisements regarding various different campaigns every day. I note that I have read the discussion of the Grunau Commission position paper in Bezeq's closing briefs, including the explanation that Bezeq was caught between the hammer of one regulator and the hard place of another regulator; but I have not been persuaded that the position paper did not present a very serious commitment to the IPTV matter.

i. I stress: I myself, here and in other cases, attribute great importance to the positions stated by the litigants. Indeed, the high and exalted words of recruitment to "the promotion of the consumer's benefit" can be taken with a grain of salt. But the fact of the commitment creates, in my view, a sort of "judicial estoppel"; see LA 4224/04 *Beit Sasson v. Shikun Ovdim* [9]. Elsewhere (CA 8301/94, *Assessing Officer for Large Enterprises v. Pi Glilot* [10] I had the chance to say the following regarding a particular litigant:

> „And it is therefore like the person who came to rent an apartment on Yarkon Street in Tel Aviv and asks the landlord, does the apartment get a sea breeze during the summer? And the landlord says: Certainly, here is the house and here is the sea, and then the renter asks, is there dampness in the winter from the sea? And the landlord responds: Of course not, where's the house and where's the sea? Similarly, the appellant holds both

> ends of the rope as stated, and claims one thing and its opposite in different places . . . if we want, we have before us a judicial estoppel in full legal form.'

(See also my comments in CA 458/06 *Stendahl v. Bezeq International Ltd* [10] (unpublished)

j. In light of all these, I join in my colleague's position (noting my above discussion regarding the interpretation of the Antitrust Tribunal's powers regarding the stipulation of conditions).

Justice

Decided as stated in the ruling by Justice E. Hayut

Given on August 20, 2009

Deputy President Justice Justice

Petition granted.
27 Elul 5768.
10 October 2007.