

Competition & Antitrust - Israel

Supreme Court overturns Antitrust Tribunal decision in precedential ruling

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Introduction

On August 25 2014 the Supreme Court published its [ruling](#) regarding an appeal filed by Azrieli Group – one of Israel's leading shopping mall groups – against an Antitrust Tribunal decision.

The Supreme Court ruling halts a gradual erosion in the scope of judicial review over decisions of the general director of the Israel Antitrust Authority (IAA).

This undesirable trend is illustrated, for example, by the 2006 Supreme Court ruling regarding the Dor Alon Energy/Sonol merger. The Supreme Court reaffirmed the basic rule that in reviewing merger decisions of the general director, the tribunal is to hold a *de novo* proceeding and re-examine the merits of the merger. However, the court added that due to the general director's high level of professionalism and expertise, such decisions should nevertheless serve as a starting point for the tribunal's review, and the facts and economic estimates underpinning such decisions are of significant value and should be regarded accordingly. The court's statements were interpreted as narrowing to some extent the tribunal's broad re-examination review of the general director's decisions which, until that point, reviewed the merger at hand almost as a first instance.

Other examples include tribunal decisions that have limited the right of perusal of appellants seeking to review materials upon which IAA decisions are based – both the IAA's internal documents and materials submitted to it by third parties – due to considerations of business-related confidentiality and trade secrets. These have further narrowed the right to access files, deviating from the mechanism introduced in the 2003 Supreme Court decision in *Ma'ariv*, based on which counsel for the appellant was granted access to the file subject to strict confidentiality undertakings. Introducing such restrictions to appeal proceedings, which do not allow an appellant or its attorneys to fully review all materials that are relevant to the general director's decision, hinders the appellant's ability to launch a well-founded appeal, which in turn limits the effectiveness of judicial review of the general director's decisions.

It is therefore unsurprising that in recent years companies have become reluctant to challenge decisions of the general director. Especially in the area of merger control, many corporations have waived their right to appeal to the tribunal or even withdrew their merger applications before a formal IAA decision.

The tribunal's decision in *Azrieli* placed another significant obstacle before parties to a merger that is denied by the general director. According to the decision, such parties must lock themselves into a binding merger agreement for the duration of the appeal proceedings, which often take many years, in order to preserve their right to appeal. However, the court overturned the tribunal's decision, thereby stopping the gradual erosion of the right to appeal the general director's decisions.

The judgment in *Azrieli* is also the first time that the Supreme Court has sustained an appeal against a tribunal decision which was not brought forth by the general director, but rather against him.

Facts

The case concerned an agreement between the Azrieli Group and Mashar, a company of the Fishman Group, whereby Azrieli would acquire the One Plaza retail power centre in Be'er Sheva, the location of an existing Azrieli-owned shopping mall.

In November 2012 the general director opposed the merger, reversing his earlier pre-ruling which had approved the transaction. As a result of the general director's opposition, Mashar publicly announced that it was cancelling the agreement with Azrieli and was actively searching for an

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alternative buyer.

Azrieli filed an appeal with the tribunal. The general director requested that the appeal be struck down, arguing that it had become theoretical as there was no longer a binding merger agreement between the parties. The general director held that even if the tribunal were to accept the appeal, the parties would need to seek his approval of any new merger agreement regarding the One Plaza centre.

The general director based his position, among other things, on notice given by Mashar that the agreement had been terminated, as his approval had been a condition precedent for carrying out the merger. However, the general director granted no practical significance to Mashar's statement that if Azrieli's appeal to the tribunal were accepted, there would be a reasonable possibility that the transaction would be carried out.

The tribunal dismissed the appeal, concluding that it had become theoretical upon cancellation of the merger agreement.

Appeal

Azrieli argued that the appeal was not theoretical, since there was still a possibility that the transaction would be executed if the appeal were accepted, and that the tribunal's conclusion that cancellation of the merger agreement (due to the general director's opposition) implied that the appeal lacked any practical significance was mistaken.

Additionally, Azrieli argued that from the outset appeals against the general director's decisions to oppose a merger were rare, in part due to the fact that merger transactions rarely survive the costly and prolonged challenge proceedings. Parties generally do not or cannot agree in advance that if a merger agreement is opposed by the general director, it will continue to bind them pending conclusion of all challenge proceedings. Parties are unwilling to be bound to a transaction which will be executed at an unknown date and under unknown circumstances.

As a result, the general director's opposition to a merger effectively terminates or renders non-binding virtually any merger agreement. Moreover, almost all appeals to the tribunal concern transactions which are no longer in effect, since merging parties are rarely obliged to carry out the transaction even if it is subsequently approved by the tribunal. Therefore, it may be concluded that an appeal against the general director's opposition to a merger is conducted to grant the parties the right, rather than the obligation, to execute a merger.

Decision

The court sustained the appeal, overturning the tribunal's decision and reinstating Azrieli's challenge against the general director's decision.

The court accepted Azrieli's arguments, holding that despite Mashar's cancellation of the merger, the challenge had not become theoretical; and that the tribunal had erred in concluding that it had no practical significance, based on the circumstances of the cancellation and Mashar's notice which indicated that a reasonable possibility of executing the transaction still existed. The court further accepted Azrieli's argument that the appeal was made regarding a concrete, unresolved dispute between Azrieli and the general director, which pertained to a specific case and was based on defined facts. Additionally, the practicality of the requested remedy was a question of measure. Even in the existence of a valid merger agreement, complete certainty does not exist in reality and is not a prerequisite for classifying the remedy as having operative significance.

The court further concluded, contrary to the tribunal's position, that when an appeal is sustained and the parties enter into a new agreement that does not differ substantively from the cancelled agreement, the general director's approval of the new agreement is not required.

Moreover, the court reaffirmed – retreating from the rhetoric adopted in the tribunal's *Dor Alon Energy/Sonol* decision – that the tribunal's judicial review of decisions of the general director is by no means ordinary. The tribunal is empowered by law to affirm, rescind or amend a decision of the general director and diverge from it even if the decision is not flawed in such a way as would justify intervention in an administrative decision according to the rules of administrative law.

Comment

Underlying the court's judgment is recognition of the centrality and importance of the right to subject an administrative decision to judicial review. In this context, the court stated that obstacles to the right of access to judicial proceedings might compromise the rule of law, the protection of fundamental rights and the individual's right to remedy the wrongs of other individuals or governmental authorities. Further, the broad powers of review granted by law to the tribunal to re-examine decisions of the general director and deviate from them as necessary give special reason for caution when dismissing proceedings *in limine*.

In the antitrust context in particular, the judgment is an important milestone as it may halt the erosion of the scope of judicial review over the general director's decisions. The judgment will allow merging companies whose transactions are blocked by the general director to challenge his position without being compelled to commit themselves to a binding merger agreement for the duration of the proceedings before the tribunal. It is hoped that this ruling will assist in restoring centrality and importance of fundamental rights. In particular, the right of access to courts, both in the antitrust context and more generally.

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