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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Out-of-Market Efficiencies in Competition Enforcement – Note by Israel

6 December 2023

This document reproduces a written contribution from Israel submitted for Item 12 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/out-of-market-efficiencies-in-competition-enforcement.htm.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

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Israel

1. Background – Competition and Efficiency Considerations in Israeli Merger Review

1. Israel's first competition law, the Restrictive Trade Practices Law – 1959, did not address the subject of corporate mergers. In 1975 a committee was appointed to study the possibility of subjecting mergers to some form of regulation. In its report,¹ the committee recommended regulation of mergers. The committee observed that while some countries base merger regulation solely on competition considerations, other countries balance competition considerations against additional considerations, in particular considerations of efficiency. The committee recommended that in Israel the latter approach should be adopted, i.e. that merger regulation should balance competition considerations and efficiency considerations (the committee appears to have believed that in many or most cases the two types of considerations would be in conflict with each other). The committee did not, however, offer any specific recommendations as to how the two types of considerations should be balanced, only that they should be carefully taken into account in determining whether each merger serves the public interest.

2. The committee's recommendations were implemented when the 1959 law was replaced by what today is known as the Economic Competition Law – 1988 (hereinafter: **the Competition Law**),² which (in addition to other significant changes) included a new chapter on merger review. Section 21(a) of the Competition Law provides:

3. The Director shall object to a merger of companies or stipulate conditions for the merger if in his opinion there is reasonable concern that as a result of the merger as proposed, competition in that sector will be injured significantly or the public will be injured in one of these:

1. The price level of an asset or service;
2. Low quality of an asset or service;
3. The quantity supplied of an asset or the extent of a service, or the regularity of supply and its conditions.

4. Section 21(a) does not contain any explicit mention of efficiency. Nonetheless, efficiency considerations would seem to be relevant to determining whether the statutory conditions for objection to a merger are met. For instance, in the case of a horizontal merger which would grant the merged company some degree of market power, efficiencies flowing from the merger could in theory counterbalance such market power and lead to the conclusion that the proposed merger would not lead to higher prices, lower quality, reduced output etc. as mentioned in section 21(a) of the Competition Law.

5. In the 35 years that have passed since enactment of the merger provisions, Israeli courts have addressed the relation between competition considerations and efficiency considerations in the merger context, but they generally have done so in dictum. With one

¹Report of the Committee on Mergers and Conglomerates, reprinted at 32 HaPraklit 559 (1979).

² Previously titled the Restrictive Trade Practices Law – 1988. As part of a 2019 amendment to the Law, it was re-titled as the Economic Competition Law. At the same time, the agency name was changed from the Israel Antitrust Authority to the Israel Competition Authority.

possible exception, no case has actually had to weigh an efficiencies defence in a merger case. In cases in which an efficiencies defence was raised, either no threat to competition was found, or the claimed efficiencies were not proven, or the court found some other reason why it was not necessary actually to decide the issue of the efficiencies defence.

6. In a 1991 decision, the Competition Tribunal referred to the committee's recommendation that merger review balance competition considerations and efficiency considerations, but ultimately it was not required to make any decision in this respect.³

7. In a 1995 decision, the Competition Tribunal held clearly that efficiency considerations must be considered, and that the Director erred in objecting to a merger without considering whether efficiencies expected to result from the merger would outweigh the injury to competition which the Director found would be caused by the merger.⁴ On appeal, however, the Supreme Court held that it was unnecessary to decide what role efficiencies should play in merger review, because in the case at hand no significant potential harm to competition had been demonstrated.⁵

8. In a 2006 decision, the Supreme Court recalled that previously it had found it unnecessary to decide what role efficiencies should play in merger review; in the case before it the Court once again found it unnecessary to decide, since the claimed efficiencies had not been proven.⁶

9. In 2007 the Competition Tribunal noted that no decision had yet been reached in the case law whether a merger which may harm competition may be approved on the basis of efficiencies expected to flow from the merger. The Tribunal found it unnecessary to make such a decision, since in the case before it the claimed efficiencies clearly were outweighed by the threat to competition which the merger posed.⁷

10. In 2009 two members of a three-justice Supreme Court panel explicitly indicated their belief that efficiency considerations are entitled to less weight than competition considerations and cannot overcome competitive harm which a merger may cause, but again the decision in the case did not turn on this issue.⁸

11. In 2012 the Competition Tribunal discussed at some length the question of whether efficiencies can justify approval of a merger which may harm competition. The Tribunal reached the conclusion that under the case law efficiencies cannot justify approval of a merger which may harm competition. Nonetheless, the court went on to note that even the merging parties did not argue that the claimed efficiencies would cause a reduction in price. To the extent that an efficiencies defence does exist in Israeli law, the Tribunal held, the one claiming such a defence must show that the merger will cause an increase in consumer welfare – and the merging parties had made no such showing.⁹

³ Case 5/91 Elite Israeli Food Industries et al. v. Osem Food Industries et al. (1991).

⁴ Case 2/94 Competition Director v. Tnuva (1995).

⁵ Case 2247/95 Competition Director v. Tnuva (1998).

⁶ Case 3398/06 Competition Authority v. Dor-Alon Energy in Israel et al. (2006), ¶¶31.

⁷ Case 8006/03 Yehuda Steel v. Director of Competition et al. (2007), ¶¶63-65.

⁸ Case 2082/09 Eurocom DBS v. Bezeq Israeli Communications Company (2009), separate opinions of Justices Rivlin, Rubenstein.

⁹ Case 36014-12-10 Caniel Packaging Industries v. Competition Authority (2012), ¶¶ 4-10, 68-69.

12. In 2019 the Competition Tribunal seemed to assume that an efficiencies defence can be cognizable in Israeli merger law. The Tribunal wrote that all agree that the burden is on the merging parties to show that the merger will create efficiencies sufficient to overcome the harm to competition which the merger may cause. In the case at hand, though, the Tribunal found that while there were indications that the merger would create efficiencies, these efficiencies had not been quantified and also it had not been shown that they would be passed on to consumers. In any event, the Tribunal found that no reasonable possibility of competitive harm had been shown, so it was not necessary to rule on the efficiency defence.¹⁰

13. Thus, the case-law in Israel has not produced a clear statement of whether an efficiencies defence can be recognized, nor has it produced a detailed statement of how – if at all – a claimed efficiencies defence should be evaluated. In no adjudicated case has an efficiencies defence actually been accepted.

2. The ICA's policy – only in-market efficiencies will be considered

14. The Israel Competition Authority (ICA) is required by law to publish its reasons for objecting to a merger. On a number of such occasions the ICA has indicated its willingness to consider an efficiencies defence, and it has detailed the requirements which such a defence would have to meet in order to be accepted; in all these cases, however, the ICA rejected the proposed efficiencies defence. In a 2001 decision the ICA wrote that in order to constitute a defence, efficiencies would have to be merger-specific and proven.¹¹ In a 2003 decision the ICA specified an additional requirement: the projected efficiency gain would have to be passed on to the consumer, in the form of improved quality or reduced price.¹² In a 2005 decision the ICA specified further requirements: the claimed efficiencies must be significant, must be realizable within a short time after completion of the merger and must benefit consumers in the same markets in which the competitive concerns arise.¹³

15. In 2011 the ICA published Guidelines for the Competitive Analysis of Horizontal Mergers, the final chapter of which addresses the efficiencies defence.¹⁴ As in its earlier decisions, the ICA stated that in order to be recognizable, claimed efficiencies must be proven objectively; must improve the merged company's ability and incentives to compete in a manner which will serve the public and find expression in the form of lower prices, increased quality, increased product variety or technological innovation; must be direct and merger-specific; must be significant and realizable within a short period of time after completion of the merger. The Guidelines state explicitly that savings in fixed costs ordinarily will not qualify for consideration.

¹⁰ Case 745-07-18 Bank Mizrahi-Tefahot v. Competition Director (2019), ¶¶ 215-224.

¹¹ Grounds for Objection to a Merger between The Blue Square Israel and Yarkon (Plus 2000) Food Wholesaling (2001), pp. 39-41.

¹² Grounds for Objection to a Merger between Yehuda Steel and United Steel Works (2003), p. 10.

¹³ Grounds for Objection to a Merger between Dor Allon Energy Israel and Sonol Israel (2005), chapter E.

¹⁴ Position Paper 1/11 in the matter of Guidelines for the Competitive Analysis of Horizontal Mergers (2011).

16. Additionally, the Guidelines require that a significant portion of the efficiency gain be passed on to the final consumer; in this connection the Guidelines state (emphasis added) "the extent of the efficiency gain passed on to the final customer must not be less in scope than the injury caused *to him* by the restriction on competition." This balancing of the efficiency benefit passed on to the consumer against the competitive harm caused to that same consumer reflects the ICA's position, as stated in its prior decision, that in order to be cognizable efficiencies must relate to the same markets in which the competitive concerns arise. The ICA's position is that the rationale for recognizing an efficiencies defence is that in some cases efficiencies arising from the proposed merger may be sufficient to prevent the consumer from being harmed by the anti-competitive effects of the merger; this rationale can exist only when the benefits occur in the same market in which the competitive concerns arise.