

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Israel

1. Introduction

1. The Israeli Competition Tribunal, established under the Economic Competition Law-1988 (hereafter – the "Competition Law"), is a significant part of the competition regime in Israel. Indeed, there is no doubt as to the far reaching importance of an effective judicial review system. This is more so the case, taking into consideration judicial review, which is conducted by a specialized tribunal, well equipped to engage in substantive deliberation on competition law and policy, such as the Israeli Competition Tribunal.

2. The Israeli Competition Tribunal has, over the years, acquired broad reaching, significant knowledge and expertise in antitrust and competition law. Accordingly, it takes a major role in the creation of case law and the development thereof, regularly delving into fundamental issues at the heart of antitrust and competition law.

3. Such a competition tribunal, which is able to oversee an agency's conduct, from a professional and knowledgeable standpoint – going beyond generally accepted administrative review standards such as due process, and procedural soundness – also insures that decisions made by the competition agency maintain their reasoned, well founded and measured nature.

4. This paper intends to provide an overview of the standard of review implemented by the Competition Tribunal, on decisions granted by the General Director of the Israel Competition Authority (hereafter also – the "General Director" and the "ICA", respectively), and certain developments thereof in case law. We will mainly focus on the Tribunal's standard of review, as reflected in decisions concerning merger transactions. We will precede the above, with a brief reference to the legal framework of the Competition Tribunal; and conclude with a few comments going forward¹.

2. The Israeli Competition Tribunal

5. The Israeli Competition Tribunal, which sits in the Jerusalem District Court, was established under Section 32 of the Competition Law, as a specialized Tribunal. The members of the Tribunal, are district court judges, which serve as chief and deputy chief justice of the Tribunal²; and representatives of consumer and economic organizations³. The Competition Tribunal, is subject *inter alia* to Sections 32-40 of the Competition Law, to regulations issued under these sections⁴, and to the Israeli Administrative Tribunals Law-1992 (hereafter – the "Administrative Tribunals Law").

¹ Note, that this contribution does not purport to address all aspects of the issue of the review standard implemented by courts over competition decisions in Israel.

² The Competition Law, Section 32(c).

³ Ibid, Section 32(d).

⁴ Antitrust Regulations (procedures in the tribunal and on appeal) - 1988

6. In essence, the Tribunal is vested with two main kinds of jurisdiction: First, as a court of first instance, adjudicating in proceedings initiated by the General Director and by any other relevant entity, on various issues of antitrust law. This includes for instance, the authority to divest merged companies, the authority to instruct a monopoly to divest part of its assets, and the authority to break up monopolies⁵; Second, as a court of appeals on decisions issued by the General Director. We will address hereafter, aspects concerning the standard of review, relating to the Tribunal's appellate jurisdiction.

7. In its capacity as a court of appeals, the Competition Tribunal is vested *inter alia* with the authority to deliberate appeals on merger decisions granted by the General Director⁶, appeals on declarations on a monopoly⁷, appeals on other declarations made by the General Director (concerning for instance, a restrictive arrangement)⁸; and appeals on a relatively new power vested with the ICA (as of 2012) – to impose administrative fines on corporations and on individuals with reference to certain violations of the Competition Law⁹.

8. Notably, the District Court of Jerusalem¹⁰, and not the Tribunal, is vested with exclusive jurisdiction over criminal antitrust proceedings¹¹. Administrative petitions against administrative decisions made by the ICA, are also not deliberated before the Tribunal, but rather before the Israel High Court of Justice. The standard of review of such administrative petitions, is generally limited to acceptable administrative review standards, such as due process, administrative correctness, reasonableness and proportionality of the decision petitioned. Both criminal judgments of the District Court and final Tribunal judgments are subject to appeal before the Supreme Court of Israel.

3. The Standard of Review over the General Director's Decisions

9. The Competition Law, sets forth in Section 22(c) titled "*Appeal on the General Director's Decision*" that the "*Tribunal may approve the General Director's Decision, revoke, or change it*". The Administrative Tribunals Law, sets forth in Section 37 that "*the*

⁵ The Competition Law, Sections 25, 30A, and 31, respectively.

⁶ Ibid, Section 22.

⁷ Ibid, Section 26(a) and 43.

⁸ Ibid, Section 43.

⁹ Amendment 13 to the (then titled) Israel Antitrust Law-1988, issued in 2012. See Chapter F1 of the (currently titled) Competition Law, concerning administrative fines. With reference to appeals on a decision to impose administrative fines, see the Competition Law, Section 50(13). Note, that in a recent amendment to the Competition Law, enacted on 1 January 2019, this authority was amended to reflect a significant increase, to a maximum administrative fine of NIS 100 million on a corporation.

¹⁰ According to a temporary order (one year as of 31 March 2019), excluding pending cases, criminal antitrust matters shall be deliberated before the Central District Court of Lod.

¹¹ Note, that with reference to criminal proceedings, as acceptable, the court is vested with the authority to convict defendants. It does so, according to the well accepted standard of "beyond reasonable doubt"; the burden of course, lies with the state.

tribunal is authorized to approve the decision appealed, cancel it and grant a different decision in its place, or return the matter with directions to the deciding authority".

10. Over the years, case law has addressed this legislative standard, *inter alia* in appeals of the General Director's decisions concerning merger transactions.

3.1. De-novo Standard of Review: Case Law

11. On 6 July 1994, the General Director published a decision, blocking a merger between the Slaughterhouse off-Ha'negev (a meat products factory agro cooperative society Ltd) and Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel, Ltd. This decision was appealed to the Competition Tribunal, which granted the appeal in part. In 1998, the Supreme Court of Israel upheld the Competition Tribunal's decision in the appeal, and set fourth that the Competition Tribunal has a broad review authority over the General Director's decisions, and that the Tribunal may review the General Director's decisions *de novo*¹². This set the tone for the subsequent case law of the Competition Tribunal – according to which its standard of review on the General Director's Decision, is a *de novo standard*¹³.

12. As apparent from the above, such a standard of review, is qualitatively and significantly different than the accepted standard of judicial review of an administrative authority, which is mostly limited to the administrative correctness, the reasonable and the proportionality of the decision (as referenced above regarding administrative petitions filed with the Israel High Court of Justice). In practice, the Competition Tribunal, delve into the questions arising in the appeal while analyzing the market definitions, the competition concerns examined by the General Director, and the remedies imposed.¹⁴

3.2. The Dor-Alon Case and Subsequent Case Law

13. The concept of the standard of review of the Competition Tribunal over the General Director's decisions took a certain turn in the Supreme Court's decision concerning the *Dor-Alon case*. This merger case, was brought before the ICA and was deliberated during 2005 and 2006. The case involved two companies in the fuel industry – Dor-Alon Energy Israel (1988) Ltd. and Sonol Israel Ltd., seeking the approval of the General Director for a merger transaction. In November 2005, the General Director issued a decision blocking the merger. Upon appeal to the Tribunal, the decision was overturned. The Tribunal approved the transaction subject to remedies. Finally, in 2006, the Supreme Court reversed the ruling

¹² Civil Appeal 2247/95 the General Director of Competition v. Tnuva Cooperative Center for Marketing of Agricultural Produce in Israel, Ltd (Nevo, 13.12.98) (Hebrew) (hereafter – the "Tnuva Case").

¹³ See for instance, Appeal (antitrust) 1/01 Bezeq the Israel Communication Company Ltd. v. the General Director of Competition (09.06.03); see in this regard also, Michal Halperin, On the Dor-Alon – Sonol Case – What Should Deliberation before the Antitrust Tribunal look like, E(2) Ta'agidim (2008) 69 (Hebrew). (General Director Halperin was a Partner in a private law firm at the time of the publication of the Article; prior to that she served as Chief Legal counsel of the Competition Authority when the General Director's decision on this merger was granted, and during the deliberation on the appeal submitted to the Competition Tribunal concerning the merger which is the subject of her paper).

¹⁴ Ibid, p. 64-5.

once again, upheld the General Director's Decision, and blocked the merger¹⁵. In this regard, the Supreme Court stated in the Dor Alon Case, *inter alia* as follows:

"...the decision of the authorized entity which is on appeal before the Tribunal, should be reviewed on the presumption that it is done according to the best professional considerations, and that the administrative correctness presumption applies to it. This is especially the case, concerning the General Director, which is a purely professional entity... such an authority has broad and deep theoretical knowledge in the various fields of antitrust... and an accumulation of years' experience which stems from vast enforcement activity in the field. The powers of the General Director are very broad, and the knowledge and expertise... have special weight.

Against this backdrop... the review of the General Director's decision in the framework of an appeal before the Tribunal, should grant its standing large weight, both theoretically and practically... Accordingly, it is in the power of the Tribunal to deviate from the General Director's decision, if it found that it made a mistake, and reach a different decision according to its best judgement, but it is never a clean slate ['opening a new page'] in the judicial process, as if there is no decision being appealed, and as if nothing occurred prior to the judicial deliberation. In light of this, I see a basic difficulty with the Tribunal's approach towards the General Director's decision, and with its presumption, as a starting point, that there is no need to 'devote time with the details of the General Director's decision to block the merger', in its language, and on the judicial line which it took, characterized to a great extent by a disengagement from the data, estimations and determinations of the General Director, in its first-original review of the case"¹⁶

14. As arises from the above, while the Supreme Court clarified that the Tribunal may deviate from the General Director's Decision, if it finds a mistake in it, it went on to put particular emphasis on the notion that the Tribunal should regard the General Director's decision as a *starting point* for the discussion. Furthermore, the Tribunal should assume that the General Director's decision is correct; it also recognized the importance of the knowledge, acquired expertise, and the cumulative experience of the authorized authority.

15. Similarly, in a more recent merger case, in 2012, concerning the General Director's decision to block a merger transaction, the Tribunal followed this spirit, and set forth as follows:

"It would be incorrect to say that the Supreme Court's intention was to narrow down the scope of judicial review, to an external review of 'reasonableness'... and such tests from the Administrative Law, the starting point of their implementation is that the court does not replace the judgment of the authorized administrative authority with its own judgment... indeed, as opposed to the judicial review characterizing Administrative Law, the Tribunal hears witnesses, and among its members are professionals who are not necessarily jurists. Not in vain did the

¹⁵ Antitrust (antitrust) 613/05 Dor Alon Energy Israel (1988) Ltd. v. the General Director of Competition (Nevo, 09.04.2006) (Hebrew), Civil Appeal 3398/06 the General Director of Competition v. Dor Alon Energy Israel (1988) and others (Nevo, 06.12.06) (Hebrew), (hereafter – together: the "Dor Alon Case").

¹⁶ The Dor-Alon Case, Para. 11-14.

Supreme Court state... that the Tribunal has broad authority to examine the General Director's decision brought before it... However, the Supreme Court clarified, that the proceeding before the Tribunal cannot presume that the General Director's Decision and its reasons, are without weight. The Tribunal does not deliberate the appeal as if it was a first instance administrative court...¹⁷.

16. Indeed, in its review of the General Director's decision, the Competition Tribunal examines the competitive analysis included in such decision, however, the Tribunal does *not* presume the decision has no weight. Rather, the decision serves as the starting point of the deliberation.

17. Another example can be found in a decision granted by the Competition Tribunal in December 2014, concerning an appeal on the General Director's decision to block a merger between two companies. The companies party to the proposed merger, were owners of underground parking lots located very close to the old city in Jerusalem¹⁸ – "*the significance of which cannot be overstated both as a national and international valuable touristic site*"¹⁹. In its decision, the General Director found *inter alia* that these are the two major parking lots used by visitors to the old city of Jerusalem and that the acquisition would establish a complete monopoly in the area and subsequently apposed the merger. An appeal was filed with the Competition Tribunal, which upheld the Director General's ruling. In its decision from December 2014, the Tribunal accepted the General Director's position. In its decision, the Tribunal examined the details of various aspects of the competitive analysis conducted by the General Director, including the static competition analysis and its conclusions and the remedies imposed by the General Director.

18. The Tribunal's implementation of this standard of review on the General Director's decision was also reflected in its decision from November 2016 on the *MeiEden Bar Case*²⁰ concerning a proposed merger between companies active in the branded filtered water bars. In this case as well, the Tribunal, which rejected the appeal, examined the General Director's competition analysis, with relation to various aspects, such as the product market, competitive concerns in connection with the proposed merger (the number of players in the market, entry to barriers, additional characteristics increasing competitive concern), the dynamic analysis, and more.

¹⁷ AT 36014-12-10 Kaniel Packaging Industries Ltd. v. the Competition Authority (Nevo, 10.06.12), para. 14.

¹⁸ The General Director's Decision: Reasoning of the Decision on the Objection to the Merger Between: El Rov Mamila Commercial Center (1993) Ltd. v. Karta Development Company Central Jerusalem Ltd. Antitrust 500579 (Hebrew); Antitrust 46791-03-14 El Rov Mamila Commercial Center (1993) Ltd. v. Karta Development Company Central Jerusalem Ltd. (4.12.2014) (hereafter together – the "Elrov-Karta Case")

¹⁹ The Tribunal Decision on the Elrov-Karta case, para. 33.

²⁰ The General Directors Decision: reasoning of the Decision on the Objection to the Merger between: Electra Consumer Product (1951) Ltd. and MeiEden Bar – First Class Services Ltd. (6.4.2016) Antitrust 500960; the Antitrust 43441-04-16 MeiEden Bar – First Class Services Ltd. v. the General Director (20.11.2016). (hereafter together – the "MeiEden Bar Case").

4. Looking Forward: Concluding Comment on Administrative Fines

19. On 2012, the General Director was granted with the authority, to impose administrative fines on corporations and individuals for certain violation of the Competition Law. The first appeals of the General Director's decisions concerning administrative fines are currently pending.

20. One point worth mentioning in this regard, is that the legislator opted to keep the same standard of review on decisions granted by the General Director concerning administrative fines, as for other decisions. Indeed, it stands to reason, that it did so *inter alia* taking into consideration the above developments in case law, and the accepted approach according to which the General Director's decision cannot be regarded, in the framework of an appeal, as weightless. Rather it should be regarded as the starting point of any deliberation, presumed to be correct, and furthermore as a decision granted by a professional entity, with a deep and broad theoretical knowledge in the various fields of antitrust, and with years of experience. Nevertheless, as stated above the Tribunal has broad consideration in deciding an appeal over the decision to impose administrative fines and it has the authority to intervene in the decision whether a violation of the Competition Law occurred and on the decision on the amount of administrative fine imposed.