

Cross-border mergers in view of Israeli Competition Law

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Merger transactions that spread across borders and require approval in multiple jurisdictions have become common practice in the current global commercial environment. Transactions of this sort give rise to complex questions involving the application of the Israeli Competition Law, and the unique conduct of the multiple sides and jurisdictions involved. This paper will offer some pragmatic insights with respect to this matter.

Antitrust law in Israel – the general framework

One of the fundamental objectives of Israeli Competition Law is to enable and facilitate competition in Israeli markets. This objective is embodied in the Restrictive Business Practices Law, 1988 (the 'Law'). The Law defines three types of restraints of trade: restrictive arrangements, monopolies, and mergers. This paper will focus on the latter.

The Law defines the term 'Merger of Companies' broadly by providing a non-exhaustive list that includes the full or partial unification of two or more companies in one of the following ways: an acquisition of the principal assets of a company; an acquisition of more than one quarter of the company's issued capital stock or of the voting power; the right to appoint more than one quarter of the directors, or receive more than one quarter of the company's profits.

Competition Law in Israel aims to achieve economic goals at the national level. Accordingly, it is designed to address competition issues in Israeli Markets. However, in today's global business environment, where it is not uncommon for economic and legal activity to spread across jurisdictions, the Law is required to address circumstances that exceed Israeli territorial boundaries. One significant example of such circumstances is cross-border merger transactions that influence competition within Israel and require the approval of not only the Israeli Antitrust Authority (IAA) but also the approval of other authorities in different jurisdictions.

Merger of companies

According to the Law a merger of companies will fall within the supervision of the IAA, if certain circumstances are met. A merger transaction must first be analysed to determine whether it constitutes a 'Merger of Companies'. It must then be determined whether a notification to the IAA is

required according to thresholds set out in the Law. If notification is required, it must be submitted by all merging parties to the IAA. Upon receipt of a notice of merger, the General Director of the IAA (the 'General Director'), after consulting with The Advisory Exemptions and Mergers Committee, will determine whether to approve the merger with respect to values protected by Law. Consummation of a merger that falls within the supervision of the IAA without an approval is deemed illegal and may constitute both a criminal offence and a civil wrong.

A cross-border merger – when does it constitute a 'merger of companies'?

Cross-border merger transactions involving a foreign company give rise to preliminary questions as to the circumstances under which the Law will apply.

As mentioned above, the Law applies to restrictive business practices that affect competition within Israel. Foreign companies are not excluded from the application of the Law. The mere fact that a foreign company is a party to a merger transaction does not in itself prevent the applications of the Law. The key question is this: what are the potential applications of the merger on Israeli markets.

First, one must analyse the circumstances under which a foreign company is considered a 'company' under the Law.

A 'company' is defined under section 1 of the Law *inter alia* as 'A company founded and incorporated in accordance with the Companies Ordinance [New Version]... including a foreign company so incorporated...'

The Law applies to a merger transaction with a foreign company in each of the following situations:

1. A foreign company that is registered in Israel - In such circumstances the Law applies explicitly.
2. A foreign company that is not registered in Israel but is affiliated with an Israeli company.

Under the circumstances of point 2, according to the draft guidelines drawn by the General Director with respect to filling notices of mergers (the 'Guidelines'), a merger transaction between such a foreign company (affiliated with an Israeli company) and an Israeli company, creates an indirect merger between the two Israeli companies. The Guidelines provide that when a foreign company holds more than one quarter of the Israeli company's issued capital stock, the Israeli company will be viewed as a party to any merger transaction involving the foreign company. The same rule applies when the foreign company holds one quarter of the voting power, the right to appoint more than one quarter of the directors, or the right to receive more than one quarter of the company's profits. The affiliation between the foreign company and the Israeli company does not have to be direct, and it can derive from property rights transferred to the foreign company and not merely from ownership. The above also applies when the foreign company holds negative control rights over the Israeli company, for example veto

rights or any other ability to block decisions due to the structure of the board of directors.

3. A foreign company that is not registered in Israel and is not affiliated with an Israeli company but maintains a place of business in Israel.

In point 3, according to the Guidelines, the foreign company is viewed as a registered foreign company. A foreign company may be considered to maintain a place of business in Israel if it holds significant influence over the conduct of a local representative. In considering this issue, the IAA will examine whether the foreign company has the power, according to the contractual relationship or in practice, to set the prices, the stock levels and other aspects of the business. In practice, this is a material examination of the relationship between the foreign company and the local representative, dealing with the nature and depth of the influence the foreign company holds over the local representative (whether titled an agent, a distributor, a representative or any other way). The more influence the foreign company holds over the local representative, the more likely it is that the foreign company be viewed as maintaining a place of business in Israel.

Cross border mergers – filing with the IAA

The Law requires the merging parties (including relevant foreign companies) to file a notification to the IAA when one of the following requirements is met:

1. As a result of the merger, the combined market share of the merging companies exceeds 50% of the relevant market.
2. The combined sales turnover of the merging companies in the financial year preceding the merger exceeds NIS150m (approximately US\$37m) and at least each of two of the merging parties' sales turnover exceeds NIS10m (approximately US\$2.5m).
3. One of the merging companies is a monopoly (a company will be considered a monopoly if it controls more than 50% of a certain market, either the product market or the geographical market).

In the case of a merger with a company conducting business both in Israel and overseas, the requirements apply solely with respect to the sales turnover of the company within Israel and with respect to the company's market share in Israel.

Cross border mergers – practical implications

Cross-border merger transactions that require multi jurisdictional approvals often require a wide and complex examination of the competitive effect involving markets around the world. Under such circumstances, parties to the merger transaction tend to cooperate in order to achieve the relevant approvals.

As a practical matter, when cross-border merger transactions require approval in multiple jurisdictions, the IAA will tend to take into consideration the decisions made by other authorities in different jurisdictions (primarily the FTC, DOJ and the EC Commission), considering there are no unique circumstances concerning the Israeli markets.

It is also common practice that parties in such circumstances waive their right to confidentiality with respect to information provided to competition authorities, in order to allow the IAA to seek information from those authorities with respect to the merger, thus accelerating the competitive review.

It is not uncommon in cross boarder transactions for all parties to be represented by the same competition lawyer with respect to receipt of approvals. This situation, although efficient, may raise delicate issues of confidentiality and competition matters with respect to the exchange of information between parties, prior to closing (gun jumping). One practical solution is to distinguish between external lawyers and in-house counsels with respect to the exchange of information between the parties. Sensitive information will tend to be handled by external lawyers.

Conclusion

Globalisation has made merger transactions spread across borders and jurisdictions, a common phenomenon. The basic presumption that should be taken into account while engaging in such transactions is that although the Law examines the competition within the national boundaries, the mere fact that a foreign company is involved in the merger does not in itself exclude the application of the Law.

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