

## Competition - Israel

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### Supreme Court Issues New Ruling in Telecommunications Case

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On August 20 2009 the Supreme Court issued a ruling upholding an Antitrust Authority decision to block a merger in the telecommunications industry due to potential competition concerns. The new ruling, which reversed the Antitrust Court's previous decision to clear the merger, provides important guidance on the implementation of the 'potential competition doctrine' in Israeli antitrust law, particularly in the telecommunications markets.

#### Facts

In 2006 the Antitrust Authority blocked a transaction by which Bezeq, Israel's leading telecommunications firm, planned to obtain sole control in Yes, a company which offers multi-channel television transmissions via satellite (Bezeq already held nearly 50% of the shares in Yes prior to the proposed transaction). Apart from Yes, the only other firm to offer multi-channel television transmissions services in Israel is the cable company HOT. The Antitrust Authority blocked the merger based on the 'actual potential competition doctrine', arguing that were it not for the merger, Bezeq would introduce its own multi-channel television transmissions through a broadband internet connection (IPTV), in competition with HOT and Yes. Therefore, the merger was likely to diminish Bezeq's incentives to introduce IPTV, thus stabilizing the Yes and HOT duopoly.

Earlier this year, the Antitrust Court overruled the Antitrust Authority's decision. The court reasoned that Bezeq was unlikely to introduce IPTV regardless of the merger with Yes, since it would not have been profitable for it to invest in a technology that competed with a firm that it partially owned (Yes). The court added that Israeli telecommunications regulation, which is unlikely to change in the foreseeable future, does not allow Bezeq to offer television transmissions via the Internet, further weakening its incentive to invest in IPTV. The court ruled that the Antitrust Authority had failed to produce objective evidence to support its assertion that entry into the market through the development of IPTV infrastructure was likely.

#### Supreme Court Decision

The Supreme Court recently reversed the Antitrust Court's ruling and approved the Antitrust Authority's decision to block the merger. The Supreme Court concluded that the Antitrust Court's analysis was erroneous because it ignored the trend of convergence in the telecommunications sector. While the Antitrust Court's analysis of Bezeq's incentives focused on the immediate relevant market (the multichannel television transmissions market), Bezeq's incentives to invest in the development of IPTV infrastructure originated from its desire to counter competition in other markets. The Supreme Court noted that the development of a broadband internet connection would enable Bezeq to offer a bundle of telecommunications services in competition with bundles offered by other telecommunications firms, such as HOT. The Supreme Court further noted that since the Antitrust Authority had presented subjective evidence indicating that Bezeq had intended to develop IPTV prior to the merger, the burden was on Bezeq (and not the Antitrust Authority) to supply convincing objective evidence that it was not economically reasonable for Bezeq to develop such capability. The Supreme Court also approved the Antitrust Authority's theory that even if Bezeq was to introduce IPTV, competition would still be harmed because Bezeq would charge Yes's rivals high access prices.

#### Comment

The judicial proceedings seem to have focused on the wrong questions. While the Supreme Court thoroughly examined Bezeq's claim that it would not have introduced

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IPTV regardless of the merger, little attention was given to the probability that it would have done so despite the merger. The subjective evidence on which the Supreme Court based its decision suggests that in order to compete in the new converged telecommunications market, Bezeq would have been forced to develop IPTV. According to the Supreme Court's logic, such evidence should have shifted the burden to the Antitrust Authority to produce objective analysis to indicate that this strategic path was likely to be reversed or significantly delayed by the merger. Such an analysis is not trivial, since the merger involved only a modest rise in Bezeq's holdings in Yes (from 49% to 58%). The assumption that such an increase would diminish Bezeq's strategic incentives to develop IPTV seems rather remote. The Supreme Court, probably aware of the difficulty, reasoned that under the Antitrust Authority's guidelines, once Bezeq had acquired more than 50% of Yes, it would not have needed additional approval to extend its holdings to 100% (and therefore it could be assumed that it would have acquired 100%). However, this argument is unconvincing because the Antitrust Authority could have easily conditioned the approval with a requirement that any additional increase in Bezeq's holdings would require its approval.

Therefore, it seems that the principal issue of this case was not whether a modest increase in Bezeq's holdings in Yes was likely to diminish potential competition (since reason and evidence suggest that it would not), but rather whether Bezeq's acquisition of formal control in Yes could have reasonably harmed competition, under the assumption that Bezeq would have developed IPTV regardless of the merger. The answer to the latter question, which was almost completely ignored in the proceedings, is not simple or clear.

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