

Kluwer Competition Law Blog

Israel: Class-action Suit in Case of Excessive Pricing

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At the end of July, the Supreme Court of Israel issued a judgment giving local consumers the right to submit class-action suits against dominant companies in case of exorbitantly high prices.

Background

The dominant company at stake, Central Bottling, deals with the production, marketing and distribution of brands of the global Coca-Cola Company. This company serves as a franchisee of Coca-Cola for the production and marketing of Coca-Cola drinks in the Israeli market, and during the years 2005 to 2015, it consistently held about 90% of this market share.

Consumers claimed in a representative class action proceeding represented by Mr Ronan Gafniel that Central Bottling is abusing its position as a dominant company in the cola beverage market in Israel to charge an excessive price for a Coca-Cola drink in a 1.5-litre bottle.

The case, which ended up at the Supreme Court, required to tackle several questions: does the Israeli competition law prohibit a dominant company from establishing an excessive price for a product or service? If so, what are the conditions for the application of this prohibition? Also, is a class-action suit an appropriate legal remedy for such a case?

Excessive price as an antimonopoly violation

Section 29a(a) of the [Competition Law](#) establishes a general provision prohibiting a dominant company from abusing its position in a market in a way that could reduce the competition or harm the public. In section 29a(b) a list of alternatives is detailed, establishing a presumption that such action amounts to behaviour that constitutes an abuse of dominance. Section 29a(b)(1) establishes rules according to which the determination of the level of unfair buying or selling prices of the property or service constitutes an abuse of dominance.

The main substantive question arising before the Court is not extraordinary and is known from other jurisdictions: to what extent can the judicial body intervene in free market price regulation?

The judicial authorities considered that the aspiration to promote consumer welfare through the

protection of competition in the Israeli economy is at the core of the competition law provisions. The basic concept in this context is that free competition benefits consumers and increases welfare. At the same time, the judicial authorities should be cautious and righteous because of the general principles of *laissez-faire*.

Using and citing the case law from the European Union, the Court proposed a test for excessive pricing. Firstly, the plaintiff should prove that the dominant company's price is excessive. To prove this fact, a plaintiff can use several legal assessment tests like evaluation of costs, profitability, and comparison. Secondly, if an excessive price is established, a defendant must provide a rationale for this price.

Ultimately, in this case, the Court concluded that three essential factors can confirm a violation of competition law in case of excessive pricing. The defendant avoided revealing information necessary to clarify the cause of the excessive price, has a significant market share in the Israeli market, and there is a significant gap between the price of the product and the prices of the competitors' products.

The European case law as an example for further development

Despite the fact that the Court noted that foreign law does not bind in the interpretation of the Israeli law and Israeli economy is a unique economy with different characteristics from the European economy (paragraph 40), paragraphs 33, 34 and 35 of the decision contain an overview and brief analysis of the key landmark cases regarding this issue in various jurisdictions, including the European Union.

It is worthy to note that there is another remarkable case, which also could be taken into account by the Israeli judicial body – [AKKA/LAA case](#) and respective [opinion](#) of the Advocate General Wahl – where there were elaborated several very essential outcomes as to the excessive price, including several clarifications on the application of the [United Brands test](#).

Allocation of burden of proof in class-action suits

Section 8 of the [Law](#) on Class Actions enumerates a series of conditions for approving a class action suit. An essential requirement is that the action raises substantial questions of fact or law common to the group members, and there is a reasonable possibility that these questions will be decided in favour of the group.

With reference to the [case](#) *State of Israel v. Line of Thought Ltd*, the Court indicated that a class action is a powerful tool of legal remedy. Aside from the advantages of this tool, it cannot be ignored that the mere approval of a request to file a class action may create heavy pressure on the defendant.

But the position of such a plaintiff is weaker in comparison to a dominant company. The Court confirms it in paragraph 51 of the decision that there is a built-in information gap between the parties, which often makes it difficult to prove the cause of the claim. The reason for the excessive price is one of the most difficult to prove – both because of the considerable questions that arise in

this context in the request for approval and because for the purpose of deciding, a database is required that the applicant usually does not have access to.

Moreover, it was unambiguously stipulated that the burden of prove imposed on a class-action plaintiff requires sufficient evidence for justifying a legal ground of action in a preliminary step of the litigation.

The Court proposed the following solution: a plaintiff has a procedural tool – discovery proceedings – which can help to obtain deficient evidence and oblige a dominant company to present respective documents. Of course, such an allocation of burden should be regarded as a procedural relief for a class-action plaintiff.

Next steps

The Supreme Court ordered the hearing to be remitted to the lower court to continue the proceedings. The judicial authorities will have take this precedent into account.

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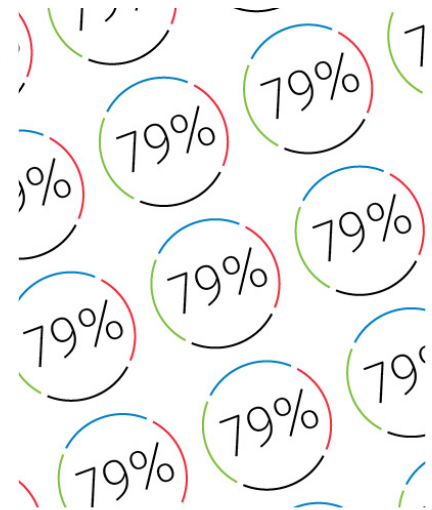
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