Private Antitrust Litigation

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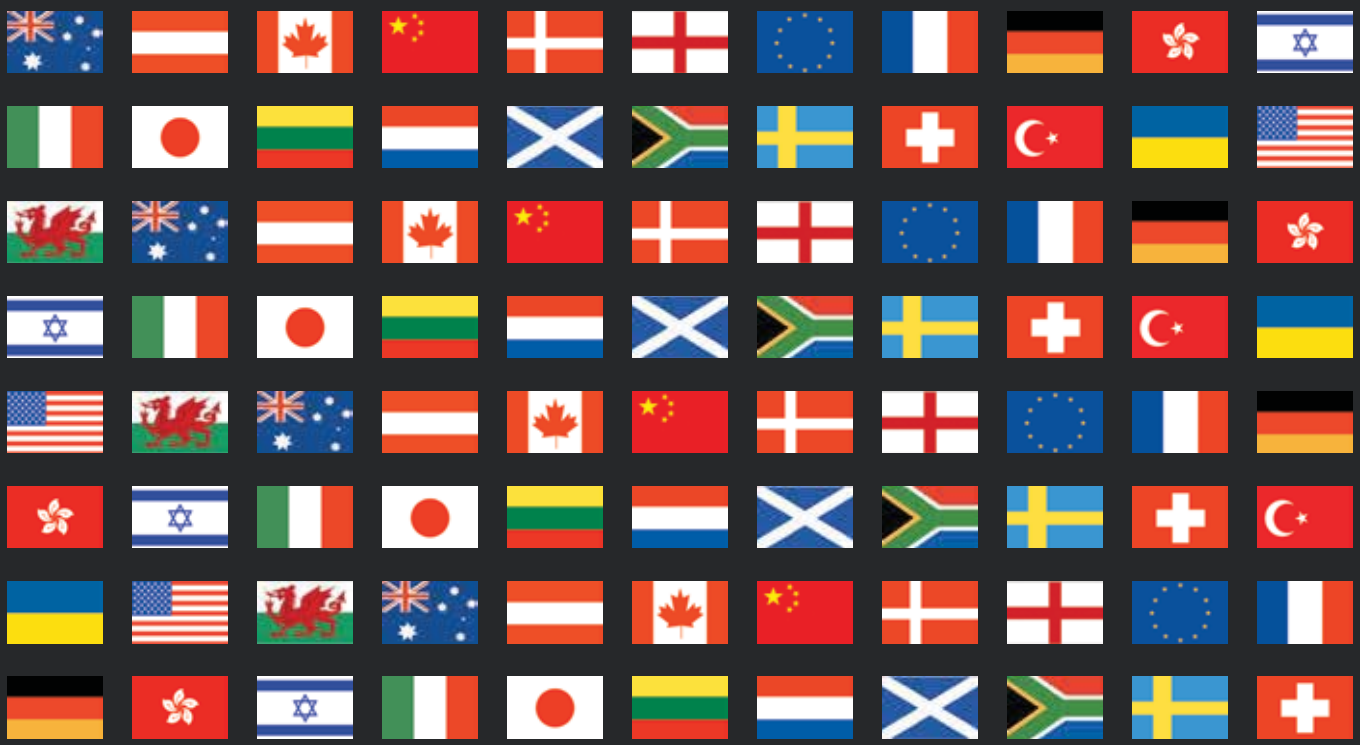

2017

GETTING THE DEAL THROUGH

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Private Antitrust Litigation 2017

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Israel

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Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In recent years, following the social unrest of 2011, there has been a sharp increase in private antitrust litigation, especially class actions. This increase is particularly noticeable with respect to international cartels and excessive pricing class actions.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions based on the Restrictive Trade Practices Law, 5748-1988 (the Antitrust Law or the Law), can be filed under the Class Actions Law, 5766-2006, in the framework of contractual suits or as certain tort claims, as well as under other legislation. See question 3.

The Antitrust Law is silent with regards to the ability of indirect purchasers to bring private lawsuits against antitrust violations. The Supreme Court has thus far not been required to decide on this matter and there is no precedent that affirms or denies the applicability of the indirect purchaser doctrine under Israeli law.

However, in recent cases where litigants have attempted to use the doctrine, courts have generally held that indirect purchasers are not precluded from bringing tort claims, such as private antitrust suits, under Israeli law. In *Naor v Tnuva*, a class action against Israel's largest dairy producer, which was certified in April 2016, Tnuva argued that the indirect purchaser doctrine barred the group from bringing a claim against Tnuva and referenced US federal case law in order to substantiate this argument. The Central District Court ruled that under Israeli law indirect purchasers are permitted to bring tort claims and that, specifically in the antitrust context, this view is supported by a textual and purposive interpretation of the Antitrust Law and its explanatory notes.

This view is also supported by an amicus curiae brief submitted by the Attorney General of Israel in *Hatzlacha v El Al Airways et al*, a class action against four major commercial airlines. The Attorney General stated that at least in regards to price-fixing violations – the offence under discussion in that case – the cause of action of indirect purchasers should be recognised. The case is still pending.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Section 50(a) of the Antitrust Law provides that an act or omission contrary to the provisions of the Law shall constitute a tort in accordance with the Tort Ordinance [New Version]. The same applies to any breach of directives issued by the Commissioner of the Israel Antitrust Authority (the IAA and the Commissioner respectively) and conditions imposed by the Commissioner as part of a merger or restrictive arrangement approval. Such violations can serve as the basis for claims for damages or other injunctive relief by private parties.

The Class Actions Law provides that a person, public entity or consumers' organisation may, under certain conditions, file a class action on behalf of a class of plaintiffs and seek damages for breach of the Antitrust Law.

Private antitrust claims are commonly made in the context of contract litigation. A party who seeks to defend against enforcement of a contract will often argue that the contract violates the Law (illegal contracts are normally not enforced under section 30 of the Contracts Law). Israeli courts are reluctant to brand contracts that lack obvious anticompetitive characteristics with a mark of illegality. However, if a court comes to the conclusion that a provision in a contract violates the Law, this provision will normally be unenforceable.

While less common, private claims alleging unfair competition by competitors may also rely, in certain circumstances, on the Unjust Enrichment Law, 5739-1979. Under such claims, the plaintiff may be entitled to receive profits unjustly obtained by the defendant through anticompetitive behaviour, without having to prove actual damages. This was determined in *Unipharm v Sanofi*, which is subject to appeal before the Supreme Court. Claims based on this law may be especially important in cases where the plaintiff lacks the ability to substantiate the damages caused.

As with other civil claims, private antitrust actions are deliberated before civil courts.

The Antitrust Tribunal acts as an appeals court over decisions of the Antitrust Commissioner. Additionally, the tribunal serves as a first-instance forum in applications for approval of restrictive arrangements. The tribunal does not have jurisdiction over private antitrust claims.

Private parties can also agree to turn to alternative dispute resolution mechanisms such as arbitration and mediation (see question 37).

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

As mentioned above, private actions are available where the defendant has engaged in conduct that is in violation of the Antitrust Law. Such violations may include the engagement in a restrictive arrangement that is not permitted under a statutory or block exemption or that has not been properly approved or exempted (this includes horizontal restrictive arrangements such as cartel offences – ie, price-fixing, bid-rigging, market allocation, etc and certain vertical restrictive arrangements). Monopoly violations such as refusal to deal and abuse of dominant position (eg, unfair pricing, price discrimination, tying, predatory pricing, etc), as well as violations of monopoly directives or other conditions imposed by the Commissioner (eg, merger conditions) and the breach of merger control provisions are also actionable violations.

A finding of infringement by the IAA is not required to initiate a private antitrust action. However, a 'declaration of breach' made by the Commissioner pursuant to section 43 of the Antitrust Law serves as prima facie evidence for what was determined in the declaration in any legal proceeding, thus facilitating private actions. In practice, declarations are indeed usually followed up by private enforcement, in particular class actions. Declarations of breach include a declaration that a certain arrangement constitutes an illegal restrictive arrangement; a merger was unlawfully consummated; a course of action determined or recommended by a trade association constitutes a restrictive arrangement; and a monopoly has abused its dominant position. The Commissioner may also issue a 'monopoly proclamation' stating that a certain firm is a monopoly, which also serves as prima facie evidence to such monopoly position in any legal proceeding.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

As regards subject-matter jurisdiction, the general rule is that private claims in the sum of less than 2.5 million shekels are deliberated in magistrate courts and claims above that sum are deliberated in district courts. Parties cannot agree to deviate from such rules. Most antitrust-related tort claims are above the sum of 2.5 million shekels and thus are usually deliberated in district courts.

As regards territorial jurisdiction in antitrust-related matters, the plaintiff is entitled to submit its claim to a court located in the jurisdiction where the defendant resides or conducts its business, where the obligation was created or intended to be fulfilled or where the illegitimate act was committed. If there are several defendants, the plaintiff is entitled to submit its claim to any court in which the claim could be submitted against one of the defendants. Parties can agree to deviate from these rules.

Courts are authorised to assume jurisdiction with regards to a foreign defendant only after the statement of claim is duly served to such defendant. If the defendant is found within Israeli jurisdiction (eg, is registered or operates directly in Israel or has a local office, branch or representative in Israel), the statement of claim may be served directly to the defendant or its representative. However if the defendant is not found within Israel's jurisdiction, the plaintiff is required to seek the court's approval to serve the claim outside of Israel's borders. The court is authorised to approve such request if at least one of the conditions detailed in section 500 of the Civil Procedure Regulations, 5774-1984, is met (eg, the claim is based upon an act or omission committed in Israel).

Once the court has assumed jurisdiction, the defendant can argue that the courts of the state of Israel are not the 'natural forum' to try the claim (forum non conveniens).

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals, including those from other jurisdictions, provided that the subject matter and personal jurisdiction are appropriate.

As regards subject-matter jurisdiction, the Antitrust Law does not include an express provision that applies its provisions to legal relations outside of Israel. The issue of its application to arrangements concluded between foreign entities outside of Israel has yet to be decided by the Supreme Court. Lower courts have rendered somewhat inconsistent decisions, with a tendency in recent years to adopt the effects doctrine as the prevailing test for the extraterritorial application of the Antitrust Law (see, for example, *ACUM Ltd v The Antitrust Commissioner* and the Antitrust Commissioner's determination regarding the alleged *Gas Insulated Switchgear Cartel*). The effects doctrine requires, among others, that the conduct in question had a significant impact on competition in Israel.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

Third parties may fund private antitrust litigation.

Generally in civil proceedings, contingency fees are available, as well as other fees structures, such as a fixed amount or an hourly rate. In class actions, the plaintiff and representing counsel are prohibited from receiving fees. At the end of the proceeding, the court determines the compensation that is to be paid to the plaintiff and the attorney's fee.

If certain conditions are met, certification requests and class actions may also be funded by a foundation established under the Class Actions Law. The foundation is authorised to fund certification requests and class actions in which there is a public or social importance in having them brought before the court. The foundation, which began operating in 2010, is funded by the state. In 2015, 41 requests for funding were accepted, one of which was an antitrust claim, representing approximately 53 per cent of all requests submitted to the foundation's deciding committee.

8 Are jury trials available?

No.

9 What pretrial discovery procedures are available?

The underlying principle in pretrial discovery is to allow the most extensive discovery possible of the information relevant to the dispute in order to aid in uncovering the truth. At the request of a litigant the court may order that the parties to a dispute disclose in an affidavit the documents relevant to the dispute that are or were in their possession, including the existence of documents that are protected by privilege. At a litigant's request, documents in the opposing party's possession must then be made available for inspection and copying (and any party can request additional relevant documents not mentioned in such affidavit). While this process may require petitioning the court, litigants usually deliver the relevant disclosed documents to one another without a court order.

The definition of 'documents' is interpreted widely and includes all relevant information and data, including in electronic format. Courts are also careful not to allow parties to embark on fishing expeditions.

Third-party discovery is available on a very narrow basis and is founded upon court precedents, not legislation. A party may petition the court to instruct a corporation that is not party to the proceeding to comply with a discovery request if the corporation belongs to or is under the full control of the opposing party.

Third-party discovery regarding an entity that is not party to the dispute is very limited. In protection of third parties' right to privacy on personal information, the Supreme Court has ruled that such discovery will occur only in rare and exceptional cases and will require a high degree of persuasion regarding the necessity and essentiality of the requested information, among other stringent conditions. Information relevant to a dispute which is in the possession of an administrative agency can also be obtained through the Freedom of Information Law, 5758-1998, in addition to a request for third-party discovery.

Litigants may submit questionnaires to an opposing party. The questionnaire and the responses to it are not part of the court pleadings. They are not part of the evidentiary materials upon which findings may be based unless they are formally submitted as such to the court. The party that requested to have the questionnaire completed is granted the discretion to decide if and to what extent to use the responses to the questionnaire and submit them as evidence before the court.

Pretrial discovery procedures in class actions are more limited than those in standard civil proceedings. Under the Class Actions Regulations, 5770-2010, the court is authorised to grant discovery only if the documents the discovery of which is being requested are related to issues relevant to the certification request (as opposed to relevant to issues concerning the claim itself) and the claimant has presented prima facie evidence establishing the fulfilment of the requirements for the certification of a class action. These rules have been further developed by Supreme Court rulings (see *Tnuva v Prof Yaron Zelekha* and *Boaz Yifat et al v Delek Motors et al*).

10 What evidence is admissible?

Generally, the following evidence is not admissible in civil proceedings: hearsay; evidence regarding which a minister issued a certificate of confidentiality (eg, when there is a public interest in the confidentiality of certain information); evidence that was obtained through harm to privacy, as defined in the Protection of Privacy Law, 5741-1981; and statements recorded through illegal eavesdropping, as defined in the Eavesdropping Law, 5739-1979.

Witnesses are permitted to testify only on facts, as opposed to theories and conclusions. A notable exception to that rule is expert testimony, which may include the presentation of theories and conclusions with respect to the expert's field of expertise. Naturally, in private antitrust claims, opposing parties usually retain economic experts to prove competitive harm and quantify damages.

Litigants can usually agree to stray from evidence law and determine that they may submit evidence that would otherwise not be admissible. Furthermore, if a party to a civil proceeding does not object to the submission of inadmissible evidence immediately following its submission, such party is precluded from claiming otherwise later and such evidence will be regarded as admissible.

11 What evidence is protected by legal privilege?

There are two central legal privileges relevant to private antitrust claims: the attorney–client privilege and the legal documents privilege. Additionally, trade secrets are often protected under confidentiality granted by the court.

Under attorney–client privilege, an attorney (including in-house counsel) is barred from disclosing information provided to him or her by his or her client (or by a person on the client's behalf), if the information is substantially linked to the professional services provided by the attorney. The same prohibition applies to the attorney's employees. According to case law, the client is also entitled to enjoy the attorney–client privilege, in the sense that the client will not be forced to disclose information concerning professional consultation with his or her lawyer. The attorney–client privilege is absolute, thus the court is not authorised to remove it. The legal sources for attorney client privilege are section 48 of the Evidence Ordinance [New Version], 5731-1971, as well as section 90 of the Bar Association Law, 5721-1961. Attorney–client privilege does not extend to communications provided in relation to the commission of future or ongoing crimes or fraud.

The legal documents privilege provides that documents prepared either by an attorney, his or her client or someone on their behalf in connection with pending or anticipated legal proceedings are privileged. The normative source for this privilege is a Supreme Court ruling. It has yet to be determined whether the privilege can be waived by the court. The legal documents privilege also applies to documents created in the framework of pending or anticipated alternative dispute resolution proceedings (eg, mediation, arbitration). However, only documents prepared predominantly in order to serve such potential legal proceedings may enjoy the privilege.

A party to a civil proceeding is entitled to file a petition to the court for non-disclosure of evidence constituting trade secrets, pursuant to section 23(c) of the Commercial Torts Law, 5759-1999. The court will accept the petition if the interest in non-disclosure of the evidence is greater than the need to disclose it, and if other measures cannot be taken to protect the trade secrets (eg, partial discovery, discovery only to outside counsel, etc).

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Follow-on litigation may arise when an investigation ends with a criminal conviction and sentencing. Civil claims can be submitted to the same judicial panel that convicted the defendant within 90 days of the date on which the verdict becoming final (section 77 of the Courts Law [Combined Version], 5744-1984; section 17 of Civil Procedure Regulations, 5774-1984). Findings and conclusions determined in the criminal proceeding are deemed as if they were established in the civil proceeding (section 42D of the Evidence Ordinance).

Plaintiffs can also submit a 'regular' claim in which the findings and conclusions of the criminal court can be used, subject to conditions, in the civil proceeding (see question 13).

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Generally, evidence or findings in criminal proceedings are admissible as prima facie evidence in private actions, subject to the following conditions:

- the evidence and the findings are part of a convicting judgement and provided the basis for conviction (ie, were not obiter dictum);
- the convicting judgement is final (either the time frame for submitting an appeal has passed or the appeal proceedings have been exhausted); and
- at the very least, one of the parties in the civil proceeding is the convicted person, its substitute (ie, one who legally assumes the convicted person's place such as the buyer of a convicted company) or a person whose responsibility arises out of the responsibility of the convicted person (eg, an insurance company, an employer, etc).

An opposing party may be permitted to attempt to meet the burden of proof and refute such prima facie evidence and findings, subject to receiving the court's approval and other stringent criteria.

It should be noted that, notwithstanding the above, evidence and findings introduced in sentencing proceedings are not admissible in court and thus cannot be relied on by plaintiffs in parallel private actions.

The leniency programme applies only to criminal liability regarding certain violations of the Antitrust Law. Therefore leniency applicants are not protected from follow-on private litigation or administrative enforcement measures. The first case in which the leniency programme was used in Israel was in the *GIS* cartel case. In this case, one of the parties to the alleged cartel (ABB) provided the IAA with evidence in exchange for leniency. In 2013, the IAA issued a declaration of breach (an administrative measure) according to which the parties to the arrangement in question (including ABB) were parties to an illegal restrictive arrangement. Following the determination, several class actions and a civil claim were brought against the alleged cartel members, including ABB.

The IAA does not normally disclose documents obtained in its investigations under its own initiative. A private claimant can file a petition to the IAA for the review of such documents pursuant to the Freedom of Information Law. While the Freedom of Information Law does not apply to materials obtained in the course of investigations conducted by the IAA, the IAA applies similar principles when reviewing petitions for disclosure. Additionally, if the documents were submitted to the court either in criminal or administrative proceedings, a private plaintiff can also file a petition to review the court's case file. Generally, under both disclosure alternatives, third parties that the documents refer to will be given the opportunity to object to the disclosure of the documents. A common ground for objection is that the documents refer to sensitive commercial information such as trade secrets.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

A stay of proceedings in private antitrust actions may be granted on the same grounds as in any other civil proceeding. Defendants commonly petition the court for a stay of the proceedings when an action dealing with substantially the same cause of action is pending elsewhere, whether administrative or criminal (the lis alibi pendens principle). When weighing the petition, the court takes into account potential cost and time savings to the state and the parties, the prevention of contradicting court decisions and the balance of convenience between the parties, among other factors.

Plaintiffs are also permitted to petition the courts for a stay of proceedings. This is commonly done when criminal or administrative enforcement proceedings are pending and the findings in such proceedings may support the plaintiff's claim.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Generally, the burden of proof in civil cases lies with the plaintiff who is required to prove his claim on the balance of probabilities. The IAA Commissioner can publish a declaration of breach, which provides the plaintiff with prima facie evidence that the Antitrust Law was breached by the defendant. Additionally, cartels, bid-rigging arrangements and some other forms of horizontal arrangements are held as inherently harmful to competition and thus the plaintiff does not need to prove their actual competitive effect in order to establish liability. This is seemingly different, however, in the case of international cartels, where one must prove the fulfilment of the requirements of the effects doctrine as a precondition for the application of the Antitrust Law.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The timetable for private proceedings varies significantly between cases, primarily depending on the scope of the case, the strength of the claim and the willingness of the parties to settle. As in other private claims, an antitrust claim can be dismissed in limine or it can last for several years. Parties can file a petition to expedite specific court proceedings (eg, court hearings).

17 What are the relevant limitation periods?

Civil claims not related to real estate prescribe within seven years from the day that the cause of action arose (sections 5 and 6 of the Prescription Law, 5718-1958). In civil antitrust claims, the cause of action arises on the day on which the damage occurred; in case of an ongoing infringement, the cause of action may arise on the day on which the infringement ceased (section 89 of the Tort Ordinance). However, if the facts constituting the cause of action were unknown to the plaintiff for reasons out of the plaintiff's control and which it could not have prevented with reasonable care, the period of limitation begins on the day on which the facts became known to the plaintiff (section 8 of the Prescription Law). According to case law, the degree of knowledge required to trigger the commencement of the

limitation period is suspicion of the facts that constitute the cause of action (including cases in which the plaintiff should have had such suspicions).

If damage caused by the defendant is not discovered on the day of its occurrence, a civil tort claim shall prescribe within 10 years from the day on which the damage occurred (section 89(2) of the Tort Ordinance; *Merom Golan Kibbutz Cooperative Society of Agriculture settlements Ltd v Yoram Fradkin*). This rule, however, does not apply in cases where other elements of the offence were discovered after the time in which the damage occurred. For example, if a plaintiff discovers that it was harmed at the time in which the damage occurred but only learns at a later date that this harm was due to the operations of a cartel, the limitation period will not be limited to 10 years as of the time in which the damage occurred.

In addition, there are a few specific limitation rules which apply only to class actions. For example, if the court certifies a class action, the relevant group members will be deemed, for the purposes of limitation, as if they submitted a claim on the day on which the request for approval of the class action was submitted. If the court rejects a request for certification of a class action or dismisses such request, personal claims of the relevant group members will generally not prescribe for one year as of the day upon which the court's decision became final, thereby extending the limitation period as necessary.

18 What appeals are available? Is appeal available on the facts or on the law?

In civil proceedings, a trial court's judgment is subject to appeal by right to the appeals court. Interim decisions are subject to appeal by permission. Some interim decisions, most of which deal with technical matters (eg, decisions regarding deadlines), are not subject to appeal during the trial court proceeding.

Administrative decisions of the Antitrust Commissioner (eg, a determination according to which a party committed a violation of antitrust law) are subject to appeal by right to the Antitrust Tribunal. Judgments of the Antitrust Tribunal are subject to appeal by right to the Supreme Court. Interim decisions of the Antitrust Tribunal, in contrast, are not subject to appeal during the proceeding.

Appeals can be based both on legal or factual grounds. However, the appellate court will rarely intervene in factual determinations of the trial court and is much more likely to intervene in matters of law.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Class actions may be filed only regarding matters listed in the Class Actions Law or where other legislation explicitly grants a right to file a class action. As described in question 3, collective proceedings in respect of antitrust claims under the Antitrust Law are available under the Class Actions Law.

20 Are collective proceedings mandated by legislation?

No. Parties can choose whether to file a claim as a private civil suit or a class action (provided that there is a right to file a class action in the relevant matter). Once a class action has been certified, all parties that belong to the group as it was defined by the court are automatically included in the action unless they affirmatively opt out of the class within the allotted time frame.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Under section 8 of the Class Actions Law, a court is authorised to certify a class action if the following cumulative requirements are satisfied: the action must raise substantive questions of law or fact that are common to all members of the group and there is a reasonable possibility that the answer to these questions will be found in favour of the group; a class action is the most efficient and equitable method to resolve the dispute under the circumstances of the case; and it must be reasonable to presume that the interests of all members of the group will be represented and managed in an appropriate manner and in good faith.

Plaintiffs are required to demonstrate that the above conditions are satisfied based on prima facie arguments and evidence in support of their claim.

22 Have courts certified collective proceedings in antitrust matters?

In recent years there has been an increase in the number of antitrust-related class actions. In particular, class actions based on excessive pricing claims against monopolies have become increasingly common since the social justice protests of the summer 2011. There has also been in increase in class actions against alleged international cartels (see 'Update and trends'). Many of the antitrust class actions do not reach the certification stage as they are withdrawn (usually with a reward granted in exchange for the withdrawal) or settlements are reached.

The Central District Court recently certified a class action against Tnuva, in which it was argued that Tnuva charged excessive prices (*Naor v Tnuva*, see question 2).

23 Can plaintiffs opt out or opt in?

Once a class action has been certified by the court, plaintiffs may opt out of the class by informing the court of their desire to do so within 45 days of the publishing of the class action's certification, or within a longer time frame if so determined by the court.

24 Do collective settlements require judicial authorisation?

Once a class action has been filed or certified by the court, a settlement of the claim requires judicial authorisation. If a proposed settlement is not dismissed in limine by the court, the court will order that the submission of the settlement be made public and that the class members, the Attorney General as well as several other entities be sent copies of the proposed settlement. Certain parties, such as a member of the class, a government agency related to the subject matter of the settlement or class action and the Attorney General, may file a reasoned objection to the proposed settlement.

A member of the class who is not interested in being party to the proposed settlement may request to be removed from the class that the settlement shall apply to.

The court is authorised to approve a settlement only if it found that the settlement is appropriate, fair and reasonable. However, if the proposed settlement is submitted prior to the certification of a class action, the court must also analyse conditions which are essentially the conditions required for certifying a class action – that prima facie questions of law or fact which are common to the members of the class are raised and that ending the action by way of a settlement is an efficient and equitable method of resolving the dispute. The Class Actions Law also sets other requirements and procedures that may apply in approving a settlement, such as appointing an expert in the relevant subject matter to provide its opinion on the proposed settlement.

Class action practice has also led to the development of another form of settlement, which involves the withdrawal of class action suits. The Class Actions Law sets out the procedure for the withdrawal of a class action. A class action can only be withdrawn if it has not yet been certified and once a withdrawal is approved, it does not create a res judicata. In some cases, however, defendants have taken up the practice of granting an award despite the action's being withdrawn. This is often done when the defendant is of the opinion that the action indeed raised an issue of importance and led to a beneficial outcome such as a positive change in behaviour. This practice has been met with scepticism by courts. This has brought the courts to set certain conditions for the approval of withdrawal requests that involve the provision of some form of reward or benefit in exchange for the withdrawal of the class action certification request.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Israel is not divided into multiple jurisdictions. For administrative purposes, Israel is divided into six districts. Private actions dealing with the same matter can be brought simultaneously to courts in different jurisdictions. However, the Supreme Court is authorised to order that such private actions will be deliberated in the same court.

26 Has a plaintiffs' collective-proceeding bar developed?

No.

Update and trends

The social unrest of the summer of 2011 marked a turning point in the Israeli public's attitude towards dominant corporations and government regulation of the economy and competition. In response to the public call for reform, Israel's parliament, the Knesset, enacted new legislative measures aimed at lowering the cost of living. Many of these efforts focused on promoting competition. The centrality of competition-based considerations and the IAA's role in the Israeli economy have since been on the rise.

In addition to increased regulatory activity of the IAA, private parties have also begun to take a more prominent role in the antitrust landscape. In April 2014, the IAA published guidelines on the IAA's enforcement policy regarding excessive pricing. The guidelines established that the IAA views the charging of excessive prices by monopolies, under certain conditions, as illegal unfair pricing.

In the past two years alone, about a dozen class actions have been filed on excessive pricing grounds. The Central District Court recently certified a class action against Tnuva, Israel's largest dairy producer and a proclaimed monopoly in the dairy sector, relying in part on the guidelines.

However, the current Commissioner, who began her post in August 2015, recently announced a public hearing and formal re-evaluation of the policy on excessive pricing. Meanwhile, in private actions that lean heavily on the guidelines, courts have expressed a degree of support for the excessive pricing policy which is now undergoing re-evaluation. This may lead to the emergence of significantly different interpretations by civil courts and the IAA with regards to monopoly excessive pricing.

In recent years there has also been an increase in the number of civil claims submitted by indirect purchasers against international cartels. In 2013 several civil proceedings (including class actions) were filed against members of the alleged international Gas Insulated Switchgear cartel (an important component in electric power systems). Class actions have also been filed against member of the alleged international LCD cartel and cathode ray tubes (CRT) cartel, among others.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

An antitrust-related cause of action enables the plaintiff to seek compensatory damages, which are limited to the actual loss suffered by the plaintiff. This is often proved by the use of an expert economic opinion.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

The interim remedies and injunctions available in private antitrust actions are the same as those available in other civil actions and are generally aimed at preserving the status quo. A plaintiff who seeks an interim remedy must convince the court of the existence of a prima facie cause of action; that the balance of harm weighs in its direction; that the motion is made in good faith; and that granting the remedy is just and warranted under the relevant circumstances and does not cause harm beyond what is necessary.

In antitrust-related cases, however, the Supreme Court has held that courts should rarely grant motions for interim remedies due to antitrust claims requiring 'a profound examination', which should be conducted in the course of the main proceeding. A notable exception to this rule concerns determinations issued by the Commissioner stating that the defendant breached antitrust law. In these cases, the determination serves as prima facie evidence that the antitrust laws were in breach, and thus civil courts should be more inclined to grant motions for interim remedies.

29 Are punitive or exemplary damages available?

In civil antitrust cases, damages are limited to compensatory damages and thus punitive or exemplary damages are generally not awarded. Recently, the IAA began advocating for an amendment to the Antitrust Law that would allow for treble damages for antitrust offences.

30 Is there provision for interest on damages awards and from when does it accrue?

Damages will normally include interest and will be linked to the consumer price index according to the Interest and Linkage Adjudication Law, 5721-1961. Damages accrue from the action's day of submission or from another date as determined by the court, starting from the day the cause of action arose. Interest on repayment of legal expenses, if awarded, accrue from the time the expenses were made until the later of the date in which the judgment is rendered or payment of the award as determined by the court. Interest on repayment of attorney fees accrue from the time in which the judgment is rendered until the date of repayment as determined by the court.

31 Are the fines imposed by competition authorities taken into account when setting damages?

This question has yet to be examined by the courts. The IAA was granted legislative authority to impose 'fines' (monetary payments) only in 2012. Nevertheless, it is expected that fines imposed by the IAA (or foreign competition authorities) will normally not be taken into account when setting damages. Fines, which go to the national treasury, do not mitigate the actual damages suffered by the plaintiff and their purpose (punitive) is different from the purpose of civil damages (compensation).

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

At the discretion of the court, legal costs are often imposed on the losing party. The amount of the awarded costs is dependent on, inter alia, actual legal costs (eg, court fees, witnesses' salary, costs relating to the registration of a court protocol, etc), attorney fees, the value of the claimed remedy or relief, the value of the awarded remedy, the complexity of the case in question and the manner in which the parties handled themselves during the proceedings.

33 Is liability imposed on a joint and several basis?

In antitrust-related cases, liability is mostly imposed on a joint and several basis. However, courts are authorised to distribute liability among the defendants. In *Tower Air v Aviation Services Ltd* the plaintiffs argued that the coordinated activity of the defendants, in the framework of a jointly owned company, constituted an illegal restrictive arrangement. The plaintiffs also argued that the said company abused its monopoly position in the market. The court ruled in favour of the plaintiffs and determined that the defendants are equally responsible towards the plaintiffs. Nonetheless, the court divided the liability among the defendants according to their shares in the jointly owned company.

34 Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Indemnity agreements and insurance policies among defendants are invalid regarding monetary payment proceedings undertaken by the IAA (an administrative enforcement measure) and criminal antitrust proceedings. However, as with civil proceedings in general, insurance policies and indemnity between defendants in civil antitrust matters is permitted subject to certain prohibitions and limitations. Such claims can be asserted in the framework of the principal proceeding or in a separate claim.

35 Is the 'passing on' defence allowed?

Only a limited number of cases have addressed this subject. Thus far courts have yet to positively rule whether the passing on defence is a valid defence argument in civil antitrust cases. In *Isracard Ltd v Reis* the Supreme Court implicitly acknowledged the passing on defence in the context of a claim alleging that a monopoly charged excessive prices.

Some courts have recognised the right of indirect purchasers to bring antitrust lawsuits, which logically should lead these courts to acknowledge the passing on defence – in order to avoid double compensation (eg, *Hatzlacha The Consumers' Movement for the Promotion of a Fair Society and Economy v AU Optronic Corporation* and *Naor v Tnuva* (see question 2)).

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Any defence claim that can be brought in civil proceedings is also valid in the context of civil antitrust proceedings. This is in addition to substantive

antitrust defence arguments (such as the applicability of a block exemption, statutory exemption etc).

37 Is alternative dispute resolution available?

Antitrust claims, particularly in the context of contract dispute, may be brought not only before a court, but also in the course of arbitration, which is becoming increasingly common in Israel. The Arbitration Law, 5728-1968, provides contracting parties broad discretion to agree on the substantive law and procedural rules that shall apply to arbitration proceedings. The Arbitration Law, however, may not be used as a mechanism for enforcing illegal contracts such as those that are in violation of antitrust law. Nonetheless, in an attempt to encourage the use of arbitration as a dispute resolution mechanism, courts have not categorically disqualified arbitrations in which one party argued that the disputed agreement was, in whole or in part, an illegal restrictive arrangement.

In one case, the Supreme Court validated an arbitration clause, even though the agreement in which it was included was argued to be a restrictive arrangement. The members of the panel expressed different opinions as to whether the agreement indeed violated the Antitrust Law; this question remained unanswered. In another case the court rejected a claim of invalidity regarding an arbitration agreement, owing to the fact that it was signed after the contractual relations between the parties, which were claimed to constitute a restrictive arrangement, had terminated.

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