

# Attorney general takes cautious and restrained approach regarding excessive pricing

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## Background AG's opinion

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Israeli competition laws prohibit a monopolist from charging 'unfair' prices for its product. While there is no dispute that this type of prohibition applies to the sale of goods at a loss, aimed at excluding the monopolist's competitors from the market (predatory pricing), the question of whether this prohibition also applies to excessive prices charged by a monopolist has long been disputed. At the heart of this discussion is the potential benefit of lowering prices versus the harm to firms' incentive to compete long term and the theoretical and practical difficulties identifying what constitutes excessive pricing.

A fundamental turning point for the issue of excessive pricing in Israel was the publication of an Israeli Competition Authority (ICA) opinion in 2014, whereby the ICA declared, for the first time, that excessive pricing by a monopolist is prohibited under Israeli law. Following the publication of the opinion, numerous motions to certify actions as class actions were filed with district courts and some were even certified, while the courts acknowledged the excessive pricing prohibition and adhered to a relatively broad interpretation of its limits. The enthusiastic private enforcement coupled with a broad recognition of the excessive pricing prohibition has led to an exceptional situation from a global perspective in which dozens of motions to certify the filing of excessive pricing class actions have been filed in Israel.

In recent years there have been significant developments in district court rulings and in the ICA's position; however, the Supreme Court has refrained from ruling on the matter of excessive pricing.

### AG's opinion

In January 2019 the Central District Court (Hon Justice Grosskopf) certified the filing of a class action against the Central Bottling Company on the grounds of excessive pricing of Coca-Cola bottles. **(1)** This certification decision recognised the excessive pricing prohibition and took a broad approach regarding its limits and the methodology to establish the claim.

The Central Bottling Company filed a motion with the Supreme Court for leave to appeal on this decision. In light of the principal questions raised by the motion, the attorney general (AG) decided to join the proceedings.

On 8 June 2020 the AG submitted his opinion regarding the applicability of the excessive pricing prohibition under Israeli law and the appropriate test for its application. The AG adopted the ICA's current opinion regarding excessive pricing (as detailed in ICA Public Opinion 1/17), while opposing the broad approach taken by the court in the Central Bottling Company case. In his opinion, the AG maintained that the Supreme Court should determine that the Competition Law prohibits monopolists from setting unfairly high prices.

Simultaneously, the AG acknowledged the disadvantages associated with the enforcement of the prohibition of unfair high pricing, predominantly the distortion of the free market mechanism and harm to firms' incentives to invest in research and development, innovation, gaining reputation and improving efficiency. Consequently, the AG argued that excessive pricing should be interpreted narrowly, enforced carefully and used only in cases where the benefits unequivocally outweigh the costs and damages derived from the prohibition.

Consequently, the AG suggested a two-stage test to ascertain an infringement of the prohibition on unfairly high pricing.

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At the first stage, it should be examined whether the prices actually charged were significantly higher than the prices that would have been charged under competitive terms. At the second stage, it should be examined whether the high price is also unfair.

The AG explained that there are several common sub-tests to examine whether prices charged are above the competitive price:

- the gap between the price of the product and its cost of production (the price-cost test);
- analysis of the firm's profitability, as depicted in its financial data (the profitability test);
- a comparison between the price charged by the monopolist and:
  - the price of the product in a different geographical market or at a different time period;
  - the prices charged from different customers; and
  - the prices charged for competing products (the comparison test).

The AG asserted that private litigation cases should err on the side of over-estimation of the competitive price and prevent over-enforcement of the prohibition, along with its negative consequences.

In general, according to the AG, courts must implement numerous tests and act in cases where the obvious conclusion is that the monopolist's price is significantly and consistently above the competitive price. The AG expressed doubts regarding the Central District Court's approach, according to which an apparent deviation from cost-based pricing is enough to determine excessive pricing.

If the court finds that the price charged by the monopolist is significantly and consistently higher than the competitive price, it should continue to the second stage, in determining whether the price is also unfair. According to the AG, the purpose of the fairness of the price analysis is to examine whether the high prices are due to the abuse of the monopolist's market power or if a legitimate reason can explain them. The AG has specified various considerations to assist in examining fairness:

- The power disparity between the monopolist and its customers and the existence of alternatives to the monopolised product – the court should consider whether the monopolised product is an essential product, whether demand for it is inelastic and whether alternatives to said monopolised product are available on the market. Another relevant consideration is whether the monopolist is close to 'super dominance', consistently and long term.
- The direct damages incurred by consumers – the court should consider how long the high price has been charged by the monopolist, whether the product is an essential product or an essential input for a large number of products on the market and other considerations.
- The concern that the company's high prices preclude the creation or entry of new products and services in overlapping markets or exclude competitors from overlapping markets.
- Considerations regarding the specific circumstances of each market – the court should consider the existence of significant entry barriers to the market and how the monopolist acquired its dominant position (ie, whether it was due to historical circumstances regarding government market planning or a result of innovation and product differentiation or risk taking).

Courts should therefore distinguish between cases where the monopolist is charging a higher price having made substantial investments in marketing the product, establishing high-end status or research and development and cases where the monopolist charges a particularly high price for input resulting in the exclusion or weakening of other competitors in the market. The AG specifically addressed high-end products, expressing substantial doubt about whether the excessive-pricing prohibition should apply to such products.

The AG addressed the Central District Court's decision regarding the burden of proof in the certification stage. According to the AG, the complexity of the excessive-pricing prohibition and the necessity for cautious implementation sides with raising the standard of proof, rather than lowering it. Further, the AG opined against the principle set by the Central District Court whereby, in the event that the monopolist withholds information about its costs and profits, the burden of proof for the movant in the certification stage of the class action is significantly lowered.

The matter is now pending the Supreme Court's decision and if the AG's position is accepted, it may have significant impact on pending class actions.

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## Endnotes

(1) Class Action 6179-09-16 *Gafniel v the Central Bottling Co Ltd*.

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