Private Antitrust Litigation 2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil and India.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Elizabeth Morony of Clifford Chance LLP, for her assistance with this volume.

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Israel

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

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

In recent years there has been a consistent increase in private antitrust litigation. In particular, the filing of private actions (predominantly class actions) against alleged international cartels has steadily risen. Motions to certify class actions were filed in respect of *Gas Insulated Switchgear*, *Cathode Ray Tubes*, *Liquid Crystal Displays*, *Trucks*, *Air Cargo* and more.

In the past year, precedential district court decisions were issued in this area. In the case of *Hatzlacha v El Al Israel Airlines et al* – which concerns an alleged air cargo cartel – the Central District Court certified a filing of an antitrust class action against foreign companies for the first time. In the case of *Zuckerman v Siemens AG* – which concerns the alleged *Gas Insulated Switchgear* cartel, the Central District Court approved a settlement between the plaintiffs and the defendants (all of which are foreign companies) of approximately US$140 million). The Central District Court's decision in the case of *RLFI Agriculture v Man Truck & Bus AG* addresses discovery in the context of a motion to certify a class action against foreign truck manufacturers concerning alleged anticompetitive conduct that concerned European markets. The Court denied the plaintiff's broad motion for discovery of documents because the plaintiff failed to prove that the prerequisites of the effects doctrine (which sets out the conditions for applying the Economic Competition Law, 5748-1988 (the Competition Law), to foreign conduct) were met in respect of the alleged foreign conduct.

The filing of excessive pricing private actions (predominantly class actions) has also been on the rise in recent years. Although the Supreme Court has yet to rule on whether monopolies are subject to excessive pricing prohibition, in 2014 the Competition Commissioner published a public guideline document in which he stated that, in his view, monopolies are subject to the prohibition. Consequently, numerous motions to certify excessive pricing actions as class actions have been certified in recent years, and in March 2020, the District Court ruled – for the first time – on the merits of such an action (see *Naor v Tnuva*, concerning the pricing of cottage cheese).

In June 2020, Israel's Attorney General (AG) submitted an opinion with the Supreme Court (in the framework of Motion for Leave to Appeal 1248/19 *Central Bottling Co v Gafniel*) regarding the applicability of the excessive pricing prohibition in Israeli law and the appropriate test for its application. The AG maintained that the Supreme Court should determine that the Competition Law prohibits monopolists from setting unfairly high prices. At the same time, the AG argued that the prohibition should be interpreted narrowly, enforced carefully and used only in cases where the benefits unequivocally outweigh the costs and damages derived from the enforcement of the prohibition.

Applicable legislation

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 deriving from the provisions of the Competition Law may be filed as class actions under the Class Actions Law, 5766-2006 (the Class Actions Law), in the framework of contractual suits or as certain tort claims, as well as under several other pieces of legislation.

The Competition Law is silent with regard to the ability of indirect purchasers to bring private lawsuits alleging antitrust violations. Thus far, the Supreme Court has not had to decide on this matter, and there is no Supreme Court precedent that affirms or denies the applicability of the indirect purchaser doctrine under Israeli law.

However, in recent cases, lower courts have explicitly acknowledged the right of indirect purchasers to bring antitrust suits against those violating antitrust law (*Naor v Tnuva*, *Ronen Gafniel v Central Bottling Co Ltd,Weinstein v Dead Sea Factories Ltd*, *Hatzlacha v El Al Israel Airlines et al* and more). This view was endorsed by an amicus curiae brief submitted by the AG in the case *Hatzlacha v El Al Israel Airlines et al*.

That being said, it has been suggested by lower courts, obiter dictum, that because cases of indirect purchasers concern a chain of transactions, it would not be appropriate to allow a cause of action for every link in the chain. As a rule of thumb, the courts have suggested that an indirect purchaser should be allowed to bring forth an action when the product maintains the original form in which it was sold by the manufacturer. In addition, in a recent decision, the Central District Court stated, obiter dictum, that if the right of indirect purchasers to bring antitrust actions is recognised under Israeli Law, it should be limited to situations where the direct purchasers refuse to bring those actions themselves.

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

Section 50(a) of the Competition Law provides that an act or omission contrary to the provisions of the Law constitutes a tort in accordance with the Tort Ordinance (New Version). The same applies to any breach of a directive issued by the Commissioner of the Israel Competition Authority (ICA) and conditions imposed by the Commissioner as part of an approval for a merger or restrictive arrangement. These 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 a breach of the Competition Law.

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Private antitrust claims are commonly made in the context of contract litigation. A party that seeks to defend itself against the enforcement of a contract will often argue that the contract violates the law (under section 30 of the Contracts (General Part) Law, 5733-1973, illegal contracts are generally not enforceable). Israeli courts are reluctant to brand contracts that lack obvious anticompetitive characteristics as illegal. However, if a court arrives at the conclusion that a provision in a contract violates the law, the provision will, in general, be unenforceable.

Although less common, private claims alleging unfair competition by competitors may also rely on the Unjust Enrichment Law, 5739-1979. Under those claims, the plaintiff may be entitled to receive profits unjustly obtained by the defendant, by means of anticompetitive behaviour, without having to prove actual damages. Such reliance was permitted in *Unipharm v Sanofi*, which is currently under appeal before the Supreme Court. Claims based on the Unjust Enrichment Law may be especially important in cases where the plaintiff lacks the ability to substantiate the damages caused. An opposing view was subsequently applied by the District Court of Tel Aviv in the case *Unipharm Ltd v GlaxoSmithKline plc* (8 June 2018). Both judgments are currently under appeal before the Supreme Court.

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

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

Private parties may also agree to turn to alternative dispute resolution mechanisms, such as arbitration and mediation.

PRIVATE ACTIONS

Availability

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?

Private actions are available where the defendant has engaged in conduct that is in violation of the Economic Competition Law, 5748-1988 (the Competition Law). Such violations may include the defendant's 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, including 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 and predatory pricing), and violations of monopoly directives or other conditions imposed by the Competition Commissioner (eg, merger conditions) and the breach of merger control provisions are also actionable violations.

A finding of infringement by the Israel Competition Authority is not required to initiate a private antitrust action. However, a 'declaration of breach' made by the Competition Commissioner pursuant to section 43 of the Competition Law serves as prima facie evidence for the occurrence of whatever was determined in the declaration of breach, in any legal proceeding, thus facilitating private actions.

In practice, declarations are 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 that was unlawfully consummated; a restrictive arrangement in the form of a course of action determined or recommended by a trade association; and a declaration that a monopoly has abused its dominant position. The Competition Commissioner may also issue a 'monopoly proclamation', stating that a certain firm is a monopoly, which also serves as prima facie evidence for establishing the existence of a monopoly position in any legal proceeding.

Required nexus

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?

Regarding subject-matter jurisdiction, the general rule is that private claims for sums of less than 2.5 million shekels are deliberated in magistrates' courts, and claims above that amount are deliberated in district courts. Parties cannot contract out of those jurisdictional rules. Most antitrust-related tort claims are for sums in excess of 2.5 million shekels and, as such, are usually deliberated in district courts.

With regard to 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 regard to a foreign defendant only after a statement of claim has been duly served. If the defendant is found to be 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 found not to be within Israel's jurisdiction, the plaintiff must seek the court's approval to serve the claim outside Israel's borders. The court is authorised to approve the request if at least one of the conditions detailed in section 500 of the Civil Procedure Regulations, 5744-1984, or section 166 of the new Civil Procedure Regulations, 5778-2014, set to come into force on September 2020, is met.

Once the court has assumed jurisdiction, the defendant is entitled to argue that the Israeli courts are not the 'natural forum' for trying the claim (*forum non conveniens*).

Restrictions

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.

With regard to subject-matter jurisdiction, the Competition Law does not include an express provision that applies its provisions to legal relations outside Israel. The issue of its application to arrangements concluded between foreign entities outside 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 Competition Law (see, for example, *ACUM Ltd v The Antitrust Commissioner*, RLFI *Agriculture v Man Truck & Bus AG* and the Competition Commissioner's determination regarding the alleged *Gas Insulated Switchgear* cartel). The effects doctrine requires, inter alia, that the conduct in question has had a direct impact on competition in Israel, and an insignificant impact on competition is not sufficient.

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PRIVATE ACTION PROCEDURE

Third-party funding

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 fee structures, such as a fixed amount or an hourly rate. In class actions, at the end of the proceedings, the court determines the compensation that is to be paid to the plaintiff as well as the attorneys' fee payable in connection therewith.

If certain conditions are met, certification requests and class actions may also be funded by a public fund (the Class Actions Fund) established under the Class Actions Law and funded by the state. The Class Actions Fund is authorised to fund certification requests and class actions in which there is a public or social interest, and the Israel Competition Authority (ICA) has a permanent representative in the Fund. In 2019, 75 requests for funding were accepted, three of which were antitrust-related class actions.

Additionally, the ICA may offer professional guidance to plaintiffs in antitrust-related class actions.

Jury trials

8 | Are jury trials available?

No.

Discovery procedures

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 to aid in uncovering the truth. At the request of a litigant, the court may order that the parties to a dispute disclose the documents relevant to the dispute that are or were in their possession in an affidavit, 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 the affidavit). Although this process may require litigants to petition 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 (as well as all relevant data used in the parties' experts' opinions). Courts are also careful not to allow parties to embark on 'fishing expeditions'.

Third-party discovery is available on a very narrow basis and derives from jurisprudential precedents, not legislation. A party may petition the court to instruct a corporation that is not party to the proceedings 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. Protecting third parties' right to privacy of their personal information, the Supreme Court has ruled that discovery will be required only in rare and exceptional cases and will require a cogent argument regarding the necessity and essentiality of the requested information, among other stringent conditions. However, information relevant to a dispute in the possession of an administrative agency, can be obtained through the Freedom of Information Law, 5758-1998 (the Freedom of Information Law), in addition to making 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 completion of the questionnaire is granted the discretion to decide whether, 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, which are the subject of the discovery, are related to issues relevant to the certification request (as opposed to being relevant to issues concerning the claim itself), and the claimant has presented prima facie evidence establishing that the requirements for the certification of a class action are met. These rules have been further elaborated by Supreme Court rulings (see *Tnuva v Prof Yaron Zelekha, Boaz Yifat et al v Delek Motors et al* and *Israel Consumer Counsel v Tnuva*).

In respect of class actions for excessive pricing, information relating to profitability (eg, costs figures and revenue) may be subject to disclosure, particularly if relied upon by the defendant (*Tnuva v Prof Yaron Zelekha, Israel Consumer Counsel v Tnuva* and *Osem Investments Ltd v Soroker)*. In *Ronen Gafniel v Central Bottling Co Ltd* a formula was set by the Central District Court linking the level of disclosure in excessive-pricing cases and the level of proof required to certify the claim. Generally, the court holds that if the defendant is reluctant to disclose sensitive information (including pricing and profitability) to refute the plaintiff's claim of excessive pricing of a certain product, the court may certify the claim based on preliminary indications founded in public data (such as newspaper articles and annual reports). A similar approach was recently adopted by the District Court in respect of a motion to certify a class action filed on the grounds of an alleged international cartel (*Hatzlacha v El Al Airways et al*). Israel's Attorney General later criticised this approach in the framework of excessive pricing class actions.

Admissible evidence

10 | What evidence is admissible?

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

In the case *RLFI Agriculture v Man Truck & Bus AG*, the defendants argued foreign administrative decisions – and, in particular, the European Commission's infringement decision concerning the defendants themselves – is inadmissible as hearsay evidence. The court stated that this type of argument is of substantial weight, without conclusively ruling on the matter. Conversely, in *Hatzlacha v El Al Israel Airlines et al*, for the sake of the certification, the District Court accepted foreign court rulings and foreign administrative decisions as evidence, and it consequently approved a filing of a class action against the defendants.

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

In general, litigants are entitled to deviate from evidence law by mutual agreement and, as such, to 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, the party is precluded from later claiming otherwise, and the evidence will be regarded as admissible.

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Legal privilege protection

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 attorneys' employees. According to case law, the client is also entitled to enjoy attorney–client privilege in the sense that the client will not be forced to disclose information concerning professional consultation with his or her lawyer.

Attorney–client privilege is absolute, and, as such, the courts are not entitled to rescind it. The legal sources for attorney–client privilege are section 48 of the Evidence Ordinance (New Version), 5731-1971, and 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, nor to communications that involved a third party.

The legal documents privilege provides that documents prepared either by an attorney, his or her client or someone on its behalf in connection with pending or anticipated legal proceedings are privileged. The normative source for this privilege is a Supreme Court ruling. The legal documents privilege also applies to documents created in the framework of pending or anticipated alternative dispute resolution proceedings (eg, mediation and arbitration). However, only documents prepared predominantly to serve such potential legal proceedings may benefit.

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 this type of petition if the interest in the 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 and discovery only to outside counsel or economic expert).

Criminal conviction

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 became final (section 77 of the Courts Law (Combined Version), 5744-1984; section 17 of the Civil Procedure Regulations, 5774-1984; and section 19 of the new Civil Procedure Regulations, 5778-2014).

Utilising of criminal evidence

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 judgment and provided the basis for conviction (ie, were not made obiter dictum);
- the judgment to convict is final (either the time frame for submitting an appeal has expired or the appeal proceedings have been exhausted); and
- at the very least, one of the parties to the civil proceedings is the convicted person, its substitute (ie, a person 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 or an employer).

An opposing party may be permitted to assume the burden of proof and refute such prima facie evidence and findings subject to its receipt of the court's approval for the rebuttal, together with other stringent criteria concerning the rebuttal.

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 Economic Competition Law, 5748-1988 (the Competition Law). Therefore, those granted leniency are not protected from follow-on private litigation or from administrative enforcement measures. The first (and only) case in which the leniency programme was used in Israel was in the alleged *Gas Insulated Switchgear* cartel case. In this case, one of the parties to the alleged cartel (ABB) provided the ICA with evidence in exchange for leniency. In 2013, the ICA 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 declaration, several class actions and a civil claim were brought against the alleged cartel members, including ABB.

The ICA does not normally disclose documents obtained in its investigations of its own volition. A private claimant can file a petition to the ICA for review of those documents pursuant to the Freedom of Information Law. Although the Law does not apply to materials obtained in the course of investigations conducted by the ICA, the ICA applies similar principles when reviewing petitions for disclosure in respect of those materials. 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.

Stay of proceedings

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 any other civil proceeding. Defendants commonly petition the court for a stay of proceedings when an action dealing with substantially the same cause of action is pending elsewhere, whether the parallel action is administrative or criminal in nature (the lis alibi pendens principle). When weighing this type of petition, the court takes several factors into account, including the potential cost and time savings to the state and to the parties, the prevention of contradictory court decisions and the balance of convenience between the parties.

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 those proceedings may support the plaintiff's claim.

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Standard of proof

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 its claim on the balance of probabilities. The ICA Commissioner can publish a declaration of breach, which provides the plaintiff with prima facie evidence that the Competition Law was breached by the defendant.

Additionally, cartels, bid-rigging arrangements and certain other forms of horizontal arrangements are held to be inherently harmful to competition; thus, the plaintiff does not need to prove their actual anti-competitive effect to establish liability. However, this principle appears to be distinguished in respect of cases regarding international cartels, in which it must be proven that the requirements of the effects doctrine are met, as a precondition for the application of the Competition Law.

Time frame

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 with other private claims, an antitrust-related claim can be dismissed *in limine* or it may be litigated over a period of several years. Parties can file a petition to expedite specific court proceedings (eg, court hearings).

Limitation periods

17 | What are the relevant limitation periods?

Civil causes of action generally expire 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 the case of an ongoing infringement, the cause of action may arise on the day on which the infringement ended (section 89 of the Tort Ordinance).

However, if the facts constituting the cause of action were unknown to the plaintiff for reasons beyond the plaintiff's control and that the plaintiff 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 applicable case law, the degree of knowledge required to trigger the commencement of the limitation period is a suspicion regarding the facts that constitute the cause of action (including cases in which the plaintiff should have had those suspicions).

If damage caused by the defendant is not discovered on the day of its occurrence, grounds for a civil tort claim expire after 10 years from the day on which the damage occurred (section 89(2) of the Tort Ordinance and *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 at which the damage occurred. For example, if a plaintiff discovers that they were harmed at the time at which the damage occurred but only learns at a later date that this harm was because of the operations of a cartel, the prescription period will not be limited to the 10-year period.

In addition, there are a few specific limitation rules governing prescription that 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 prescription, as if they had 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 the certification of a class action or dismisses the request, the personal claims of the relevant group members will generally be prescribed for one year from the day of the court's decision, thereby extending the limitation period as necessary.

Appeals

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 a right of appeal to a higher tribunal. A second appeal requires leave from the court. Interim decisions are subject to appeal where leave is given. Some interim decisions, most of which deal with technical matters (eg, decisions regarding deadlines), are not subject to appeal during the trial court proceedings.

Administrative decisions of the Competition Commissioner (eg, a determination according to which a party violated the Competition Law) are subject to a right of appeal to the Competition Tribunal. Judgments of the Competition Tribunal are subject to a right of appeal to the Supreme Court. Interim decisions of the Competition Tribunal, by contrast, are not subject to appeal for the duration of the proceedings before the it.

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

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Class actions may only be filed regarding matters listed in the Class Actions Law or where other legislation explicitly grants a right to file a class action. Collective proceedings in respect of antitrust claims under the Economic Competition Law, 5748-1988 (the Competition Law) are available under the Class Actions Law.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

No. Parties may elect to file a claim as a private civil suit or as 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 belonging to the class as defined by the court are automatically included in the action unless they definitively opt out of the class within the allotted time frame.

Certification process

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 answers will find favour in 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 must demonstrate that the above conditions are satisfied based on prima facie arguments and evidence in support of their claim.

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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 in summer 2011, and the opinion published by the previous Commissioner in 2014 stated that excessive pricing may be viewed as a breach of the Competition Law. There has also been an increase in class actions against alleged international cartels. Many of the antitrust-related class actions do not reach the certification stage as they are withdrawn (usually with a reward granted in exchange for the withdrawal) prior to certification, or settlements are reached between the parties.

In 2016, the Central District Court certified a class action against Tnuva, in which it was argued that Tnuva charged excessive prices (*Naor v Tnuva*). In 2020, the Court ruled in favour of the plaintiff, making it the first ever excessive pricing class action in Israel to be sanctioned by the Court.

In 2019, in two decisions handed down by the Central District Court (*Ronen Gafniel v Central Bottling Co Ltd* and *Alon Tzadok v Strauss Group Ltd*), the excessive pricing cause of action was recognised as a valid cause of action. The decisions also refer to the evidential threshold that the class plaintiff must meet at the certification stage. The Court determined that the evidential threshold will be set according to the scope of the information disclosed by the defendant regarding its costs, inputs, profitability, risks, etc.

An appeal was filed with the Supreme Court on the *Ronen Gafniel* decision (Motion for Leave to Appeal 1248/19 *Central Bottling Co v Gafniel*). Israel's Attorney General (AG) joined the proceedings and, in June 2020, submitted an opinion with the Supreme Court regarding the applicability of the excessive pricing prohibition in Israeli law and the appropriate test for its application. The AG argued that the excessive pricing prohibition should be recognised under Israeli law but should be very carefully enforced. The AG was also critical of the Central District Court's approach regarding the burden of proof in excessive pricing class actions. Furthermore, the AG position contested the rule set by the District Court that lowers the thresholds when the monopoly does not disclose sensitive business information.

In 2020, the Central District Court certified a filing of a class action against four airlines operating in Israel, based on an alleged international cartel that influenced the prices of cargo shipping by air (*Hatzlacha v El Al Israel Airlines et al*).

Opting in or out

23 | Can plaintiffs opt out or opt in?

Generally speaking, once a class action has been certified by the court, plaintiffs may opt out of the class by informing the court within 45 days of the class action's certification being published, or longer, at the court's discretion.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Once a class action has been filed or certified by the court, 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 AG, as well as relevant regulators (eg, the Competition Commissioner, the Consumer Protection Commissioner or the Supervisor of Banks) be sent copies of the proposed settlement. Certain parties, such as any member of the represented class, a government agency related to the subject matter of the settlement or class action and the AG, may file a reasoned objection to the proposed settlement.

A member of the class action class who is not interested in being party to the proposed settlement may ask to be removed from the action.

The court is authorised to approve a settlement only if it finds 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 certain conditions before giving its approval to the settlement, which are essentially the conditions required for certifying a class action. The Class Actions Law also sets forth other requirements and procedures that may be applicable to the approval of a settlement, such as the appointment of an expert on the relevant subject matter to provide an opinion on the proposed settlement.

Legal practice on the matter of class actions 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* with regard to the members of the class (but rather only with regard to the named plaintiff).

In some cases, however, defendants have taken up the practice of granting a reward to the withdrawing plaintiff and its counsel despite the action being withdrawn. This is often done when the action appears to have raised an issue of importance and has led to a beneficial outcome, such as a positive change in behaviour, or as a method of hastening the conclusion of unfounded actions and, thus, avoiding the associated public relations and litigation costs.

This practice has been met with scepticism by the courts, which in certain cases have deprived the withdrawing plaintiff and its counsel of any reward. Accordingly, the courts have 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. In recent years, the Supreme Court determined, in *Markit Efficiency Products Ltd v Sonol Israel Ltd*, that a reward for a withdrawing plaintiff and its counsel should be approved by the Court only in exceptional circumstances, subject, inter alia, to the provision of actual benefits to the action arising from the filing of the motion for certification.

National collective proceedings

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 before multiple courts in different jurisdictions. However, the Supreme Court is authorised to order that those private actions be deliberated upon before the same court.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No.

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REMEDIES

Compensation

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 via expert economic opinion.

Other remedies

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 unnecessary harm.

However, in antitrust-related cases, the Supreme Court has held that courts should rarely grant motions for interim remedies owing to 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 Competition Commissioner, which state that the defendant has breached the Economic Competition Law, 5748-1988 (the Competition Law). In those cases, a determination by the Commissioner would serve as prima facie evidence that the Competition Law was breached, and, thus, civil courts should be more inclined to grant motions for interim remedies.

Punitive damages

29 | Are punitive or exemplary damages available?

In civil antitrust cases, damages are limited to compensatory damages; thus, punitive or exemplary damages are generally not awarded (though technically possible under general tort law). In recent years, the Israel Competition Authority (ICA) has begun advocating for an amendment to the Competition Law that would allow for treble damages for antitrust offences.

Interest

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

Damages normally include interest and are linked to the consumer price index according to the Interest and Linkage Adjudication Law, 5721-1961. Damages begin to accrue interest from the day the action was submitted, or on another date determined by the court, which may be any date following the rise of the cause of action. Interest on repayment of legal expenses, if awarded, will accrue from the date those expenses incurred until the date of the judgment and the payment of the award as determined by the court. Interest on the repayment of attorneys' fees accrues from the date on which the judgment is rendered until the date of repayment as determined by the court.

Consideration of fines

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 ICA was granted legislative authority to impose 'fines' (monetary payments) only in 2012. As a matter of legal rationale, fines imposed by the ICA (or foreign competition authorities) should 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). The level of fines primarily correlates to the violator's turnover, which should not impact civil compensation. However, the level of the fine may have some relevance to the civil court proceedings in cases where harm to competition served as an aggravating circumstance in the calculation of the fine, as such harm is often associated with harm to the public.

Legal costs

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, inter alia, upon the actual legal costs (eg, court fees, witnesses' salary and costs relating to the registration of a court protocol), the attorneys' 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 conducted themselves during the proceedings.

Joint and several liability

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 jointly owned company abused its monopoly position in the market. The court ruled in favour of the plaintiffs and determined that the defendants were equally responsible towards the plaintiffs. Nonetheless, the court divided the liability among the defendants according to their shares in the jointly owned company.

Contribution and indemnity

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

Indemnity agreements and insurance policies among infringing parties are invalid with regard to monetary payment proceedings undertaken by the ICA (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 are permitted subject to certain prohibitions and limitations. Claims for contribution or indemnity may be asserted in the framework of the principal proceeding or in a separate claim.

Passing on

35 | Is the 'passing-on' defence allowed?

Only a limited number of cases have addressed this subject. Thus far, the courts have yet to positively rule on whether the passing-on defence is a valid defence argument in civil antitrust cases. In *Isracard Ltd v Reis,* the

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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, to avoid double compensation (eg, *Naor v Tnuva*, *Weinstein v Dead Sea Factories*, *Ronen Gafniel v Central Bottling Co Ltd* and *Hatzlacha v El Al Israel Airlines et al*).

Other defences

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 (eg, the applicability of a block exemption and statutory exemption).

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Antitrust claims, particularly in the context of contract disputes, 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 in agreeing 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 in violation of the Competition Law. Nonetheless, in an attempt to encourage the use of arbitration as a dispute resolution mechanism, the courts have not categorically disqualified arbitrations in which one party has 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 in respect of whether the agreement violated the Competition Law; this question remained unanswered. In another case, the court rejected a claim of invalidity regarding an arbitration agreement because it was signed after the contractual relations between the parties, which were claimed to constitute a restrictive arrangement, had been terminated.

As with other civil disputes, antitrust claims may be resolved within the framework of mediation, subject to the parties' consent, prior to commencing formal litigation proceedings. In many cases, including class actions, the courts instruct the parties to attempt to resolve their dispute before a mediator (who may be formally appointed by the court), while the formal litigation proceedings remain suspended.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

In recent years there has been a consistent increase in private antitrust litigation. In particular, the filing of private actions (predominantly class actions) against alleged international cartels has steadily risen. Motions to certify class actions were filed in respect of *Gas Insulated Switchgear*, *Cathode Ray Tubes*, *Liquid Crystal Displays*, *Trucks*, *Air Cargo* and more.

The filing of excessive pricing private actions (predominantly class actions) has also been on the rise in recent years, and numerous motions to certify excessive pricing actions as class actions have been certified. In March 2020, the District Court ruled – for the first time – on the merits of such an action (see *Naor v Tnuva*, concerning the pricing of cottage cheese).

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