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# Antitrust Litigation

**Israel**
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# ISRAEL

## Law and Practice

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# 1. Overview

## 1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in Israel is truly evolving. We are witness to an ever-increasing use of arguments from the realm of competition law in civil litigation and the law is also changing significantly.

**Excessive Pricing Charged by a Monopoly**

Recently, as part of an appeal filed by Coca Cola against the District Court's decision to certify a class action on the grounds of excessive pricing, the Supreme Court Justices requested that the Attorney General provide his position regarding the applicability of a claim of excessive pricing charged by a monopoly as cause of action under the Israeli Class Action Law. The Attorney General's position is significant, as this is the first time that the Attorney General and the Israeli Competition Authority (ICA) have publicly stated their view regarding the ability to file private actions against excessive prices charged by a monopoly.

The Attorney General's position takes a cautious approach concerning the cause of action of excessive pricing and states that, given the many difficulties it raises, it should be used in a very limited manner and only in apparent and obvious cases.

The Attorney General's position adopted a two-stage test to examine the existence of excessive pricing: first, the court is required to examine whether the price is significantly higher then what it would have been had competition existed. Only if the answer is positive, can one move to the second stage and examine whether the price is not only high but also unfair.

The Attorney General's position has a significant influence on how courts will examine lawsuits on excessive pricing. The courts are likely to consider the Attorney General's position in their decision to certify or deny class actions on the grounds of excessive pricing.

In another parallel development, the District Court recently approved a class action against the Tnuva company on the grounds of excessive pricing of its cottage cheese. This is the first time that a court in Israel has allowed damages in a final judgment. The Court ruled that an unfair excessive price was charged and granted damages which stand at only 1%-3.5%.

This judgment is questionable and an appeal was filed on the grounds that the small degree of excessiveness of the price does not meet the criteria set by the Attorney General's position, requiring the cause of action to be accepted only in apparent and obvious cases.

The Supreme Court's decisions in both the Coca Cola and Tnuva appeals will be very significant, as they will set a unified analysis for the cause of excessive pricing charged by a monopoly. The Supreme Court's decisions will also set a precedent for many pending class actions for the cause of excessive pricing.

## 1.2 Other Developments

Another development is the new Civil Procedure Regulations (CPR), which are likely to come into force in January 2021. According to the CPR, to serve a statement of claim on a foreign entity that is not located in Israel, the court's permission for service of the process outside of Israel must be obtained. The court can allow this only if one of the alternatives in Section 500 of the CPR applies to the case at hand.

Recently, another alternative was added, which states that the court can permit service of a statement of claim on a foreign entity if the claim is based on damage that the plaintiff suffered in Israel from a product, service or conduct of the defendant, so long as the defendant could have anticipated that the damage would be incurred in Israel and that the defendant or a related person deals in multinational commerce or services on a significant scale.

# 2. The Basis for a Claim

## 2.1 Legal Basis for a Claim

Every plaintiff (whether a natural person or a corporation) can avail itself of civil remedies for breach of the Competition Law. These remedies stem from the provisions of Section 50 of the Competition Law, which provides that the breach of any of the provisions of the Law shall be tantamount to a tort.

The Law does not define the elements of the tort, and does not prescribe any provisions regarding the remedy that is to be granted for the breach of any of the provisions that amount to a tort. For the purpose of giving the tort substance, Section 50 of the Law refers to the Civil Wrongs Ordinance (CWO) and all of the general principles that are set out in that Ordinance and in case law.

One of the elements of the tort is proof of damage, a breach of the Law that does not cause damage will not entitle the injured party to compensation.

A not inconsiderable portion of the claims that are submitted in the context of competition law are follow-on claims, which are submitted after the Israeli Competition Authority (ICA) has taken enforcement steps. The existence of the enforcement process by the Competition Commissioner enables plaintiffs to rely on the ICA's proceedings and, after those enforcement

proceedings, there is a higher chance that civil claims will be submitted for the same actions.

### 2.2 Specialist Courts

In Israel, there is a designated tribunal for competition issues, but it does not deal with civil claims. The function of the Tribunal is to constitute an instance for judicial review of the decisions made by the Competition Commissioner, such as the decision to approve a merger, but there is no expert court in civil matters on the grounds of competition law.

There are proceedings in place for the transfer of matters between courts, but these do not arise incidentally to the question of expertise in competition matters.

### 2.3 Decisions of National Competition Authorities

The decision of the ICA does not bind the court, but it is of considerable weight. Section 43(e) of the Competition Law provides that a ruling of the ICA constitutes prima facie evidence of its content in any legal proceedings. The Supreme Court has held that the ruling is prima facie evidence of significant weight.

With respect to the decisions of a foreign competition authority, there is no evidentiary force to findings made in foreign proceedings or in a foreign legal system. This is the case in general and in particular, taking into account the clear provisions of the Law that are set out in Section 43(e).

The ICA does not directly intervene in civil proceedings, but there might be cases in which the court requires that the ICA appear in court in order to express its position on various issues. In addition, the Prosecutor General can join any claim in court in order to set out the position of the State. These are exceptional proceedings and if they take place in a tort claim on the grounds of breach of competition law, it might be expected that the Prosecutor General's position will be in accord with that of the ICA.

### 2.4 Burden and Standard of Proof

The burden of proof falls on the plaintiff, with the prescribed standard being the "balance of probabilities" (ie, that the court is persuaded that the plaintiff's version is the more reasonable).

There are defence arguments that transfer the burden of proof from the plaintiff to the defendant. Thus, for instance, the argument of "passing on of damage" transfers the burden of proof from the plaintiff to the party claiming that the plaintiff has passed the damage onwards.

### 2.5 Direct and Indirect Purchasers

As noted in **2.1 Legal Basis for a Claim**, breach of the provisions of the Competition Law will be deemed to be a tort by virtue of Section 50 of the Law. Therefore, the general doctrines in the CWO apply.

The doctrine of compensation is set out in Section 76(1) of the CWO and provides that a plaintiff will be entitled to compensation "only for such damage that might naturally flow in the ordinary course of affairs, and that comes directly from the defendant's tort". The causal link doctrine prescribes that there must be a causal link between a person's act or omission – an act or omission that amount to a tort – and damage caused to the plaintiff, in respect of which he or she is claiming compensation. Section 64(2) of the CWO explains that this link is severed where another person was the decisive cause of the damage.

The question of whether a class action pursuant to the Competition Law can be submitted by indirect consumers has not yet been ruled upon by the Supreme Court but the tendency that appears to be forming supports this possibility. The Attorney General has submitted a position that discussed this issue. Pursuant to this opinion, the possibility that an indirect consumer might submit a class action ought to be recognised because the indirect consumer is not necessarily an indirectly injured party and because obstructing the option of submitting such a class action will block the possibility of submitting class actions on causes of action in antitrust law. After the submission of this opinion, District Court judgments have recognised the possibility of indirect consumers submitting class actions on, among others, the grounds of excessive pricing.

Of note is the last ruling that certified a class action including indirect purchasers as part of the motion. The ruling held that there is no scope to excessively widen the potential class to all kinds of customers. In this case, the class included only those who suffered damages directly and those who purchased the products from that direct purchasers.

### 2.6 Timetable

The Civil Procedure Regulations (CPR) prescribe that cases are to commence 30 days after the date of submission of the last statement of claim if the court does not intend to set pre-trial proceedings. But, in most cases, pre-trial proceedings do take place, and these take several months after the submission of the final pleadings. Furthermore, the start of the case could also be delayed for some time after the date of commencement of the proceedings, because of court overload. Moreover, it is possible that a number of years might pass between the commencement of proceedings and the handing down of a final judgment.

Civil proceedings can continue at the same time as public enforcement. The ICA does not have the legal option of suspending civil proceedings that are taking place at the same time as enforcement proceedings. However, the ICA does have the

ability to submit its position to the court that is hearing the civil proceedings, and to recommend the suspension of them.

Furthermore, a party to the civil proceedings can request that the court suspend the civil proceedings during the course of the public enforcement proceedings, but such a verdict is subject to the exclusive discretion of the court.

## 3. Class/Collective Actions

### 3.1 Availability

Class actions exist in the Israeli legal system and are very common, particularly for breaches of the Competition Law. The causes of action in respect of which a class action may be submitted are set out in the Second Schedule to the Class Actions Law, 5766-2006 (the Class Actions Law), one of which is a cause of action pursuant to the Competition Law.

According to the Third Schedule to the Class Actions Law, a class action on a cause of action under the Competition Law shall be an opt-out claim. Therefore, every person who is part of the class of plaintiffs defined by the court at the time of certification shall be deemed to have consented to submission of the class action on their behalf. According to Section 11 of this law, a member of the class who does not wish to be included in it must give notice of this within 45 days of the date of publication of the verdict of the court regarding certification, or at a later date if so prescribed by the court.

The question of whether a class action for a cause of action pursuant to the Competition Law can be submitted by indirect consumers has not yet been ruled upon by the Supreme Court but the tendency that appears to be forming supports this possibility. This is discussed in more detail in **2.5 Direct and Indirect Purchasers**.

### 3.2 Procedure

**Who Can Bring a Class Action?**

Section 4(a) of the Class Actions Law sets out the persons who are entitled to submit a motion to certify a class action and who will be the plaintiffs in the proceedings on behalf of all of the members of the class.

A person with a personal cause of action, which gives rise to substantial questions (of fact or law) that are common to all of the members of the class to which he or she belongs, may submit a class action.

In addition, a public authority may submit a motion to certify a class action so long as the subject of the claim is one of its public purposes. The definition of a public authority in the Law sets out three authorities: the Commission for Equal Rights for Persons with Disabilities, the Israel Nature and Parks Authority and the Commission for Equal Opportunities in the Workplace. Therefore, a public authority cannot submit a cause of action pursuant to the Competition Law since the cause of action would not be one of its public purposes.

A class action can be submitted by any plaintiff for any personal cause of action, and by an organisation where there is a difficulty finding a lead plaintiff with a personal cause of action. In addition, the Israeli Consumer Council may also submit a motion to certify a class action, even if there is no difficulty in locating a plaintiff with a personal cause of action and it indeed does so quite often.

**Certification**

When a class action is submitted, proceedings take place in which the court examines whether to certify submission of the claim as a class action. In the framework of these proceedings, the lead plaintiff must prove the conditions that are set out below.

Firstly, the plaintiff must comply with the threshold conditions and show that he or she has a personal cause of action. In addition, when one of the elements of the cause of action is damage, the plaintiff must show that he or she has suffered prima facie damage.

Other conditions that the plaintiff must prove for the purpose of certification of the motion are set out in Section 8(a) of the Class Actions Law:

- the class action must give rise to substantial questions (of fact or law) that are common to all of the members of the class;
- there is a reasonable chance that it will be ruled upon in favour of the class of plaintiffs;
- a class action is the most efficient and fairest method of ruling on the proceedings – where clarification of the claim requires a separate factual and legal hearing for the individual members of the class of plaintiffs, there is no room for certification of the motion; and
- there are reasonable grounds for presuming that the interests of the members of the class will be represented and managed in a suitable manner and in good faith.

If this final condition is not proved but the rest of the conditions (including the threshold conditions) are, the court may order the addition of a lead plaintiff or lead counsel, or the replacement of the lead plaintiff or lead counsel.

The burden of proof with which the lead plaintiff is required to comply at the stage of certification of the motion is relatively low: he or she must set out the basic infrastructure of their case. The applicant is not required to set out direct evidence and may make do with circumstantial evidence. As noted above in this section, it is sufficient to prove that prima facie damage has been caused.

### 3.3 Settlement

Pursuant to Section 18(a) of the Class Actions Law, a settlement must be certified in court. Pursuant to Section 19(a) of the Law, the court shall certify a settlement if it believes that the settlement is appropriate, fair and reasonable taking into account the interests of the members of the class.

In cases in which the motion to certify a settlement is submitted prior to certification of the class action, the court will only certify the settlement if the action is in compliance with the conditions for certification of it as a class action, and where a settlement is the fairest and most efficient method.

The law provides that, prior to certifying a settlement, the court will obtain the position of the Attorney General or a person acting on his or her behalf. However, in practice, the courts often certify settlements despite the opposition of the representative of the Attorney General.

## 4. Challenging a Claim at an Early Stage

### 4.1 Strikeout/Summary Judgment

Under Israeli law, claims can be set aside in limine in two ways: strikeout and dismissal. Dismissals give rise to a res judicata so that the plaintiff is not entitled to submit any other claim for an identical or similar cause of action. Strikeout does not constitute a res judicata. A claim may be struck out or dismissed in limine at any stage of the proceedings.

**Dismissal**

Section 101 of the CPR sets out the circumstances in which it is possible to set aside a claim in limine by way of dismissal:

- the cause of action or a factual dispute has been heard in the past and ruled upon in essence;
- the court lacks jurisdiction to hear the claim, whether another court or district has jurisdiction to hear it or not (if the claim was submitted to the correct court); and
- another reason, according to which the court believes that the claim must be dismissed, such as prescription, laches, abuse of process, the plaintiff or the defendant not being fit to sue (for instance, if legally incompetent) or want of privity between the parties.

**Strikeout**

Section 100 of the CPR sets out the circumstances in which it is possible to set aside a claim in limine by way of strikeout:

- the statement of claim does not demonstrate a cause of action, so that even if the plaintiff proves the facts in the statement of claim, it will not be entitled to the requested remedy;
- the claim is vexatious or bothersome;
- the value of the claim has been underestimated (less than its true value), and the plaintiff has not amended the deficiency within the time prescribed for such; or
- failure to pay the full filing fee.

Note that this is not a closed list so that the court has jurisdiction to strike out a claim for other reasons as well.

### 4.2 Jurisdiction/Applicable Law

In Israel, there is one set of laws that applies to the entire country.

The Competition Law is a territorial law that applies to the Israeli territory.

Having said that, the District Court has recognised the possibility of adopting the "effect doctrine" and applying the Israeli Competition Law to international cases if they have effect in Israel

According to the Court, in cases in which the illegal conduct has a substantial, direct and deliberate impact on competition in Israel, the effect doctrine could be used to bring action in Israel.

Recently the Court refused to apply the effect doctrine because the effect on competition in Israel was negligible, and the plaintiff did not meet the necessary burden of proof.

The decisions of the ICA have also discussed this issue in the context of the application of Israeli antitrust laws to international restrictive arrangements.

Thus, in a ruling regarding a restrictive arrangement pursuant to Section 43 of the Competition Law, it was held that the purpose of the Law is to protect competition in business in Israel, and for the purposes of achieving this, to also cover actions that were not taken in Israel but which cause harm to competition there. Furthermore, it has been held that Israeli law must be interpreted in the spirit of the effect doctrine. According to this doctrine, it is possible to apply the Competition Law to actions

that harm competition in Israel, even if these actions were taken outside of the boundaries of the state.

In a later verdict, the Competition Commissioner addressed the effect doctrine and the question of when Israeli law can be applied to actions that are taken outside of the boundaries of the state. The Commissioner held that for the purpose of the application of Israeli antitrust laws it is necessary to prove a clear relationship between the actions taken overseas and the Israeli market.

Alongside the substantive test, which relates to the question of when the Law must be applied to actions taken outside of Israel, there is a procedural aspect which relates to the ability and method of service of process outside of the boundaries of the state on foreign defendants.

### 4.3 Limitation Periods

The relevant statute on the prescription period in civil claims on antitrust matters is the Prescription Law, 5718-1958 (the Prescription Law). Pursuant to Section 5 of which, the prescription period for a civil claim is seven years.

The prescription period commences on the date on which the cause of action comes into being, that is the date on which the act or omission grounding the claim occurs. Where the cause of action is damage, the prescription period starts on the date of occurrence of the damage.

However, if the damage is discovered late, the prescription period will commence on the date on which the damage is discovered, so long as no more than ten years have passed since the date on which the act or omission took place.

Pursuant to Section 3 of the Prescription Law, the defendant must raise the claim of prescription at the first opportunity. "First opportunity" has been interpreted in the case law to mean the first opportunity on which the defendant had the possibility of making its arguments, which could even be prior to the submission date of the defence statement. In addition, pursuant to Section 27 of the Prescription Law, the court can dismiss a claim for laches even if the prescription period has not yet passed.

**Class Actions**

A specific arrangement applies to class actions. Pursuant to Section 26 of the Class Actions Law, when the court certifies a claim as a class action, the prescription period for the members of the relevant class will commence on the date of submission of the claim. If the court dismisses the motion to certify the claim, the prescription period will not end until one year has passed after the date on which the verdict becomes absolute.

## 5. Disclosure/Discovery

### 5.1 Disclosure/Discovery Procedure

Discovery takes place during the preliminary stage of the proceedings and is divided into general discovery and specific discovery. The starting point in civil proceedings is maximum discovery and the parties operate with an "open hand" in a manner that allows for full evidentiary infrastructure, providing an opportunity to adequately address the arguments of the opposing party; although there are exceptions and restrictions to this rule, which are recognised in case law and statute. Furthermore, the court limits the document-discovery stage to a fixed period, so that a late motion for discovery of a document might be dismissed.

During the general discovery stage, a party seeking discovery of documents does not address its motion to a specific document, but rather, requires the opposing party to conduct investigation and inquiry in an attempt to locate all of the documents relating to the matter in question. Section 112 of the CPR sets out the court's jurisdiction to hand down an order of discovery of documents at the request of a litigant. In response to the demand, the opposing litigant must set out what documents related to the matter are, or were, in its possession or control, and have been located by it, following due investigation and inquiry.

Specific discovery relates to a situation in which a litigant is aware of a document that is in the possession of the other party, or a group of documents that it can characterise (on condition that it proves their relevance), and it requires their discovery in addition to general discovery. If an order for specific discovery is granted, the litigant from whom the information is requested must answer whether the document is in its possession or control, and if it is not in its possession, it must declare where it is. Such a declaration ensures that the litigant will have testimony relating to the requested document and the concern of concealment of a document by the other party diminishes.

A litigant may ask to peruse and duplicate any document that is mentioned in document discovery, in pleadings or in the affidavit of a litigant. Here too, the rule is a right of perusal, except in cases in which there is a justifiable reason to refuse it.

Breach of an order of discovery might give rise to a financial charge against the infringing party, and if the infringing party acted with disdain or did not perform the provisions of the order intentionally, the court might strike out its pleadings. Furthermore, a party cannot submit a document as evidence if it has not declared it during discovery, unless it has a reasonable justification for its omission.

In a class action, before that action has been certified, the right of perusal is relatively limited.

### 5.2 Legal Professional Privilege

Privilege is divided into two: statutory privilege and common law privilege. Some privilege is absolute and the mere classification of evidence under a category of absolute privilege denies the possibility of discovery of the document. On the other hand, some privilege is relative, and in respect of such privilege the court may allow partial disclosure or the disclosure of the substance of a document.

There are only a few kinds of absolute privilege, including documents exchanged between attorneys and their clients for the purposes of legal proceedings, and the privilege of religious officiants. On the other hand, there are several relative privileges, including privilege for the purpose of state security, privilege covering confidential commercial information, medical privilege, privilege over the relationship between a psychologist and their client, privilege between a social worker and their client, privilege for the benefit of the public and journalistic privilege.

According to the CPR, the court has jurisdiction to peruse a document in respect of which privilege is alleged, in order to determine the status of that privilege, balancing the protected interests of the party requesting privilege against the harm that will be caused to the opposing party if the documents are not disclosed. Furthermore, the court will examine whether there is alternative evidence and whether a requested document helps prove the allegations.

As a rule, the courts tend to take a cautious approach with respect to allegations of privilege, certainly in the case of relative privilege, and their tendency is to allow discovery of a document or at least part of one, though they may require the litigant receiving the document not to use the document for purposes other than the legal proceedings.

### 5.3 Leniency Materials/Settlement Agreements

In June 2005, a leniency programme was issued for violations of the Competition Law. Since its publication, and despite several attempts by the ICA to encourage the leniency programme, only a few cartel cases have been registered under the programme. One possible reason for this is that the programme does not provide any immunity or protection in civil proceedings, and parties fear exposing themselves to private damages claims.

The leniency programme is similar to turning state's evidence in criminal law and is based on the same rules. As part of the agreement, the witness agrees that the state will disclose to the other defendants every detail concerning him or her and his or her actions, insofar as the prosecution's approach is an investigative one, for which there is a duty of disclosure.

Recently, the ICA published a new leniency programme, which is relevant only to cartel cases. Under this new programme, leniency will be given only to the first involved person that approaches the ICA and only when the other terms of the programme are met, these include:

- the leniency applicant providing the ICA with all the information in their possession;
- no overt investigation having been opened concerning the matter;
- the applicant approaching the ICA independently; and termination of the applicant's participation in the cartel.

The leniency is conditional on full and continuous co-operation with the ICA.

However, a cartel's leader, a person who was formerly convicted in a cartel offence or a person who has already received leniency from the ICA in the past, cannot receive leniency under the programme.

With regard to settlements, the ICA can reach a consent decree with a party which committed an offence under the Competition Law, and request the court to give effect to that order, which may also be without admission of liability on the part of the infringing party, and may include, inter alia, a charge of a sum of money to the State Treasury and a charge to take, or refrain from taking, action in the future.

The request for a consent decree is submitted to the court, accompanied by reasons for granting it and details of the alternative solutions considered instead of the agreement. At the same time, a public notice is submitted on behalf of the ICA calling on any party who may be harmed by the order to submit their claims to the General Director.

## 6. Witness and Expert Evidence

### 6.1 Witnesses of Fact

The Israeli legal system is adversarial in nature. The testimony of witnesses is the way in which evidence is submitted and the allegations of the litigants are proven in civil proceedings. The testimony of witnesses takes place during the evidence stage of the case and is effected by submitting an affidavit of evidence-in-chief, which replaces examination-in-chief. The court may, in special circumstances, decide that the witness will testify orally in evidence-in-chief as well, on such matters as the court may prescribe.

At the start of the evidence proceedings, the affidavits of the witnesses for the plaintiff are submitted, after which the affidavits of the witnesses for the defendant are submitted. The court is authorised to order the submission of affidavits at the same time or in some other order which appears to it to be correct.

A litigant who does not adduce the affidavit of its witness will not be able to adduce the testimony of that witness, unless it sought to summon the witness without an affidavit, for justifiable reasons. In such a case, the witness will first give evidence-in-chief, which will replace the affidavit of evidence-in-chief, and thereafter, will be cross-examined.

After the evidence-in-chief, the opposing party may conduct cross-examination, which will be oral. The court may also pose any question that it wishes to the witness, and may summon a witness who has already testified, to give additional testimony.

Where a witness is summoned to appear but does not the court may issue a habeas corpus order requiring him or her to appear and may impose a fine upon him or her. If the witness is summoned once again and does not appear, the court may impose a penalty.

### 6.2 Expert Evidence

In civil claims that are based on breaches of competition law, a party seeking to prove a matter of expertise must support its arguments with an expert opinion. As a rule, an allegation that is economically complex, including the definition of a relevant market, is a matter of expertise. There is usually no need to obtain the leave of the court for the submission of an expert opinion. Pursuant to the CPR, an opinion must be submitted by the date of submission of the affidavit of evidence-in-chief by the relevant party, unless the court rules otherwise. If no verdict is handed down regarding the submission of affidavits of evidence, the opinion can be submitted up to 90 days prior to the date of the first evidence session. Upon submission of an expert opinion, the opposing party has the right to submit a counter opinion, prior to the date of the submission of its own affidavits, and in the absence of a decision regarding such a date, it must submit an opinion up to 30 days prior to the date of the first evidence session. The submission of opinions after the dates set out above requires the leave of the court.

However, in claims based on breaches of competition law, opinions are submitted together with the pleadings. Furthermore, pursuant to the opinion of the opposing party, it is possible to submit a supplementary opinion that addresses the opinion of the opposing party, and in any event, each party has the right to cross-examine the expert of the other party.

The court is authorised to appoint an expert acting on its own behalf.

## 7. Damages

### 7.1 Assessment of Damages

During the first stage, the damage is estimated by the parties via opinions that are drafted by an economic expert who is familiar with the field of competition. The opinions are usually submitted to the court together with submission of the pleadings and are usually updated after discovery and perusal proceedings. Sometimes, another opinion is submitted by an objective economic expert who is appointed by the court.

In practice, there are very few tort cases based on causes of action in competition law that have reached the stage of damage quantification by the courts, since most cases end in settlement. It is consequently not possible to point to a particular method in which the damage caused to an injured party is quantified. In general, the plaintiff makes two main arguments with respect to compensation: overcharging and loss of profits that would have been obtained but for the breach. What these arguments have in common is an attempt to create an alternative reality in which the breach of the Competition Law did not take place. The plaintiff's damage is the difference between what it would have had, in that alternative reality, and the price that it paid, or the profits that it in fact made, in reality.

It should be noted that despite the fact that the overarching principle in tort law in Israel is restitutio ad integrum, it is possible that there might also be an opening to sue, in addition, for the damage caused to the plaintiff by the enrichment derived by the tortfeasor due to breach of the Competition Law, via the Unjust Enrichment Law, 5739-1979. The ability to sue for compensation for unjust enrichment has not been ruled upon by the Supreme Court and the rulings of the district courts in this regard are not uniform.

If the courts are required to assess damages in the future, they will probably employ methods of calculation such as "before-during-after", which compare the plaintiff's condition in the market before and after the perpetration of the tort; or by using criteria via which a comparison may be drawn between different markets in which there was no tort, in order to estimate the damage.

As noted above, it is a fundamental rule in Israeli tort law that a person does not owe compensation other than for the damage that he or she causes, with the basis in awarding compensation being restitution of the injured party to the situation that he or she would have been in but for the breach. Therefore, although

the case law recognises the power of the courts to award punitive or deterrent damages, these will only be awarded in exceptional cases, in circumstances in which the tortfeasor's conduct is particularly outrageous and nefarious, is intentional and not merely negligent, and where punitive sanctions cannot be imposed in criminal or disciplinary law. To date, punitive damages have never been awarded with respect to tortious claims on the grounds of competition law.

### 7.2 "Passing-on" Defences

The courts in Israel have not yet ruled directly with regard to the pass-on defence. Prima facie, there is an opening for this defence in cases in which the tortious plaintiff is directly injured by the breach. It is a fundamental rule in tort law that a tortfeasor is not required to pay more than the damage caused or more than is necessary for restitution of the situation to its prior state; this means that, prima facie, a person injured by a breach of the Competition Law may sue the party breaching the Law for his or her share only, and not for the portion that was passed on to another party.

Alongside this, as set out in **2.5 Direct and Indirect Purchasers**, despite the fact that the question of the indirect consumer has not yet been ruled upon by the Supreme Court in Israel, the tendency in the District Court in tort claims based on competition causes of action has been that the indirect consumer also has a right to sue. The existence of the pass-on defence depends, to a considerable extent, on the existence of an independent right to sue that obtains to the indirect consumer. If an indirect customer has this right and the pass-on defence is not employed, the tortfeasor might have to pay full damages to both the direct plaintiff and the indirect plaintiff. There is, consequently, a significant opening for the application of the pass-on defence in the future.

### 7.3 Interest

Interest, in Israel, is regulated by law. The Adjudication of Interest and Linkage Law, 5721-1961 provides that a court awarding a sum of money to a litigant may, at its discretion, also award interest on such sum or part thereof. According to the Adjudication of Interest and Linkage Law, the interest period commences on the date of submission of the claim and ends on the date on which the judgment is handed down, or the date prescribed for payment of the sum awarded in the judgment, whichever is the later. Accordingly, there are judgments in which the court has awarded compensation from the date of submission of the claim and there are judgments in which compensation has been awarded for the entire period in which the tort has been in place (subject to prescription).

The interest rate is prescribed in accordance with the provisions of the Adjudication of Interest and Linkage Law, and the regulations made thereunder, and it varies in accordance with the parameters that are set out in that law.

## 8. Liability and Contribution

### 8.1 Joint and Several Liability

The CWO provides, in Section 11, that if more than two persons are liable for a tort, they will be jointly liable for the action and it will be possible to sue them jointly and severally. The class of joint tortfeasors can be divided into three categories: joint tortfeasors, separate tortfeasors who cause one single indivisible damage and separate tortfeasors who cause separate damages. With respect to the first two, joint and several liability will be set for the entire damage, whilst in the third, each tortfeasor will be held liable for the damage that they caused, separately.

The division of liability between the tortfeasors is not relevant to the injured party itself, but influences the internal division between the tortfeasors themselves, and this is a finding that is made by the court. Furthermore, the burden of proving that the damage can be divided and separated falls on the tortfeasors, and a tortfeasor who wishes to say that some of the damage was not caused by it must prove this.

In the case of a difficulty in obtaining compensation from one of the tortfeasors, Israeli law has, in principle, recognised that it is better that the other tortfeasors bear the damage than the plaintiff have to bear the tortfeasor's inability.

### 8.2 Contribution

As set out above, breach of the Competition Law constitutes a tort. Pursuant to the CWO, a defendant may submit a third-party notice in order to transfer the liability, in whole or in part, for the claim submitted against it, to a third party. A third-party notice is in fact a conditional claim, because if no liability is imposed on the defendant, the third party will be exempt from indemnifying it. The third-party notice is based on the primary cause of action, while liability towards the third party only arises via the judgment that is handed down against the defendant.

A third-party notice can also be submitted against one of the defendants in the principal claim and, in the absence of a third-party notice, it is possible to deduce that the defendant has no claim for indemnity against any of the other defendants. However, in most cases, and in the case of a tort claim, there is no need for a third-party notice between two defendants who are both liable for the tort, since the court will in any event determine the level of participation of each defendant in payment for the damage. If one of the defendants is struck out of the claim (for instance, if the plaintiff asks to strike them out), the

defendant has the right to join the struck-out defendant as a third party.

The proceedings against the third party take place in the framework of the principal claim, in order that all of the litigation might be co-ordinated, saving considerable costs to the parties and the legal system.

## 9. Other Remedies

### 9.1 Injunctions

In Israeli law, the court may issue injunctions and mandamus orders. These orders may be issued as a final remedy in a claim, or as an interlocutory remedy.

**Conditions for Granting Injunctive Relief**

With respect to an interlocutory injunction or mandamus order, the law sets out the considerations that guide the court in awarding an interlocutory order. Firstly, the applicant must prove the cause of action on the basis of prima facie reliable evidence. Additional considerations that the court will take into account include:

- the damage that will be caused to the applicant if the interlocutory remedy is not granted and its claim is upheld, as opposed to the damage that will be caused to the respondent if the interlocutory remedy is granted and the claim is dismissed (known as the balance of convenience);
- whether the motion was submitted in good faith;
- whether grant of the remedy is just and proper in the circumstances of the case (for instance, submission of a motion with laches might point to the fact that it is not just and proper); and
- whether the interlocutory remedy is proportionate.

A technical condition for the award of an interlocutory remedy is the provision of a guarantee and an independent undertaking. In addition to these, the court may order the deposit of a guarantee.

**Injunctive Relief Procedure**

In general, an interlocutory remedy will be granted in the presence of both of the parties. The court can award an interlocutory remedy at any time. However, relief in the grant of interlocutory remedies varies in accordance with the timing of the motion. Thus, when a motion is submitted for grant of an interlocutory remedy prior to submission of the claim itself, the interlocutory remedy will only be awarded if the court is persuaded that doing so is justified. This kind of order will expire within seven days unless the court sets some other date, in special circumstances.

Pursuant to Section 366(a) of the CPR, the court may grant an ex parte order if it is persuaded, on the basis of prima facie reliable evidence, that there is a reasonable concern that a hearing in the presence of both of the parties will give rise to frustration of the award of the order or will cause serious damage to the applicant. However, there are three classes of interlocutory remedies in respect of which the default is an ex parte hearing, but which are not, in general, suitable for proceedings relating to competition claims (interlocutory attachment order, injunction restricting the use of an asset, or an order for the seizure of assets). Pursuant to Section 367 of the CPR, when an ex parte order is awarded, the court will conduct a hearing in the presence of both of the parties no later than 14 days after the date of grant of the order (except for a motion for an interlocutory attachment order).

**Injunctive Relief and Antitrust**

Pursuant to the case law handed down by the Supreme Court, interlocutory remedies will not be granted on causes of action in antitrust cases. The rationale behind this rule is that claims on the grounds of competition law require in-depth factual analysis such as the definition of the market, the quantification and estimation of the market share or market power, and an examination of the probable outcome of the arrangement on competition or on the public, and they are not, by their nature, suited to interlocutory remedy. The exception to this rule is when there is a ruling by the Commissioner that states that the arrangement is a prohibited restrictive arrangement. The Commissioner's ruling, which constitutes prima facie evidence in civil proceedings, is based on an in-depth analysis of the arrangement as well as an analysis of the market and its competitive impacts. Given this state of affairs, the court will give weight to the ruling and will not itself resort to engaging in a complex factual clarification.

### 9.2 Alternative Dispute Resolution

There are three types of alternative proceedings for dispute resolution: arbitration, mediation and settlement. These proceedings are not obligatory, and parties to legal proceedings can be referred to them by consent. As a rule, the courts in Israel quite often tend to refer parties to alternative dispute resolution proceedings and they can be aggressive in terms of the pressure that they impose on the parties to resolve their disputes out of court.

Referral to arbitration proceedings can be affected in three ways:

- by virtue of an arbitration agreement between the parties (Section 1 of the Arbitration Law, 5728-1968);
- by virtue of a motion for a stay of proceedings where a party to an arbitration agreement resorts to legal proceedings despite the existence of the arbitration agreement (Section 5 of the Arbitration Law); and

- by virtue of the parties' consent during the course of the legal proceedings (Section 79B of the Courts Law [Consolidated Version], 5744-1984).

Pursuant to Section 79C(b) of the Courts Law, the courts may, with the consent of the parties, transfer the proceedings in a claim to mediation. In addition, in certain claims, pre-mediation proceedings take place, the purpose of which is to verify the possibility of resolving the dispute by way of mediation prior to the conducting of a hearing on the essence of the claim before the court.

Pursuant to Section 79A of the Courts Law, a court hearing a civil matter may, with the consent of the litigants, rule on the matter before it by way of a settlement with the consent of the parties. The court may propose a settlement to the parties or may give the force of a judgment to a settlement that the parties have reached.

## 10. Funding and Costs

### 10.1 Litigation Funding

In Israel, external funding of civil proceedings by third parties is evolving and we are witness to an increasing number of external financiers. There are private and public funds and they may be used both for the funding of private claims and for the funding of class actions.

With respect to class actions, there is a designated fund for class actions in cases of social and public significance. With respect to claims on issues of competition, a representative of the ICA sits on the advisory committee of the public fund and it has, to date, funded a number of class actions on competition-related causes of action. Since the inception of the Fund in 2011, a number of applications for the funding of class actions in the field of competition law have been submitted (5% of the total applications submitted to the Fund). In 2019, funding was given for three claims in the field of competition law. The applicant might be an organisation or a private individual and he, she or it must comply with the conditions that are set out in the CPR.

### 10.2 Costs

The legal rule is that the party that loses the legal proceedings will bear the costs of the other party. The court has discretion in this matter and may decide to award costs to the litigants, including advocates' fees, if it sees fit to do so.

In fact, the costs that are awarded do not cover actual costs and, in many cases, do not cover even a small portion of the costs.

Section 519(a) of the CPR provides that: "The court or the registrar may, if they see fit, order a plaintiff to give a guarantee for payment of all of the defendant's costs". In most cases in the trial court, the plaintiff is not required to deposit a guarantee for the assurance of the defendant's costs, other than in exceptional cases and the court is required to make cautious and sparing use of the power granted to it in Section 519.

Requiring a plaintiff to submit a guarantee for costs, which is subject to the discretion of the court, is designed, according to case law, to prevent empty claims and to ensure payment of the defendant's costs if the claim fails. This requirement might, however, impede plaintiffs and may even restrict or prevent access to the courts by plaintiffs without means. The Section does not set out the considerations that the court must take into account when hearing a motion to require a plaintiff to deposit a guarantee, and leaves the court with broad discretion in this regard. Therefore, the law that has been set out in the rulings of the Supreme Court is that this matter must be dealt with in moderation and that the plaintiff must not be required to deposit a guarantee for costs other than in exceptional cases in which the chances of success of the claim are weak and there is a real concern that if the claim is dismissed, the defendant will have difficulty collecting the costs that might be awarded in its favour from the plaintiff; therefore, when balancing the plaintiff's right of access to the courts and the defendant's right not to be out of pocket, the plaintiff's right prevails. Case law has further held that the poverty of a plaintiff is not, in and of itself, sufficient grounds for requiring it to deposit a guarantee for costs.

## 11. Appeals

### 11.1 Basis of Appeal

As a rule, there is a right to appeal every judgment, once, to a higher court. Thus, for instance, if a judgment is handed down in the Magistrate's Court, a right is granted to submit an appeal against the judgment to a District Court. Furthermore, if a judgment is handed down in a District Court, a right is granted to submit an appeal against the judgment to the Supreme Court.

After the verdict is handed down in the appellate court, there is no vested right to appeal it as well. Where the appellate court is a District Court, leave may be sought from the Supreme Court to submit an additional appeal against the judgment of the appellate court. The Supreme Court is the highest court, and therefore, there is no technical possibility of appealing its judgment. However, it is possible to request a further hearing of a judgment handed down by the Supreme Court, but those proceedings take place sparingly and only in very exceptional circumstances.

The vested right to appeal only applies after the final judgment has been obtained, but so long as the proceeding are taking place in the court, it is not possible to appeal on interlocutory proceedings by right. The court may order that various steps be taken during the course of proceedings, before the final verdict is handed down, but the litigants have no vested right to appeal those. Therefore, if a litigant feels that some injustice has been caused to it in interlocutory proceedings, it must wait for the final judgment and then appeal them in the appeal against the judgment.

However, a litigant may request leave of the court to appeal a verdict in interlocutory proceedings. If the court gives the litigant leave to do so, it may submit an appeal against the interlocutory proceedings that are in dispute, immediately.

In general, the appellate court does not discuss the findings of fact made by the trial court. The function of the appellate court is therefore to examine the legal rulings of the trial court, on the basis of the factual findings of the trial court.

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