

DISTRICT COURT DECISIONS REGARDING THE PROHIBITION OF EXCESSIVE PRICING BY A MONOPOLIST

In recent years, the issue of excessive pricing by a monopolist received significant attention from the legal community and the general public. On January 16, 2019 decisions were published on two separate motions for certification of class actions heard by the honorable Justice Ofer Grosskopf (in his capacity as District Court Justice for the Central-Lod District), which were brought on these grounds.

In Class Action 36098-05-16 **Zadok v. Strauss Group Ltd.** (hereinafter: the **Zadok Case**), the District Court dismissed a motion for certification of a class action filed against Strauss which asserted a cause of action due to the excessive pricing of cocoa powder for household consumption. Concurrently, in Civil Appeal 6179-08-16 **Gafniel v. The Central Bottling Company Ltd.** (hereinafter: the **Gafniel Case**), the District Court granted a motion for certification of a class action filed against the Central Bottling Company, which was also based on an argument of excessive pricing of 1.5L bottles of Coca-Cola.

In both decisions, the honorable Justice Grosskopf examined excessive pricing as a cause of action, along with the conditions that must be proven in order justify certification. These decisions established several important principles regarding the tort of excessive pricing.

First, the District Court noted that **although EU law was the inspiration for the claim of excessive pricing in Israeli law, the unique characteristics** of the Israeli economy justify **more extensive use** of the excessive pricing cause compared to Europe.

Second, it was determined that establishing the excessive pricing cause requires a two-stage test. After establishing the existence of a monopolist as defined in the Economic Competition Law, 5748-1988, it is necessary to examine whether the monopolist abused its position in the market in order to harm the public by setting excessive prices for its products.

Third, in order to settle the question of whether the monopolist charged an excessive price the court held that it must examine two complementary parameters: the monopolist's **market power** (to be distinguished from market share) and the **difference between the price charged for the monopolized product and the competitive price of the product**, which is generally established based of the production cost. In other words, judicial intervention may be justified where the monopolist possesses significant market power, even if the deviation from competitive pricing is relatively moderate, and vice versa – a greater deviation from competitive pricing needs to be proven when market power is less significant.

With respect to the first parameter, the Court explained that **market power** is a mandatory condition for the existence of an excessive price. This is because a firm is only able to charge excessive prices without losing customers to competitors if it possesses market power. In this context it was clarified that if a particular firm held a large **market share** (greater than 50% which is the threshold for the definition of a “monopolist” pursuant to Section 26(a)(1) of the Economic Competition Law), this would not be a conclusive indication of market power, and there may be instances in which such a market share is insufficient to establish the cause of action.

With respect to the second parameter, the Court determined that an excessive price is a price **significantly exceeding the price that would be charged under competitive conditions**. The District Court reviewed three auxiliary tests which were listed in the current Statement of Position of the Competition Authority for identifying excessive pricing. The District Court determined that each auxiliary test stands by itself as a relevant indicator of the existence of unfair pricing.

The first auxiliary test is the manufacturing costs test. Under this test the difference between the price charged by the monopolist and the product's manufacturing costs needs to be examined. Subsequently, it should be examined whether the size of that difference indicates the unfairness of the price. According to the Court, this determination shall be made in accordance with the circumstances of the specific market.

The second auxiliary test is the comparison test. Under this test, the product price charged by the monopolist is compared with a relevant benchmark. The benchmark price can be the price of competing products, the price charged by the monopolist to different customers, the price charged before or after the examined period or the price of a similar product or service in a different geographic market. With respect to this test, the Court determined that in the event the product was previously subject to price control, the last controlled price may be a relevant benchmark. However, the relevance of a controlled price depends on the time that has elapsed since price control was removed. As more time passes it becomes more difficult to consider the controlled price as a good benchmark for the competitive price.

The third auxiliary test is the profitability analysis test, wherein the monopolist's profit from sales of the product is compared to the general profitability in the relevant sector.

Finally, **the Court determined in both decisions that the burden of proof required at the certification motion stage depends on the information provided to the Court by the respondent, namely – the corporation argued to have charged an excessive price.** It was determined that if the respondent failed to provide information, the burden of proof will be more lax.

To the extent there are sufficient indications of excessive pricing, the class action will be certified and matters shall be examined based on real data at the stage of the hearing the claim on its merits. However, if the respondent corporation provides full information with respect to its pricing policy and constraints at the certification motion stage, the burden of proof imposed on the applicant at the certification motion stage shall be greater.

In the aforementioned decisions (the Zadok Case and the Gafniel Case), the Court arrived at opposite results.

With respect to the preliminary condition, the respondents in both proceedings – Strauss (in the Zadok Case) and the Central Bottling Company (in the Gafniel Case) – were previously declared as monopolists by the Director General of the Competition Authority and it was uncontested that each of them was a monopolist: Elite Ltd. (later merged with Strauss) was declared a monopolist by the Competition Authority in the cocoa powder for household consumption sector on July 5, 1989, and the Central Bottling Company was declared a monopolist by the Competition Authority in the cola beverage sector on April 8, 1998.

The declaration by the Director General of the Competition Authority of a corporation as a monopolist, as in the case of Strauss and the Central Bottling Company, constitutes *prima facie* evidence in any legal proceeding. It is important to note that the declaration of a monopolist under Section 26(a1) of the Economic Competition Law is purely declarative in nature, and arguments for violation of monopoly laws (including abuse of monopolistic power) can also be asserted against a corporation that has not been declared a monopolist.

The opposite results in each case derived from the second stage of the examination – the existence of the cause of action.

In the **Zadok** case, the Court determined that Strauss holds limited market power that does not allow it to substantially impact market prices over time. This determination was primarily based on the understanding that when Strauss raised prices in a manner that did not reflect changes in manufacturing costs, it lost some of its market share to competitors. Thus, the Court concluded that Strauss is constrained by market forces when establishing prices that are not based on costs.

The court also determined that the applicant did not meet the burden imposed on him to prove the existence of a very significant difference between actual pricing of cocoa powder and costs-based pricing (while noting Strauss' limited market power), even considering the relatively low threshold imposed on the applicant which was not exposed to real data. While the Court dismissed the certification motion, it refrained from awarding costs in favor of Strauss since it failed to expose real data in connection with cocoa powder pricing.

On the other hand, in the **Gafniel** Case it was determined that the Central Bottling Company has significant market power in relation to 1.5-liter bottles of Coca-Cola, which is sufficient to influence the price. The Court reached this determination due to the fact that the Central Bottling Company maintained a consistent price difference compared to its competitors and at the same time succeeded in maintaining a significant market share of almost 90% throughout the entire relevant period.

The Court also applied the comparison test and determined that the difference between prices of Coca-Cola sold by the Central Bottling Company and the prices of its key competitors in the cola beverage market – Pepsi and RC Cola – constitute a sufficient indication for the existence of a significant difference between the price actually charged and the price based on costs, warranting class action certification. The Court arrived at this determination, *inter alia*, while granting weight to the fact that the Central Bottling Company refrained from providing real data.

Considering these two aspects, the Court ruled that it is enough for the applicant **to point to indications that demonstrate an unrefuted concern for pricing that is not based on costs for the certification motion to be granted.**

The court approved the class action against the Central Bottling Company and awarded attorney fees to counsel in the amount of ILS 150,000 plus VAT.

The above review is a summary, provided for informative purposes only and does not constitute legal advice. For more details please contact Adv. Mattan Meridor, partner and head of the Antitrust and Competition Department
meridor@agmon-law.co.il 972-3-6078607

