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# The Attorney General of Israel Recognized the Existence of an Excessive Pricing Cause of Action against Monopolies, but Recommended that it be Used Following Careful Consideration

**June 11, 2020**

On June 8th, 2020, the Office of the Attorney General of the State of Israel (the "**Attorney General**") submitted its position on the existence of cause of action when monopolies charge high unfair prices for goods, and its application in Israel. The issue arose in a motion to certify a class-action in the case of Gafniel against the Central Bottling Company Ltd. ( "**CBC**" and "**Gafniel**").

The class-action against CBC (a declared monopoly in Coca Cola drinks) is part of a trend of applications for certification of class-actions filed against monopolies in Israel over the past few years, claiming their prices are too high. The class-action against CBC was certified in January 2019 by Judge Grosskopf of the District Court, who stated that *prima facie* evidence was presented indicating that CBC had abused its monopolistic position by charging consumers unfairly high prices for 1.5 liter bottles of cola drinks. CBC filed a motion for leave to appeal to the Supreme Court, and the Attorney General's position was requested in this regard.

In its position, **the Attorney General opined that it would be appropriate to recognize the charging of excessive pricing by a monopoly as cause of action under Israeli law**. This determination is based on (1) the interpretation of Section 29A(b)(1) of the Economic Competition Law, which provides for the prohibition of charging an unfair price by a monopoly; (2) the purpose of this Section; (3) the interpretation of

European law, on the basis of which this section was enacted in Israel; and (4) the position of the Competition Authority, subject to the necessary adjustments to the field of private enforcement (as opposed to enforcement by the Competition Authority). However, **the Attorney General noted that this cause of action should be applied with caution and restraint**. In particular, the Attorney General noted that it should only be applied when there are clear indications that the price charged by the monopoly is both significantly and unfairly high. This is due to the fact that a "*retrospective artificial intervention in high prices charged by a dominant company has considerable social and economic costs, in the form of harm to companies' incentives, product quality and the competitive dynamics of the market, which will naturally also lead to harm to consumers' well-being. Therefore, in quite a few cases, the benefit of such intervention may be lower than the said costs*."

The Attorney General claimed that **the appropriate legal test in this regard is a cumulative two-stage test**, similar to the one prescribed by European law:

In the first stage, **determination that the price is significantly higher than the price that would have been charged under competitive conditions**. This examination is performed using a number of auxiliary tests: the gap between the product price and the cost of production, the profitability test and the comparison test (comparison of competing products' prices, the product price in different geographical markets, or the product price in different time periods). However, according to the Attorney General, these auxiliary tests are difficult to apply. As a result of which, there could be mistakes in examining whether the price is excessive, especially when dealing with private enforcement. Therefore, the Attorney General stated that caution is necessary while applying the various tests for the existence of a higher price than the competitive price and while conducting civil claims on the grounds of high unfair pricing. The Attorney General noted that it is necessary to demonstrate **as wide a range as possible of indications clearly showing that the price charged is excessive**. Additionally, **it is also required that several tests be used (as far as possible under the circumstances of the case)**. Relief will be granted against a monopoly only in cases where it is clear and apparent that it charged a significantly and consistently higher price than the competitive price.

In the second stage, **determination that the high price charged is also unfair**. According to the Attorney General's position: "*[i]n general, the purpose of the "fairness" analysis of the price is to examine whether the source of the high price found is an abuse of monopolistic power or whether it is due to some other legitimate reason*." To that end, a number of considerations will be taken into account, such as: the existence of significant power disparities between the monopoly and the consumer; significant entry barriers; rigid demand and a lack of reasonable alternatives for consumers, in particular with regard to essential products; and the existence of legitimate reasons for the high prices, such as innovation and product differentiation, risk taking, etc.

In its position, the Attorney General referred to Judge Grosskopf's holding in *Gafniel*, in which a precedential test was presented. According to this test, a "parallelogram of forces" exists so that "*the more significant the market power is, the more justified the judicial intervention will be, even if the deviation from competitive pricing is relatively moderate*". The Attorney General stated, in this regard, that this test is unsuitable and unbeneficial due to the fact that in the case of charging a high unfair price, in order to establish the existence of this cause of action, the monopoly must hold significant market power as well as charge a high and unfair price.

Although Justice Grosskopf's decision included a two-stage test for the existence of

the cause of action (similar to the Competition Authority's position and the Attorney General's position as stated above), the Attorney General noted that, in practice, only a one-stage test of the price level was applied. The test was applied without examining the fairness of the price on the basis of all the relevant considerations and the circumstances of the individual market examined, which is insufficient.

The Attorney General also noted that there are difficulties in the District Court's decision to seek cost-based pricing and to determine the cost of product manufacturing as the benchmark for the actual price charged by the monopoly, *i.e.*, to base the analysis only on one indication, rather than on the widest possible range of indications, especially when the use of other tests is possible and available.

Finally, the Attorney General addressed the burden of proof and determined that given the complexity of the cause of action and the required prudence in its application, a relatively high standard of proof is required in order to certify an excessive pricing class-action. The Attorney General further noted that the information gap between the plaintiff and the defendant is not sufficient to justify lowering the burden of proof in the certification stage.

In summary, the Attorney General's position is that (i) Excessive pricing cause of action must be interpreted in a limited manner; (ii) caution should be taken with respect to its enforcement; and (iii) it should only be used in cases where the benefit clearly outweighs the costs and damages associated with its application, in particular in private enforcement. The Supreme Court's ruling on the matter should shed light on whether or not the Attorney General's position is the harbinger of a shift in the trend of class actions filled against monopolies on grounds of excessive pricing.

Please see below a link to the Attorney General's position (in Hebrew): click here

Please do not hesitate to contact us with any questions.

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