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CLIENT UPDATE



Precedent-Setting Judgment of the Supreme Court in the Gafniel Case Establishes a Case Law in Applying the Excessive Pricing Cause of Action

July 28, 2022

The Supreme Court has recently (July 26, 2022) announced its precedent-setting judgment in a judicial panel of three (Justices Baron, Hendel and Elron) in the Leave for Civil Appeal against the decision of the District Court (rendered by the Honorable Judge Grosskopf), certifying a class action against the Central Bottling Company Ltd., based on the excessive pricing of a Coca Cola 1.5 liter bottle, as the cause of action.

The judgment addressed the question whether the Israeli Competition Law prohibits a monopoly from excessively pricing a product or service and the conditions for applying such prohibition. As part of addressing this issue, the court was also required to address the question of the burden of proof imposed on the applicant in the motion to certify a class action filed based on the above cause of action.

For the first time has the Supreme Court recognized the applicability of the excessive pricing as a cause of action in Israeli law, holding that **adopting of the excessive pricing as a cause of action is imperative** (similarly to European law) and is in line with the provision 29a(b)(1) of the Economic Competition Law, prohibiting a monopoly from setting unfair prices of assets or services. However, the court called to apply the excessive pricing cause of action in a cautious and restrained manner, "**avoiding a situation where the court may turn into a super-regulator of prices in the Israeli economy**".

Although this fundamental recognition of the excessive pricing cause of action became

common practice in district courts as well, as part of the numerous cases filed with such courts to date, the method of application of the cause of action has remained controversial. As to the method of applying the cause of action, the court held that the test examining the existence of a cause of action should be a two-stage test (as is common in European law and accepted by the Head of the Competition Authority and the Attorney General), and should be applied by the court already at the class action certification stage:

In the first stage, the excessiveness of the monopolistic price is examined versus the price that would have been paid in a competitive market. To that end, common sub-tests can be used, mainly the costs test, examining the gap between the selling price of the product and the cost of its production; and the comparison test, comparing the price to various reference benchmarks (price paid to the competitors; price paid by different customers; price of a similar product on another geographic market; or product price paid in a different time period). The burden of proof in the first stage would be on the plaintiff.

In the second stage, the price unfairness should be examined. Namely, the economic circumstances leading to setting the price on the market are examined, and whether it is a consequence of abuse of monopoly power. As such, for instance, power gaps between the monopoly and a consumer, barriers to market entry, the product demand, its differentiation, availability of alternatives, etc. should be examined as well. The burden of proof in the second stage would pass to the monopolist– to demonstrate that despite the price being excessive, there are economic grounds leading to the conclusion that such a price would be still deemed fair.

The Supreme Court criticized the reasoning of the District Court, according to which, in the circumstances of the case, the required standard of proof should be significantly lowered at the class action certification stage, given the fact that the Central Bottling Company chose not to disclose to the applicant the relevant information and data required for reviewing the excessive price cause of action; holding that **there are no grounds to link the willingness of the company to disclose information to the standard of proof required at the class action certification stage.** The absence of the disclosure proceedings and the significant lowering of the standard of proof have rendered, *de facto*, the class action certification stage obsolete, rolling the excess pricing and the price fairness questions over to the hearing of the claim on the merits stage.

At the end of the day, the court referred the motion to certify a class action back to the District Court, so that the motion for discovery would be heard first, and the question whether the plaintiff has met the threshold required to certify a class action would be adjudicated later according to the tests set by the Supreme Court.

For the Judgment announced on the website of the Supreme Court (Hebrew), click [here](#).

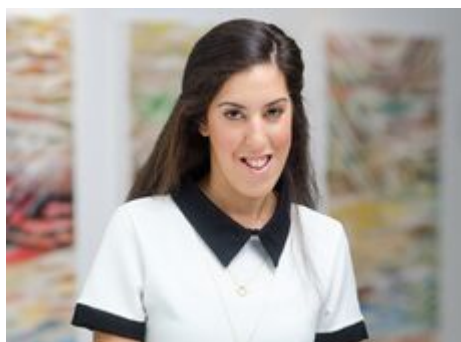
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