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## CLIENT UPDATE



### Competition Tribunal President Rejects two Class Actions Claiming Excessive Pricing against Tnuva

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In connection with the ongoing debate in Israel regarding excessive pricing claims against monopolies, the President of Israel's Competition Tribunal rejected two class action claims filed against Tnuva claiming it charged excessive prices for "white cheese" and whipped cream.

Here are some key takeaways from the court's decision:

1. **An excessive pricing violation should be narrowly interpreted** due to inherent, conceptual and practical aspects entailed in the intervention of the court in the free market. According to the court, this approach is consistent with the general trend under competition law, that being a monopoly is not prohibited, nor is a monopoly obligated to sell its products only at market prices.
2. **The burden of proof which applies in the preliminary stage of certification of a class action should be higher** when the respondent provides elaborate and detailed information during the discovery stage of the certification process. According to the court, by providing detailed information requested by the plaintiff, Tnuva reduced the information gap between it and the plaintiff, which is often an obstacle for class actions. Under these circumstances, the plaintiff's access to that information raised the burden of proof – at the very least – to make a *prima facie* case for the unfairness of the price charged by Tnuva for the products in question.
3. According to the ruling, **an applicant in a class action alleging abuse of a dominant market position, needs to prove the relevant market definition and the alleged monopoly's market share.** To that end, a plaintiff cannot rely on a declaration of a monopoly made by the Competition Authority that just referred to a broader group of products (in this case, to "dairy products" as a whole). The court ruled that the applicant failed to define the relevant markets for the products in question and therefore could not establish Tnuva's market share in these markets.
4. **A claim will succeed only when the price charged is significantly and clearly higher than the price that would have been charged under conditions of competition, and such price is also considered unfair.** In previous cases, the courts referred to rather modest profits as unfair. For example, in an excessive pricing case involving cottage cheese, the court found that the price was excessive based on an operating profit exceeding 18.5%. In its ruling in this current case, the court followed the Competition Authority and the Attorney General's views by which the excessive pricing claim should rarely be used and therefore only clearly substantial profits shall be considered unfair.

The president of the Competition Tribunal concluded the ruling with a significant statement noting that a class action may not be the most efficient and fair course of action to decide in such disagreements. A civil legal procedure, and specifically a class action, may not be the best tool to assess detailed pricing information for various products in various fields, particularly as these figures may be subject to frequent updating. This is especially the case in situations such as this, in which price controls were implemented on these products under a specific law, and under the supervision of a committee for price control, during the years following the relevant period for the class action.

As the court's approach in this case is different from previous rulings on this issue, it remains to be seen what approach the Supreme Court will take in its much awaited ruling regarding a class action in another case alleging unfair prices in the soft drink industry, and whether the approach of this ruling of the Competition Tribunal, will have a significant impact on the Supreme Court's decision.

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