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CLIENT UPDATE



The Supreme Court Upholds Tnuva's Appeal, Signaling That the Recognition of Excessive Pricing Claims Will Be Limited

27 במרץ, 2023

The judgment rendered by the Supreme Court of Israel on March 20, 2023, in the appeal heard by the panel of three justices (Justices Willner, Stein and Ronen), unanimously and on the basis of the Honorable Justice Willner's position, upheld Tnuva's appeal and overturned the District Court's judgment (rendered by the Honorable Judge Stemmer), which certified a class action against Tnuva, alleging that the latter set an excessive and unfair price of the Cottage Cheese.

The Supreme Court stressed again (further to the Supreme Court ruling in the Gafniel Case) that the courts should adopt a cautious and restrained attitude in applying the excessive pricing cause of action, especially in class actions, including at the class certification stage. This attitude mainly stems from the fact that the attempt to determine which price is excessive and unfair entails substantial challenges, which cannot be resolved merely by using legal tools; as well as due to the possibility that the very certification of class actions in this regard will eventually harm competition and the public. The said challenges are especially true with respect to any matters pertaining to private enforcement through class actions, as opposed to enforcement by the Competition Authority that has expertise in the field and has been vested with relevant enforcement powers. Moreover, the Competition Authority is not required to set the border line of the excessive pricing, while the court is actually required to determine

such boundaries in order to assess the damages caused.

The Court relies upon the two-stage test in applying the cause of action, set in the Gafniel Case, as follows: in the first stage, it should be considered whether the price is substantially in excess of the price that would have been set in competitive market conditions. Such a test will be mainly performed relying on the supporting tests customary in such matters: the product cost test, the comparison test and the profitability analysis test. Only if the answer to the above question is positive, in the second stage, it should be considered whether the price is also unfair, resulting from the abuse of monopoly power. In the second stage the burden of proving the fairness of the price will be imposed on the monopolist.

As to the application of the first stage, Justice Willner held that the judgment rendered by the District Court relied on the incomplete factual basis: no clear data were established on the prices of the Cottage Cheese set by Tnuva; no data were introduced on the competitors' prices (except for the average prices only); no evidence was provided pertaining to the common profit margins in the food or dairy industry.

Justice Willner rejected the attempt to compare the Cottage Cheese prices in the period of filing the claim to the prices in the period hereafter set on the backdrop of the "Cottage Protest" outcome. The Court upheld Tnuva's claim that in the summer of 2011, it reduced the Cottage prices due to the "economic and reputational damages" caused as a result of the social protest; the Court also held in this regard that "a company may make image-related and reputational considerations and draw economic conclusions from them", which does not in itself attest to the prices prior to the reduction being extremely high or excessive.

Under such circumstances, the Court held that it was not proven that the price of the Cottage Cheese set by Tnuva was substantially higher (obviously and conspicuously) than the one that would have been set in the competitive market conditions.

As to the application of the second stage, the Court emphasized that the mere fact that Tnuva has significant market power does not lead in itself to the conclusion that the price set by it was unfair. The consumers, who chose to purchase Tnuva's Cottage Cheese in the relevant period, could have purchased the Cottage Cheese from the competitors as well, supplying 30 percent of the Cottage cheeses on the market. The Court has attached great significance to this consideration, since the consumers' specific choice of Tnuva's Cottage indicates their preferences and personal taste, as well as Tnuva's success in distinguishing its Cottage from the products of the competitors. The Court also emphasized that the degree of necessity of the Cottage Cheese for the consumers has not been addressed at all. Furthermore, Tnuva has reduced the Cottage prices on its own initiative due to the social protest in the summer of 2011, and therefore, there was an alternative mechanism on the market restraining Tnuva, thus making the enforcement of the cause of action less relevant in the case at hand.

Finally, the Court concluded its judgment by stating that the matter demonstrated the need to adopt a cautious and moderate attitude, otherwise the Court may find itself in an unfavorable position of a "super

regulator of prices of the Israeli economy", which is not in line with the Court's role and competence, and this is not the purpose of the competition laws in general and of the excessive pricing cause of action in particular."

In this decision, apparently, the Honorable Court has further reduced the scope of the cases for applying the excessive pricing cause of action, clarifying that a class action is not the most effective and appropriate tool to enforce this cause of action. It remains to be seen how the District Courts will apply the criteria set by the Honorable court in the numerous class actions filed on the basis of the excessive pricing cause of action, currently pending before them.

Following is a link to the judgment (in Hebrew) on the Supreme Court's website: [click here](#)

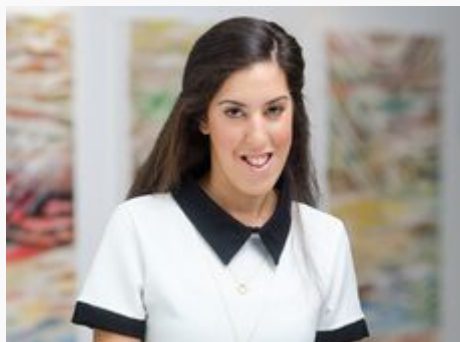
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