

A close-up photograph of a golf club head resting on a green grassy surface, with a blurred background of a golf course.

Antitrust & Competition

The Israeli Supreme Court in a landmark decision rules that a monopoly is prohibited from charging unfairly high prices but warns against excessive intervention that would harm competition



On 26.7.2022, the Israeli Supreme Court published its ruling in the appeal filed by the Central Bottling Company (which is regarded as a monopoly in selling cola beverages in Israel) against the District Court's decision to certify a motion for certification of a claim as a class action that was filed against the Central Bottling Company, alleging that it charged excessive prices for 1.5-liter bottles of Coca-Cola. In this landmark ruling, the Supreme Court held for the first time since the enactment of the Economic Competition Law (in 1988) that the section in it which prohibits a monopoly from charging "unfair" prices for products or services also applies in cases where the monopoly charges high prices (i.e., "excessive prices"), and not only when the monopoly charges low prices (also known as "predatory prices"), that can potentially exclude the monopoly's competitors from the market.

The question of whether the Israeli Competition Law prohibits a monopoly from charging excessive prices has occupied the courts and the Competition Authority for many years. The controversy revolving around this question has vastly increased after the former Director General of the Competition Authority, Prof. David Gilo, published a public statement in 2014 in which he expressed his position that the Israeli Competition Law indeed prohibits monopolies from charging excessive prices, and warned that the Competition Authority will enforce this prohibition. It is important to note that the above-mentioned public statement was published after the social protest that took place in Israel during the summer of 2011, and following the Competition Authority's examination regarding the price of the cottage cheese manufactured by Tnuva. At the same time, a wave of class action suits were filed against monopolies on the grounds of excessive pricing; today there are dozens of class action suits waiting to be decided by courts.

In 2017, the former Director General of the Competition Authority, Adv. Michal Halperin, published a new public statement, which replaced the statement published by Prof. Gilo. This time, the Director General took a more cautious and moderate approach compared to her predecessor, and emphasized that the Competition Authority will enforce the prohibition on monopolistic excessive pricing only in exceptional cases, where the price charged by the monopoly "stings the eye".

The Coca-Cola class action was one of the first to be certified by the District Courts and the first to reach the Supreme Court. As stated, on 26.7.2022, the Supreme Court upheld the District Court's ruling that the Israeli Competition Law prohibits monopolies from charging excessive prices. Nevertheless, the Supreme Court took a more cautious and moderate approach regarding the enforcement of the prohibition by courts. In its ruling, the Supreme Court repeatedly emphasized that the prohibition of excessive pricing must be enforced with great care, in order to avoid harming free competition, and in turn – the consumers. In its opinion, the Supreme Court stated that a monopoly charging high prices might be justified in appropriate cases and even has competitive advantages since it may encourage the entry of new competitors into the market. It may also incentivize existing competitors to invest in the development of new products, improve existing products and push them to become more efficient. Furthermore, the Supreme Court emphasized that the task of determining what price can be deemed “excessive”, and when a price of a product or service becomes unfair, is an extremely complex task - and for this reason, it raised concerns about making an erroneous decision that might harm competition.

Precisely for this reason, the Supreme Court relied on European law, and stated that the test for determining whether a price is excessive is a two-step test: **in the first stage**, the plaintiff must show, through an in-depth economic analysis, that the price that the monopoly charged is excessive. To this end, the Supreme Court ruled that the two main tests accepted in European Competition Law must be used: the “price-cost” test (which examines the gap between the production cost of the product and its price) and the “comparison” test (in which, for example, one can compare the price charged by the monopoly to the prices charged by its competitors or the prices charged by the monopoly in different periods as well as to the prices charged in the world for a similar product). Another test that the Supreme Court referred to is the profitability test, which compares the monopoly's profitability from the sale of the monopolized product to a reference index, which represents a profitability index of a competitive market; however, in relation to the profitability test, it emphasized that this is a complex test whose results are highly questionable.

In the second stage, and only after the claimant has managed to prove (prima facie) that the price charged by the defendant-monopoly is excessive, the burden will shift to the monopoly to show that the price charged by it is a fair price, although it is an excessive price. For the purpose of the question of the fairness of the price, the Supreme Court ruled that the balance of powers between the monopoly and the consumer must be taken into account, including the existence of a real alternative to purchasing the product, the extent of the monopoly's control over the market, and the nature of the direct damage caused to consumers (for example, if it is an essential product in the eyes of consumers who purchase it). In addition, the Supreme Court ruled that it is necessary to take into account the possibility of harming competition by enforcing this prohibition, and the company's incentives for innovation and investment, the question of the existence of an industry regulator and if it makes use of the tools at its disposal for the purpose of actual price control.

Regarding class action suits, the Supreme Court recognizes that a class action can be filed on grounds of excessive pricing; however, at the same time, the court sends a clear message that the appropriate place for examining the fairness of prices is not within the courtroom. In any case, the Supreme Court states that in class actions, it must examine whether the previously mentioned two-stage test is already met at the preliminary certification stage. In other words, at the preliminary certification stage, the court must conduct an in-depth examination of whether the plaintiff has laid a sufficient evidentiary basis demonstrating that the monopoly did charge an excessive price.

The Supreme Court has also recognized that there are substantial information gaps between the plaintiff and the defendant monopoly that burdens a plaintiff from proving his claim. However, the Supreme Court states that the plaintiff bears the burden of presenting an appropriate evidentiary basis that will tip the scales in favor of issuing a document discovery order in his favor, and although the necessary level for obtaining a document discovery order is lower than the level necessary in the preliminary certification stage of a class action, the plaintiff is not be allowed to conduct a “fishing expedition” in order to complete an incomplete motion to certify a class action suit.

The Supreme Court mentions that the District Courts are currently facing various motions for certification of a class action on grounds of excessive pricing, and in light of this, emphasizes that it is necessary to avoid a situation in which the courts become super-regulators of prices in the Israeli economy. In other words, by these remarks, the Supreme Court is clearly hinting that the prohibition on excessive pricing should be enforced by courts only in appropriate cases, where there is no alternative solution, and that a claim on these grounds will not be easily accepted. All of this was recorded with the recognition that the prohibition on excessive pricing does not solve the failures that characterize monopolistic markets.

As for the Coca-Cola case, since in this case the plaintiff's motion for discovery and examination of the documents was not decided, nor was it examined in accordance with the two-stage test outlined by the Supreme Court in its ruling, the appeal filed by the Central Bottling Company was accepted and the Supreme Court ordered the hearing to be remanded to the lower court in order to examine and decide on these issues in accordance with the rules set forth in the appeal.

We believe that the fair and balanced judgment of the Supreme Court is expected to have a real impact on the preliminary proceedings before the District Courts and the extent and manner of enforcement of the excessive price prohibition by the Competition Authority.

Please feel free to contact us with any questions that you have on this matter.



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