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## Israel—"Follow-On" Class Actions Against International Cartels

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## I. INTRODUCTION

In recent years a growing trend has emerged in Israel: more and more motions to certify class actions based on alleged global cartels are being filed with the Israeli District Courts. The typical petitioners in these cases are Israeli private consumers or private consumer organizations while the respondents are global companies that allegedly were parties to (alleged) global cartels.

Often, the trigger for private enforcement based on antitrust claims is a criminal or an administrative enforcement action taken by the Israeli Antitrust Authority. However, the new trend expands the said trigger to be enforcement actions taken by foreign competition authorities worldwide.

## II. BACKGROUND: THE ISRAELI "NEW TREND"

Under the Israeli Restrictive Trade Practices Law, 5748-1988 (the "Law"), an act or omission contrary to the Law constitutes a tort, which allows the injured party to file a civil lawsuit against the violator. Additionally, under the Israeli Class Actions Law, 5766-2006, (the "Class Action Law") a lawsuit may be filed on the grounds of a violation of the Law.

### *A. Enforcement Measures in Israel*

Enforcement actions taken by the Israeli Antitrust Authority (the "IAA") incentivize private enforcement based on antitrust claims in Israel. In some cases, motions to certify a class action against the suspected companies were submitted only a few days after companies were dawn raided by the Investigation Department of the IAA. Moreover, a motion to certify a class action will generally be submitted before (i) the Investigation Department of the IAA completes its work; (ii) the IAA assesses whether there is reasonable possibility for a conviction and whether to issue an indictment; (iii) before any hearing proceedings take place; and, of course, (iv) considerably before any verdict is reached. At times, the mere publication of a summoning of a company for a hearing with regard to suspected violations of the Law leads to civil claims.

This phenomenon is not unique to Israel. In the United States, for example, it is very common for a follow-on civil antitrust litigation to pursue actions taken by the United States Department of Justice.

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## **B. Enforcement Measures Worldwide**

Recently, there has been a notable increase in class actions filed in Israel against parties to international cartels that allegedly affected the Israeli market. Enforcement measures taken by competition authorities worldwide against parties to global cartels, usually accompanied by civil litigation, act as an incentive for private petitioners in Israel, who gradually have become less hesitant to reach out to the courts for compensation.

## **C. Treble Damages**

A new "tool" which may also enhance the power of private antitrust enforcement in Israel is the Treble Damages legislative proposal (Antitrust Bill (Amendment No. 14) which was published in Israel in October 2013 (the "Bill")). Treble Damages offer consumers and corporations harmed by violations of the Law, *inter alia*, by cartels and abuse of dominant position by a monopoly, an opportunity to seek triple damages, an injunction, and costs (including attorney fees) against the violator.

The mechanism of Treble Damages is an important deterrent, as it changes the cost-benefit calculus of the violator and is likely to provide incentives for civil enforcement. However, with respect to international cartels, serious doubt rises as to whether large foreign companies will take into account the cost-benefit balance of their exposure to Israeli civil claims.

It is interesting to note that Treble Damages will not be applicable in the case of a violator under the IAA's leniency program. Thus, the Bill might result in an increase of leniency applicants as well as private enforcement.

## **III. EXAMPLES OF FOLLOW-ON INTERNATIONAL CARTELS: CLASS ACTIONS SUBMITTED IN ISRAEL**

Following is a brief overview of the outstanding international cartel class actions that have been submitted in Israel pursuant to proceedings worldwide:

### **A. The "GIS (Gas-Insulated Switchgear) Cartel"**

An early bird of the current trend appeared in 2007. In January of that year, the European Commission ("Commission") issued a decision regarding the existence of an alleged international cartel of several companies (*inter alia*, Alstom, ABB, Siemens, Hitachi, and Toshiba) in the GIS market (sales of Gas Insulated Switchgear).

Even though the Commission's decision did not mention Israel, Israel was the first jurisdiction in which a motion to certify a class action was filed with respect to the alleged GIS Cartel (the said motion was removed at a preliminary stage).

Later on, two class actions were filed again in Israel pursuant to the Determination of the General Director of the IAA (the "General Director"), dated September 2013, regarding the alleged effect of the GIS Cartel on the Israeli market (the "Determination").

A few months after the publication of the Determination by the General Director, Israel Electric Corporation also filed a suit for damages against several of the members of the alleged GIS Cartel—a private claim in the amount of approximately U.S. \$1 billion.

### **B. The "Air Cargo Cartel"**

In 2006, competition authorities in Europe and in the United States exposed the existence of an international alleged cartel in the air cargo shipping market between multiple airlines. In the United States charges were filed against 22 airlines, and fines of more than U.S. \$1.8 billion were imposed. Also, the European Commission published that it had fined 11 airlines in a cumulative amount of EUR 799 million. In addition, multiple class actions against alleged members of the cartel have been filed in the United States. Pursuant to the said proceedings, in February 2013, a motion to certify a class action was filed in Israel against El Al., British Airways, Lufthansa, and Swiss regarding the alleged cartel.

### **C. The "LCD Cartel"**

In 2006, several competition authorities worldwide launched an investigation against members of an alleged global cartel in the market of LCD Panels for flat screens. Among the members of the alleged cartel were Chi Mei, Sharp, Samsung Electronics, AU Optronics, and LG Display. The investigation resulted in various proceedings in several jurisdictions—criminal, administrative, and civil. In Israel, a motion to certify a class action with respect to the LCD Cartel was filed against several members of the alleged cartel. The Motion is based on similar proceedings previously conducted worldwide with regard to the alleged global cartel.

### **D. The "CRT Cartel" –**

On November 2014, a motion to certify a class action was submitted in Israel against LG Electronic, Philips, LG Philips Displays, Samsung Electronics, Samsung Display Device, Toshiba, Panasonic, Hitachi, and Chunghwa, all members of an alleged cartel in the CRT and CRT-based products industry. The arguments and factual information presented in the Motion are based, *inter alia*, on foreign worldwide proceedings against the said companies in the United States, Europe, Japan, and South Korea.

The damage to the Israeli consumers allegedly derives from the broad impact of the alleged global cartel on the CRT-based products market. Recently, the Central District court in Israel approved the applicant's motion for service outside of the jurisdiction, in accordance with Regulation 500 of the Rules of Civil Procedure, 5744-1984 ("Rules of Civil Procedure").

## **IV. ANTITRUST CLAIMS AND CLASS ACTIONS IN ISRAEL**

When discussing class actions in Israel with regard to international cartels, it is important to analyze whether it is possible to apply the local antitrust and class action laws to a cartel that involves only, or is comprised mostly of, foreign corporations. Such circumstances raise several issues:

### **A. Jurisdiction and Service**

#### **1. The Effects Doctrine**

The General Director determined<sup>2</sup> that in order to achieve the purpose of the Israeli antitrust law, which is mainly to protect competition in Israel, it is necessary to interpret it, and

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<sup>2</sup> Determination Pursuant to Section 43(a)(1) of the Restrictive Trade Practices Law, 5748-1988, Regarding the Restrictive Arrangement with regard to the Selective Fragrances Market, 3002438, 1999.

other rules governing competition in Israel, in the spirit of the American "Effects Doctrine" (the "Doctrine").

According to the Doctrine, it is insufficient to rely on the assumption that an alleged international cartel, which was formulated outside of the Israeli territory, influenced the Israeli market. The plaintiff must also analyze and demonstrate in a consistent and in-depth manner that the evidence shows a concrete, direct, and clear influence of an alleged international cartel on the Israeli market.

The Doctrine is well accepted under Israeli law, thus, claims of a "world-wide" international cartel which affects the Israeli market cannot be maintained without a sufficient explanation of the manner in which the cartel allegedly influenced the Israeli market and unless supported by evidence of such influence. The Doctrine is particularly relevant to the Israeli market, which is likely to be smaller and of less significance than other global markets.

## 2. Service Out of the Jurisdiction

Under Israeli law, if a defendant or respondent is not present in person in Israel, the court may grant a motion for service outside of the jurisdiction if the claim falls under one of the categories listed in Regulation 500 of the Rules of Civil Procedure. Regulation 500 sets forth the basis for granting permission to serve abroad and is the functional equivalent of the American "long-arm" jurisdiction statute.

However, the Rules of Civil Procedure allow an Israeli petitioner/plaintiff to avoid the need to obtain leave for service out of the jurisdiction, if a corporation or an individual located in Israel is deemed to be an "agent" of the foreign respondent/defendant. This depends, however, on the degree of intensity of the relationship between the "agent" and the foreign respondent/defendant. The greater the cooperation between the local entity and the foreign respondent/defendant from a business perspective under the specific circumstances, the more inclined the court will be to conclude that the local entity is an "agent" of the foreign respondent/defendant.

An additional method of serving court documents upon a foreign respondent/defendant is through personal service when a representative of the corporation is present in Israel, and the petitioner/plaintiff serves it with the court documents.

Current rulings of Israeli District Courts examine the matter of service out of the jurisdiction in the case of a motion to certify a class action against foreign parties to an alleged cartel. A recent ruling<sup>3</sup> of the Central District Court reversed a prior ruling that did not approve service outside the jurisdiction, in a class action against the alleged foreign members of the "CRT Cartel." In the appeal, the judge concluded that once the court is convinced that the grounds for the claim and the grounds for the service out of the jurisdiction are both sufficiently based, the court should approve requests for service out of the jurisdiction, subject to compliance with the "Forum Non-Conveniens" doctrine.

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<sup>3</sup> Appeal 15317-12-14, *Merom et al. Vs. LG ELECTRONIC INC et. el.* (2015).

## B. Damages: Indirect Purchaser Doctrine

The indirect purchaser doctrine is a principle of antitrust law that provides that a consumer is not entitled to damages following a violation of antitrust laws.<sup>4</sup>

The indirect purchaser doctrine has yet to be substantially reviewed under Israeli law. Nowadays, all class actions filed in Israel following alleged international cartels are still pending. Thus, there is no conclusive answer whether the indirect purchaser doctrine applies in Israel.

On the one hand, the indirect purchaser doctrine accords with common legal principles under Israeli law, such as the Civil Wrongs Ordinance, consumer protection laws, and so forth. On the other hand, recently, the Israeli Attorney General decided to join a pending motion to certify a class action regarding the Air Cargo Cartel and filed a position in this case, according to which the indirect purchaser doctrine does not, and should not, apply in Israel with respect to price-fixing class actions, and especially with regard to class actions which relate to international cartels. The Attorney General points out that, in his view, the claims of indirect consumers should be accepted, regardless whether the damage caused to purchasers is direct or indirect.

## C. The Class Action Proceedings

The Israeli Class Action Law sets out the matters regarding to which type of motions to certify class actions may be filed in Israel and establishes the principles and requirements governing class action claims in Israel.

The Class Action Law establishes a two-stage process for hearing a class action. First, the Motion to Certify stage—an initial stage in which the court is required to determine (principally), based on *prima facie* evidence, whether the motion raises a cause of action and whether a class action is the appropriate procedural instrument to address such cause of action.

Pursuant to the Israeli Class Action Law, at the first stage a potential class petitioner is required to satisfy an evidentiary test, in order for his motion to be certified as a class action. Accordingly, a court may certify a motion as a class action claim only if it finds that all of the following conditions are met:

1. The motion raises substantial questions of fact or law that are common to the class, and it is reasonably possible that such questions would be decided in favor of the class,
2. A class action is the most efficient and appropriate means of resolving the dispute under the circumstances of the case,
3. There is reasonable basis to assume that the interests of all members of the class will be properly represented and managed, and
4. There is reasonable basis to assume that the interests of all members of the class will be represented and managed in good faith.

These conditions are cumulative and in the absence of any one of them, the court is required to reject a motion to certify.

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<sup>4</sup> Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

It should be noted that the first stage involves pleadings, depositions, expert opinions, cross-examinations, and summaries. Disclosure of documents at the first stage of the proceeding would also be permitted under the Class Action Regulations, 5770-2010, in order to allow the court to make an informed determination regarding the motion, subject to three conditions:

1. Disclosure is limited to those sources necessary to make a determination on certification issues;
2. The court must ascertain that the petitioner has established an "initial evidentiary basis" for his claims, and that the petitioner has demonstrated that he possesses a personal cause of action in the claim; and
3. The order for discovery contains the restrictions necessary to ensure confidentiality of the respondent's information, particularly with respect to trade secrets.

If the motion is certified as a class action, according to the Civil Procedure Rules both sides are obliged, among other things, to disclose, subject to a request, all documents in their control that are relevant to the claims and allow the other party to review the documents. In addition, each party is obliged to provide answers to interrogatories of the other party.

Finally, if the court accepts the motion to proceed in the case as a class action, it will continue to the second stage and address the claims in the lawsuit itself.

## V. SUMMARY

To conclude, a new emerging trend is flourishing in Israel, as demonstrated by the above-mentioned class actions filed in Israel against alleged international cartels. It appears that petitioners in Israel are interested in enforcement measures taken by both competition authorities and private plaintiffs worldwide with respect to international cartels. The said petitioners wish to walk (at least partially) in a "plowed pathway" even though it has been "plowed by a foreign plow."

This rising trend of class actions regarding international cartels raises many interesting legal questions—both procedural and substantial—which have not been determined yet under Israeli law. This trend will encourage Israeli courts to provide clearer answers with respect to these issues, and thus interesting rulings are expected to be delivered in Israel in the upcoming years.