

Israel

Michal Halperin

Meitar Liquornik Geva & Leshem Brandwein Law Offices

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation?

Substantial enforcement of the Israeli Restrictive Trade Practices Law 5748-1988 (the Restrictive Trade Practice Law) by the Antitrust Authority began approximately 14 years ago. Until then very few private antitrust cases were filed. Even today, when there is broad recognition of antitrust law by the commercial and legal community, it is the Antitrust Authority who bears the major burden of enforcing the Restrictive Trade Practice Law using criminal and administrative tools. Many private litigation cases follow enforcement steps that were taken by the Antitrust Authority, such as claims for damages rising from cartel cases or claims for damages following consent decrees that were reached by the Antitrust Authority.

There are only few cases of private antitrust litigation that are not connected to enforcement proceedings of the Antitrust Authority and most of them are unsuccessful. It seems that in many cases the plaintiffs in antitrust litigation lack the economic information and market analysis that are required in order to carry the burden of proving the case or proving the damages. Nevertheless, in the last year we are witnessing an increase in the number of private claims, and class actions regarding antitrust matters and breaches of the Restrictive Trade Practice Law.

Antitrust issues that are decided by civil courts in private litigation can be divided into two categories. The first category is of claims regarding violation of the Restrictive Trade Practice Law, such as claims for damages caused by restrictive arrangement or claims for damages caused by abuse of monopolistic position; the second category is of claims regarding contractual conflict, in which one of the parties argues that the contract is void due to infringement of the Restrictive Trade Practice Law. Many of the most important precedents in private antitrust litigation in recent years belong to the second category.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

According to section 50 of the Restrictive Trade Practice Law, every act or omission contrary to the provisions of the Restrictive Trade Practice Law shall constitute a tort in accordance with the Torts Ordinance [New Version] of 5728-968 (the Torts Ordinance), meaning the Restrictive Trade Practice Law enables private parties to bring claims under the Torts Ordinance for each infringement of the Restrictive Trade Practice Law. In addition, section 30 of the Contract Law 5741-1981 (the Contract Law) states that any illegal contract is void. Therefore, a party to an illegal restrictive arrangement may argue voidness of the contract based on illegality, which occurs according to the Restrictive Trade Practice Law.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The legislation that allows for private antitrust claims is section 50 of the Restrictive Trade Practice Law and section 30 of the Contract Law. Claims up to the total amount of 2.5 million new Israeli shekels (approximately €467,600) will be brought and heard in the magistrates court. Claims, which are over the total amount of 2.5 million new Israeli shekels will be brought and heard in the district court.

4 In what types of antitrust matters are private actions available?

Private actions are available in respect of breaches of the Restrictive Trade Practice Law, including (i) cartels, (ii) vertical restrictive arrangements, unless the arrangement obtains an approval, temporary permit, exemption or falls within the boundaries of block exemption, (iii) infringements of provisions that are imposed on monopolies, and infringement of the duties imposed on monopolies by the Restrictive Trade Practice Law and (iv) mergers that occurred without issuing merger notice or without obtaining the consent of the general director of the Antitrust Authority.

5 What nexus with the jurisdiction is required to found a private action?

The Israeli courts have not yet decided the issue of nexus with the jurisdiction in connection with antitrust private litigation. Still, the test that the general director of the Antitrust Authority applied in its determination in the case of *James Richardson PTY Israel* was that Israel antitrust law applies on foreign commerce where the unlawful conduct impacts the competition in Israel. This test has not yet proven to be accepted by the Israeli courts. Private civil proceedings against foreign entities are subject to the rules of service outside the state of Israel as provided in the Civil Procedure Rules, 5744-1984 (the Procedure Rules).

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes. Private actions can be brought against both corporations and individuals. It is also possible to have a cause of action against individual acting as an officer, a director or a shareholder of the corporation according to the piercing of the corporate veil doctrine, the fiduciary duties and the duties of care.

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not relevant.

Private action procedure**8** Are contingency fees available?

Contingency fees are available, subject to specific legal fee arrangements between the plaintiff and its counsel.

9 Are jury trials available?

No.

10 What pre-trial discovery procedures are available?

Discovery in pre-trial procedure is allowed by the Procedure Rules. According to the Procedure Rules, both sides are obliged, among other things, to disclose, subject to a request, all documents in their control, which are relevant to the subject under contention, and allow the other party to examine the documents. In addition, each party is obliged to give answers to questionnaire of the other party.

11 What evidence is admissible?

The Evidence Ordinance [New Version], 5731-1971 (the Evidence Ordinance) and the case law govern admissibility of evidence for all civil proceedings, including private antitrust claims. In general, one can submit any document and testify any witness in court subject to the main rule of the inadmissibility of hearsay testimony. There are several immunities, established by legislation and adjudication, that bar the admissibility of specific evidences. In the past two decades there has been continuing tendency to ease the technical rules of admissibility of evidence and exchange them with rules regarding the weight of the evidence. In many private civil proceedings the testimony is submitted to the court by affidavit and only the cross-examinations are heard during the hearing.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. Private actions are available where there has been a criminal conviction in respect of the same matter.

13 Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

According to section 42A of the Evidence Ordinance, the findings and the conclusions of a verdict in criminal proceeding that resulted in a conviction of the defendant are admissible and can be relied on in civil claims, as a prima facie evidence. If such verdict is filed to court in connection with civil claim, the convicted person will not be allowed to file contradicting evidence or evidence that was submitted during the criminal proceeding, unless it receives specific permission from the court.

According to section 77(a) of the Courts Law (Consolidated Version) 5244-1984 (the Courts Law), if a person was found guilty by a magistrates court or by district court, and if a civil suit was instituted against him or her – and against him or her alone – because of the facts constituting the offence of which he or she was convicted, after the criminal judgment becomes final, the judge or the panel making the conviction may hear the civil claim, if the person who submitted the claim requests so. When a civil action is heard under this section, the findings and conclusions determined in the criminal trial shall be treated as if they had been determined in the civil trial.

14 What is the applicable standard of proof and who bears the burden?

The Israeli courts have not yet decided the issue in respect of anti-trust claims. In general, in Israeli civil actions, the plaintiff carries the burden of proof and is required to prove the claim on a 'balance of probabilities'. However, according to judicial precedent, where the conduct at issue in a tort procedure is fraud, the court may determine that the standard of proof is higher than the standard of balance of probabilities. In light of the criminal consequences of antitrust law breaches, one can assume that the courts will wish to apply a standard of proof that lies between the balance of probabilities and the criminal standard of 'beyond reasonable doubt'.

15 What is the typical timetable for class and non-class proceedings? Is it possible to accelerate proceedings?

The timetable for civil proceedings varies according to the specific circumstances of the civil claims. However, the limited experience to date suggests that the full hearing of civil claims may take a number of years. This process is even longer when it comes to class actions, because of the necessity to receive certification from court to the class action, a procedure that takes a long time in itself.

16 What are the relevant limitation periods?

There are no specific limitation periods for civil antitrust suits. Section 5 of the Statute of Limitation 5718-1958, provides a general limitation of seven years. This period begins on the date the cause of the action occurred. Where the cause of action is fraud or deceit, the period begins on the date on which the plaintiff became aware of that cause.

17 What appeals are available?

According to the Courts Law and the Procedure Rules, the judgment of the magistrates court may be appealed to the district court and a judgment of the district court may be appealed to the Supreme Court within 45 days of the day of the judgment. Procedural decisions and other decisions of the courts that are not the final judgment (such as interim injunction, decision to grant certification to class action, etc) may be appealed to the courts as provided above, subject to permission to be granted by the court. A request for permission to appeal should be submitted within 30 days of the decision.

Class proceedings**18** Are class proceedings available in respect of antitrust claims?

Yes. Class proceedings have been available in respect of antitrust claims since 1996.

19 Are class proceedings mandated by legislation?

Class proceedings in the antitrust context have been mandated by legislation since 1996. In 1996, a specific chapter regarding class action was added to the Restrictive Trade Practice Law and served as a specific source that allowed plaintiffs to file class actions based upon alleged breaches of the Restrictive Trade Practice Law. According to the Restrictive Trade Practice Law, the plaintiff in a class action was required to provide a copy of the claim to the Antitrust Authority. In 2006, a new law, the Class Action Law 5766-2006 (the Class Action Law), was legislated and the chapter dealing with class actions in the Restrictive Trade Practice Law was omitted. The new Class Action Law serves as a general source for class actions,

which allows the filing of class actions according to a list of causes of action including the breach of the Restrictive Trade Practice Law. As opposed to the chapter regarding class actions in the Restrictive Trade Practice Law, there is no requirement in the Class Action Law for the plaintiff to inform the Antitrust Authority about a claim according to the Restrictive Trade Practice Law.

20 If class proceedings are allowed, is there a certification process? What is the test?

Under the Class Action Law, a plaintiff seeking class certification must submit a motion to the court requesting the certification of the claim as a class action. In order to certify a class action the court needs to be convinced that:

- the individual plaintiff possess an individual cause of action;
- certain substantial questions of law or fact are common to all class members and there is a reasonable possibility that the case will be decided in favour of the class;
- a class action is the proper and most efficient way to decide in the subject under contention;
- there are reasonable grounds to assume that the class's interest will be represented and conducted in a proper way; and
- there is reasonable ground to assume that the class interest will be represented and conducted bona fide.

21 Have courts certified class proceedings in antitrust matters?

According to the Antitrust Authority's and the Administration of Courts' records, approximately seven motions requesting the certification of a claim as a class action regarding breach of Restrictive Trade Practice Law have actually been certified by the courts. Among the certified class actions, there are claims in which a settlement was achieved prior to the certification of the class action and the class action was certified as part of the settlement. Until last year the most significant case that was certified by court was *Isracard Ltd v Howard Reis*. The plaintiff claimed that Isracard, the biggest credit card company in Israel, was collecting unfair high commissions from businesses, hence abusing its monopolist position in the market. The district court certified the class action. However, the Supreme Court reversed the decision and determined that because the plaintiff didn't manage to satisfy the prerequisites, the certification of the class action should be cancelled.

On the beginning of 2008, another motion, based on the Class Action Law, was certified – *Sharno Computerized Machines Tel-Aviv Ltd. v Bank Hapoalim and others*. The plaintiff claimed that Bank Hapoalim, Bank Leumi Le-Israel and Israel Discount Bank, the three biggest banks in Israel, were coordinating commissions and interest rates in violation of the Restrictive Trade Practice Law. The plaintiff further claimed that, as a result of such restrictive arrangement, commissions and the interest rates were raised. The district court certified the class action and determined that for the purpose of certifying a claim as a class action in the cause of restrictive arrangement, the plaintiff should prove similarity of conduct of competitors, without the need to prove that the similarity was caused by any kind of agreement, oral or in writing. An appeal to the Supreme Court regarding the aforesaid certification is still pending.

Similar motions requesting the certification as class actions were submitted later on this year, against the First International Bank of Israel, Mizrahi Tefahot Bank, Bank Hapoalim and against Israel Discount Bank. Such motions have not yet been certified.

There are several other motions, requesting certification as a class action, which have been submitted in accordance with the Class Action Law. Among them is a motion that was filed against Hewlett-Packard Israel and several distributors of its ink in Israel, claiming

that the plaintiff was damaged due to restrictive arrangement between Hewlett-Packard and several distributors to set a recommended tariff. This motion is now pending.

In another case (*Nahum Oren, Adv v New Cinema*), a motion was filed against the distributor of the Crocs™ brand in Israel, claiming that the distributor used its position as the sole importer of the brand in Israel to bind retail stores to sell the products at a fixed price, threatening that it would cease supplying the stores that would not sell the brand at such fixed price. The plaintiff claimed that this resale price maintenance practice is a restrictive arrangement forbidden by the Restrictive Trade Practice Law. The plaintiffs further claimed that since the distributor is a monopoly in the Israeli market, such behaviour was an infringement of the duties imposed on monopolies by the Restrictive Trade Practice Law. This motion is now pending.

Another motion (*Shaul Kotler, Adv v Siemens and others*) was filed against the Israel Electric Corporation and several companies that manufacture, among other things, equipment to power plants. The plaintiff claimed, relying on a report written by the European Commission, that such companies signed two restrictive agreements, for the purpose of dividing the markets. The plaintiff further claimed that in accordance with the aforesaid restrictive agreements, the cartel commission decided which company should win each tender. Accordingly, the other members of the cartel would bid higher and allow the selected company to win the tender. This arrangement caused an increase in prices by the Israel Electric Corporation. According to the plaintiff, the Israel Electric Corporation, was aware of such restrictive agreements, and refrained from preventing them. Hence, there was an increase in the prices of electricity to consumers. This motion is now pending.

22 Are 'indirect claims' permissible in class and non-class proceedings?

Whether indirect claims are permitted in class or non-class proceedings in antitrust cases has yet to be considered by Israeli courts.

23 Can plaintiffs opt out?

In general, class actions in Israel follow the opt-out model. Once certification is granted, the court defines the class on behalf of which the action will be conducted and the court's decision is publicised. At this stage each member of the class may elect to opt out by an announcement that has to be submitted to court within 45 days. Each member of the class has an additional right to opt out of the defined class in case a settlement is submitted for the approval of the court and such class member wishes not to be bound by the suggested settlement.

24 Do class settlements require judicial authorisation?

Class settlements require judicial authorisation. The court may authorise the settlement only after it is publicised and after the members of the class, the relevant governmental authorities, the relevant non-governmental associations and the attorney general were granted the possibility to object to the settlement within 45 days. The court will authorise a settlement only if it is convinced that it is proper, fair and reasonable in the specific circumstances. The court will authorise the settlement only after receiving the opinion of an impartial expert that will be nominated by it to examine the settlement, unless the court determines that such expert opinion is not required.

25 If the country is divided into multiple jurisdictions, is a national class proceeding possible?

Not relevant.

Update and trends

In 2006, the Class Action Law came into force. The aim of the Class Action Law was to ease the procedure of class action claims in courts and hence to encourage plaintiffs to use it.

In the past, the private antitrust litigations usually followed the actions taken by the Antitrust Authority. Lately, the number of civil court decisions in the antitrust context has substantially increased. More and more parties dare to file private antitrust actions even in cases where the Antitrust Authority doesn't impose any sanction or take action in order to enforce the antitrust law.

In the past year, class actions filed in connection with antitrust matters have flourished. Few class actions, dealing with major issues from the core of the public agenda were filed. The certification of the class action that was filed against the three biggest banks in Israel may be a first signal that courts wish to encourage broader private enforcement of the Restrictive Trade Practice Law.

One of the major drawbacks of the antitrust private litigation is the lapse of time between the initiation of proceeding and the final court decision. Therefore, unless an interim injunction is sought, one cannot rely on the private antitrust litigation for quick compensation.

26 Has a plaintiffs' class-proceeding bar developed?

There are several law firms beginning to specialise in class actions, but not specifically in antitrust claims.

Remedies**27** What forms of compensation are available and on what basis are they allowed?

In the case of tort claims for infringement of the Restrictive Trade Practice Law, the plaintiff is entitled to recover the amount of any loss or damage that he can prove that was actually caused as a result of the claim at issue. No multiple damages or punitive damages are available. In claims regarding contractual conflict, where the court decides that because of illegality that has occurred according to the Restrictive Trade Practice Law, the contract is void, it has discretion to grant the plaintiff restitution. The issue of restitution according to the Unjust Enrichment Law 5239-1979 was not decided yet in the specific connection of antitrust litigation.

28 What other forms of remedy are available?

According to the Torts Ordinance, and subject to the rules that are provided under the Courts Law and the Procedure Rules, the court has the power to grant an injunction as a sole remedy or in addition to damages. In any civil proceedings including antitrust litigation, the courts have the power to grant interim orders including an interim injunction that would prevent the defendant from continuing the infringement of the law against the plaintiff until the termination of the full trial in issue. According to the Procedure Rules a plaintiff may also request an investigation or accounting to be carried out, but such a remedy has not yet been requested in connection with antitrust claims.

29 Are punitive or exemplary damages available?

No.

30 Is there provision for interest on damages awards?

According to the Adjudication of Interest and Linkage Law, 5721-1961 (the Interest and Linkage Law), the courts have discretion to order interest or linkage differentials on the total amount of compensation granted to the plaintiff, including interest or linkage differentials on trial expenses and lawyer's fee. The provisions of the Interest and Linkage Law were implemented in recent antitrust litigation decision in the case of *Tower Air and others v Aviation Services and others*.

31 Are the fines imposed by competition authorities taken into account when settling damages?

The Israeli courts have not yet decided the issue of whether fines imposed by the Antitrust Authority must be taken into account when settling damages. It is important to clarify that according to the Restrictive Trade Practice Law the Antitrust Authority has no power to impose fines. Only the courts may impose fines after a criminal conviction. However, the Antitrust Authority may reach a consent decree according to which a fine will be paid to the Treasury. Such a consent decree is subject to the approval of court.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Parties are responsible for their own legal costs through the proceeding. However, on the conclusion of the proceedings, the court has discretion to decide whether the losing party will pay the successful party its costs. In practice, the sums that are decided by the court as legal costs to be paid by the losing party do not cover all the actual costs born by the successful party.

In class actions, the representing plaintiff and its counsel are eligible for a special compensation according, among others, to the benefit of the class action to the members of the class and the extent of the public importance of the class action. The court decides such special compensation.

33 Is liability imposed on a joint and several basis?

The Israeli case law regarding the issue of whether liability can be imposed on a joint and several basis in respect of an antitrust claim is very poor. In a recent case – *Tower Air and others v Aviation Services and others* – the court imposed the liability jointly and severally and at the same time decided the share of responsibility of each of the defendants as far as the relationship among the defendants was concerned. Israeli courts usually hold wrongdoers jointly and severally liable. It is assumed that they will act the same in respect of antitrust claims.

34 Is there a possibility for contribution and indemnity among defendants?

Yes. The Torts Ordinance acknowledges and allows contribution and indemnity among defendants.

35 Is the 'passing-on' defence taken into account?

To date, the Israeli courts have not yet discussed the issue of 'passing-on' defence in respect of antitrust claims.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There are many general defences that are available according to the law. There are no defences that are specific to antitrust claims.

37 Is alternative dispute resolution available?

According to sections 79A to 79C of the Courts Law, the parties to a dispute can choose arbitration, bridging or mediation as alternative means of dispute resolution. The court can either suggest a mediated

settlement to the parties or grant legal validity of a judicial decision to the mediated agreement that the parties have reached. If the parties agreed to arbitrate their dispute, the arbitration agreement should be in writing.

Different courts express different opinions regarding the question whether an arbitrator may arbitrate a dispute regarding a contract that breaches the Restrictive Trade Practice Law. This question was brought before the Supreme Court in the case of *Extel Ltd v Kalma Y Industry Ltd* but was not determined since the court's decision contained three different opinions.



Michal Halperin

mhalperin@meitar.com

16 Abba Hillel Silver Rd
Ramat-Gan
Israel 52506

Tel: +972 3 6103100
Fax: +972 3 6103111
www.meitar.com