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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Israel --

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

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-- Israel --

1. General

1. The Israeli Antitrust Act (hereafter: the Act) provides the Director General of the Antitrust Authority with powers to enforce the provisions of the Act, both on the criminal and administrative levels. Alongside these powers, the Act provides the possibility of private enforcement of the Act by anyone who has been harmed by a violation of the Act. In addition to the above-mentioned powers of criminal and administrative enforcement, the Act provides the Director General with powers that are meant to facilitate the private enforcement of the Act.

2. The IAA attributes great importance to private enforcement of antitrust law as a tool to complement public enforcement. Private enforcement can provide the injured party with the right to compensation for the damage caused to him. In addition, private enforcement is likely to improve deterrence against violating the Act and can serve as an important complement in this respect to the enforcement measures taken by the Director General.

3. Despite the possibility of private enforcement provided by the Act, the potential for private enforcement in Israel is, for the most part, not fulfilled, and there are relatively few civil actions taken against violations of the Act.

4. In what follows, we will describe the tools existing in the Antitrust Law, which were intended to facilitate private enforcement.

1.1 Individual claim by the injured party

5. A violation of the Antitrust Act can serve as a basis for private enforcement by the injured party.

6. Paragraph 50 of the Antitrust Act states that: "An act or omission contrary to the provisions of this Act has the legal standing of a tort in accordance with the Tort Act." According to this provision, an individual who is harmed by a violation of the Antitrust Act can bring a suit against the violator for the damages caused by the violation.

7. In order to bring an action for damages, the antitrust violation must be proven by the plaintiff. In addition, the plaintiff is required to prove the damages he suffered, which were caused as a result of the antitrust violation. Finally, the plaintiff must prove the amount of damage caused to him.

8. Proving the various components of the claim is complicated and costly, particularly in the case of antitrust violations.

9. The plaintiff is likely to encounter significant difficulties in proving that an antitrust violation occurred. Such violations are seldom observable by the private plaintiff and proving them is often challenging. Quantifying the amount of damages and establishing the causal link between the violation and the damages is also extremely challenging for a private plaintiff.

10. Also, it is often the case that the damage caused to a single private plaintiff is not sufficiently large to justify the resources required to pursue a claim.

11. In view of these difficulties, very few private claims are submitted to the courts in Israel for damage caused as a result of an antitrust violation.

12. Currently, there is a proposed amendment of the Antitrust Act pending before the Israeli Parliament that improves the possibility of private enforcement of the Antitrust Act. According to the proposed amendment, the violator may be liable for up to three times the value of the damage caused by the violation.

13. The proposed mechanism of treble damages is important to achieve deterrence, since it changes the cost/benefit calculation of a potential violator. This calculation is often influenced by the fact that violations of the Antitrust Act are in many cases not easy to detect and enforce against. In addition, a higher level of compensation will likely incentivize private plaintiffs to bring actions against violators of the law and thus to improve private enforcement of Antitrust Act. It is worth mentioning that according to the proposal, a violator who has been granted leniency by the IAA would not have to pay treble damages. This is in order not to reduce the incentive to use the leniency program.

1.2 Class Actions

14. In addition to the possibility of bringing a personal suit, Israeli law includes the possibility of submitting a class action.

15. In a class action, an individual sues in the name of a group of people who have not given him power of attorney to represent them. A class action raises serious questions concerning fact or law that are common to all members of the group. Israeli law views class action lawsuits as an important procedural tool that “allows consumers to come together to exercise the right of each of them to seek justice and to make a claim for damages caused to them by commercial entities, while balancing the gap in available resources between the parties in order to pursue the case.”¹

1.2.1 Conditions for submitting a class action

16. In order to submit a class action, the plaintiff must obtain an approval from the court. As part of the evaluation of the request for approval, the court examines whether the conditions stated in the Class Action Act – 2006 (hereafter: the Class Action Act) are met. The Class Action Act allows the filing of a class action for a number of violations, including “a suit based on the Antitrust Act.” In order to successfully obtain an approval to file a class action, the plaintiff must show that he has a personal claim; that the claim raises serious questions concerning fact or law that are common to all members of the class; that there is a reasonable possibility that the suit will be determined in favor of the class; and that a class action is the most efficient and fair way to resolve the matter.

17. As noted, as part of the request to approve the filing of a class action, the plaintiff must show that there is a reasonable possibility that it will be decided in favor of the class. In addition, in the preliminary discussion of the request for approval, the plaintiff must show that he himself suffered harm and prove the damage caused to him by the violation. This implies that the plaintiff must present, in the preliminary discussion, a factual narrative of the damage caused by the violation.²

¹ FH 944/15 Pelephone Communication Ltd. v. A.R.M. Technologies Ltd. (published in Nevo, March 29, 2015).

² LCA 2616/03 Credit Cards For Israel Ltd. v. N. Reis, Ruling 54(5) 701 (2001).

1.2.2 Right to file a class action

18. According to the Class Action Act, an individual who has grounds for submitting a class action and, in certain circumstances, an organization that represents relevant public interests, has the right to submit a class action if the court is convinced it is difficult for that individual to submit a personal claim.

19. In Israel, the issue of whether the plaintiff can only be someone who suffered direct harm rather than harm suffered by an indirect purchaser has not yet been decided.

20. According to the position taken by the Israeli Attorney General, after consulting with the IAA, in one of the class actions concerning an alleged violation of the Antitrust Act, an indirect purchaser should have a cause of action. In accordance with this position, the indirect purchaser doctrine, according to which an indirect purchaser does not have cause to file a class action, does not apply to class actions alleging violations of the Antitrust Act. According to this position, not recognizing the cause of action of an indirect purchaser is liable to weaken deterrence. Furthermore, the adoption of this doctrine would block the class action channel for consumers or other indirect purchasers who suffered harm from an antitrust violation. Accordingly, it would inhibit the enforcement of antitrust law in Israel and the role of class actions as a practical means of enforcing it.

21. This question is pending before the District Court.

1.2.3 Difficulties in filing a class action for violation of the Antitrust Act

22. Filing of a class action in Israel is a relatively complex process. In addition to the difficulty in proving the cause of action, there is an additional difficulty when it comes to violation of the Antitrust Act, since the courts in Israel have, to date, established rather stringent criteria for the approval of such class actions.

23. In general, many class actions are filed in Israel, primarily according to the Consumer Protection Act, 1981, the Securities Act, 1968 or the Environmental Protection Act. Fewer class actions, however, are based on a violation of the Antitrust Act.

24. Nonetheless, in recent years there has been an increase in antitrust class actions. A number of class actions have been submitted for harm caused in Israel as a result of international cartels which were investigated by antitrust agencies abroad, although they had not been investigated by the Israeli Antitrust Authority (for example, the CRT cartel or the Air Cargo Cartel).³ A number of class actions alleged excessive pricing by dominant firms.

³ These cartels were also investigated by the European Commission. See http://europa.eu/rapid/press-release_IP-12-1317_en.htm and http://europa.eu/rapid/press-release_IP-10-1487_en.htm.

2. Tools for encouraging private enforcement

25. Israeli antitrust law provides the Director General with certain tools that can be used to encourage private enforcement.

2.1 Proclamations regarding violations

26. The Director General has the authority to proclaim that an antitrust violation occurred. In particular, proclamations can be made regarding restrictive agreements; that an illegal merger has occurred; or that a dominant firm has abused its position.

27. The main objective of such proclamations is to publish the Director General's position regarding the violation.

28. A proclamation is published only after an inquiry by the IAA had produced sufficient evidence that a violation occurred. For violations that occurred after administrative fines became available, the proclamation is typically accompanied by an administrative fine. In principle, a proclamation can also be accompanied by other remedies, such as an injunction or even criminal prosecution. Nevertheless, the proclamation may stand on its own, without any sanction.

29. The main practical outcome of a proclamation, is that it constitutes *prima facie* evidence that the violation occurred in the context of any legal proceeding. Hence, the main goal of a proclamation is assist private enforcement against the violation.

30. A proposed amendment of the Antitrust Law, which is pending before the Israeli parliament, broadens the scope of violations that can be subject to proclamations. In particular, according to the new provision, the Director General will also be able to make proclamations regarding unreasonable refusal to deal by a dominant firm; violation of consent decrees; violations of conditions for the approval of mergers or restrictive agreements; and violations of instructions given to dominant firms or members of a collectively dominant group. This new provision will further broaden the scope for possible private enforcement. In particular, such proclamations would constitute *prima facie* evidence of such violations, which would assist private suits for damages caused by the violations.

2.2 Funding of class actions

31. An additional tool for encouraging the filing of class actions is the possibility of receiving funding from the State, when it is in the interest of the public that a class action be brought and adjudicated.

32. In order to receive financing, the plaintiff can contact the Fund for Financing Class Actions, whose board is composed of representatives of the public and of the various government agencies, among them a representative of the IAA.

33. The board decides on how much financing to allocate to support the plaintiff based on various criteria, among them the public importance of the claim and the potential that it will succeed.

34. A number of plaintiffs who have recently filed antitrust class actions received financing from the fund. Such financing can be used to cover various expenses, such as obtaining an expert opinion.

2.3 *Counseling for plaintiffs*

35. The IAA offers counseling for plaintiffs of possible class actions in which the plaintiff can informally discuss his allegations and receive an input from IAA staff.

3. **Conclusion**

36. Under Israeli law, there are tools that facilitate private enforcement of violations of the Antitrust Act. At the same time, due to the evidentiary and legal complexity of antitrust suits and in view of the relatively high standards of proof established to date by the courts in Israel for such suits, the number of civil antitrust suits that are filed in Israel is relatively small. The IAA's aim is to try and improve private enforcement of the Antitrust Act. It does so through proposition of legislative amendments introducing treble damages and additional possibilities for proclamations regarding violations, through advising the government fund regarding financial assistance in favor of plaintiffs considering class actions, and through consultation given to potential plaintiffs.