



FBC Antitrust and Class Action Update

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International Cartels and Class Actions in Israel

Recent years, and the past year in particular, have witnessed a growing number of motions to certify class actions in Israel with respect to damages purportedly caused by international cartels.

The plaintiffs in these cases, often consumers or consumer advocacy groups, seek redress in accordance with the class action mechanism set out in Israel's Class Action Law, enacted in 2006 (the "**Class Action Law**"). The defendants in these actions typically are global companies that allegedly were parties to cartels with an international reach. While these cartels generally were not organized in Israel, the plaintiffs assert that the cartels harmed Israeli consumers,¹ and that since the cartels violate the Israeli Anti-Trust Law, 1988 (the "**Anti-Trust Law**"), they are subject to suit in a class action for the damages that they caused in Israel.

All class actions in Israel, including those related to cartels, are required to satisfy a series of judicial thresholds: the class plaintiffs must prove by prima facie evidence that they have a valid cause of action and they must meet a heightened burden of proof; they must demonstrate that their claim is suitable for a class action procedure because it raises common questions of fact and law; and they must convince the court that the class action procedure is the fairest and most effective way to clarify the questions at hand, and that they will manage the class action in an appropriate manner and in good faith.

On the other hand, submission of motions to certify class actions under the Class Action Law is free of court fees. Thus, if the jurisprudential thresholds described above are met, class plaintiffs can sue for damages amounting to hundreds of millions and even billions of shekels that they allegedly suffered without incurring burdensome court fees.

¹ Our firm is currently representing respondents in 4 class actions of this type.

Nonetheless, class actions involving international cartels raise unique issues relating primarily to the link between the international cartels and Israel.

The Anti-Trust Law is, by nature, a territorial law. Accordingly, to establish a claim that a cartel violated the Anti-Trust Law, a plaintiff must provide evidence of the cartel's clear and significant effect on the Israeli market. This reflects the "effect doctrine," which has been adopted by the Israeli Anti-Trust Commissioner as well as any courts and regulators in other jurisdictions.

A principal ramification of the effect doctrine is that it is not sufficient for plaintiffs claiming that a cartel violates the Anti-Trust Law to prove that an international cartel exists, albeit with a marginal or indirect effect on the Israeli market: on the contrary, the plaintiff must show that the effect on the Israeli market is direct and material. The impact of the effect doctrine is that it is not sufficient simply to assume that a global cartel formulated outside Israel, however destructive, necessarily affected the Israeli market. The concrete, direct, and clear impact of the cartel on the Israeli market and presentation of evidence of this impact are necessary elements of any such claim.

In many recently filed class action cases claiming the existence of an illegal cartel in Israel, class plaintiffs have tried to base their claims on the existence of an international cartel, often relying on decisions published by competition and anti-trust authorities around the world and on pleadings filed with courts in various countries (in both criminal and civil proceedings).

In most cases, however, these international pleadings and other documents do not relate to Israel at all, but rather to their originating jurisdiction. Therefore, conclusions as to the operation of international cartels in Israel cannot be drawn from these documents. The existence of an international cartel, and its "implementation" in various countries, does not establish that the cartel directly affected the Israeli market. The effect doctrine is particularly relevant in regard to the Israeli market, which is likely to be smaller and less economically significant than other markets that are more central to the cartel's activities.

Moreover, the foreign documents from which the class plaintiffs have sought to draw conclusions regarding the operation of a global cartel in Israel are of questionable evidentiary value in Israel. In general, Israeli courts assessing a cartel's impact in Israel would be likely to disregard the documents as hearsay.

The effect doctrine also requires plaintiffs, including class plaintiffs, to prove -- in addition to the existence of the cartel and its link to Israel -- that they suffered damages caused by the cartel. The nature of these damages must be clarified and quantified. Thus, the plaintiffs must prove that the alleged cartel caused overpricing, and they must establish that the pricing was excessive (or at least show the rate of the overcharge). In our experience, proving that prices were fixed at uncompetitive levels or in a manner reflecting an overcharge in Israel is a substantial evidentiary burden, which cannot be satisfied merely through documents or conclusions reached by competition authorities

abroad. In many cases, to prove the overcharge in Israel the plaintiffs would have to produce a detailed, economic report that assesses the issue and quantum of damages from an Israeli perspective in an independent and compelling manner.

To date, Israeli courts have not approved a motion to certify a class action related to damages caused in Israel by an international cartel. Therefore, at present no legal precedent exists that would offer substantive guidance as to how an Israeli court would deal with this type of class action. Only time will tell.

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If you have any questions about the matters addressed in this Update, please contact the following FBC author or your regular FBC contact.

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