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Private Enforcement of Competition Law – Note by Israel

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More documentation related to this discussion can be found at: oe.cd/peocl.

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Israel

1. Introduction

1. The Israel Competition Authority (hereinafter: the **ICA**) views private enforcement as a crucial and complementary tool to its public enforcement efforts. It can achieve objectives that public enforcement cannot always fulfill, such as compensating victims and addressing violations the ICA may not pursue for example - due to evidentiary challenges or resource constraints. This paper outlines highlights of the ICA's perspective on private enforcement, detailing the statutory legal framework, aspects of the ICA's institutional support for private plaintiffs, and procedural challenges arising from parallel proceedings.

2. The Legal Framework

2. Israeli competition law, and other Israeli laws, facilitates private enforcement primarily through two central statutory provisions:

3. **Tortious Claim:** Section 50(a) of the Economic Competition Law, 5748-1988 (hereinafter: **the Competition Law or the Law**), establishes that any act or omission in violation of the Law constitutes a tort under the Civil Wrongs Ordinance. This provision explicitly grants victims of antitrust violations such as the abuse of a dominant position, restrictive arrangements, or unlawful mergers, a civil cause of action for damages. Section 50(b) provides that instructions given or conditions imposed by the Director General are deemed "statutory provisions" for the purposes of section 63 of the Civil Wrongs Ordinance (Breach of Statutory Duty).

4. **Class Actions:** Section 3(a) of the Class Actions Law 5766-2006, stipulates that a class action may be filed solely on the grounds and pursuant to the statutes enumerated in the Second Schedule to the Law. Under the Second Schedule, a class action may be brought based on a cause of action under the Economic Competition Law. This stands in contrast to other legislation listed in the Schedule to the Class Actions Law, under which a class action may only be filed for a breach of specific provisions thereof. The Class Actions Law (Section 12(d) and Item 1 of the Third Schedule), also exempts antitrust class actions from the general mechanism requiring advanced identification or proactive "opt-in" of the represented group. The representation mechanism is therefore automatic and general. This reflects the economic reality that antitrust damages are often widely dispersed among a vast group of consumers, causing relatively minor individual harm but significant aggregate injury.

5. Additional statutory mechanisms further facilitate private enforcement. Notably, under Section 43(e) of the Economic Competition Law, a final determination by the General Director of the ICA according to section 43(a) and 26(a1) of the competition law, for example: a determination that an arrangement constitutes a restrictive arrangement, a determination that companies are obligated to file a merger notification, a determination that a monopolist has abused its position, a declaration of a concentration group, and a declaration of a monopolist, serves as prima facie evidence in any legal proceeding. This mechanism significantly mitigates the inherent informational asymmetry and evidentiary burden faced by private plaintiffs in proving the infringement (facilitating "follow-on" actions).

2.1. ICA's Support and Institutional Involvement

2.1.1. Class Actions Coordinator - Israel Competition Authority

6. The ICA is formally represented on the statutory Class Action Financing Fund (established under Section 27 of the Class Actions Law). This Fund assists plaintiffs in financing socially and publicly significant class actions. The ICA's representative in the fund provides the necessary competition law expertise during the Fund's deliberations on financing applications related to competition law violations.

7. Furthermore, this representative is the Class Actions Coordinator at the ICA, and as such they are responsible for providing informal guidance and preliminary assistance to private and class plaintiffs regarding competition law enforcement.[1]

2.1.2. Assisting Civil Courts – Expert Regulator and Attorney General Submissions

8. Beyond structural statutory mechanisms, courts frequently solicit the ICA's position in ongoing civil proceedings. In cases involving competition issues, the court or the parties may request a submission of the Attorney General's opinion. In other cases, primarily novel cases in which the ruling may have broad implications, the Attorney General may independently request to appear in the proceedings. In competition law matters, the ICA acts as the primary professional regulator formulating the substantive foundation for the Attorney General's position.

9. Such interventions are vital for the consistent development of competition jurisprudence. For instance, in a landmark proceeding concerning the "excessive and unfair pricing" doctrine, the Attorney General's opinion, heavily based on the ICA's methodology, resulted in a Supreme Court ruling[2] that remains the central policy framework guiding the application of the excessive pricing doctrine in Israel.

2.1.3. Settlement Review

10. Sections 18(c) and (d) of the Class Actions Law, vest the Attorney General with the authority to review and object to proposed class action settlements by submitting a formal opinion.

Settlements involving competition matters are as a matter of course referred to the ICA for in depth substantive review and the formulation the State's position regarding their approval.

2.2. Parallel Enforcement: Challenges and Complexities

11. While designed to be complementary, private enforcement often operates asynchronously with public enforcement. Private actions are frequently initiated when the ICA is entirely uninvolved, or conversely, after the ICA has concluded its enforcement and published a detailed determination. Complex procedural challenges may arise, however, when private litigation proceeds concurrently with an active, yet incomplete, ICA enforcement procedure.

[1] According to the Israel Competition Authority's 2025 Annual Report, the Authority provided guidance and consultation to eight private plaintiffs during that year

[2] Supreme Court of Israel (2022). *LCA 1248/19 Central Bottling Company Ltd. v. Gafniel*

2.2.1. Evidentiary and Administrative Challenges

12. Plaintiffs routinely file requests based on the Freedom of Information Law requesting investigative materials from the ICA's files. In several cases, private plaintiffs have petitioned the court to join the ICA to the private enforcement proceeding, and have filed a motion with the court within the private enforcement proceeding, alongside motions seeking orders compelling the ICA to disclose information from its own enforcement files, for use in the private action. Disclosing such documents while an enforcement proceeding is ongoing, poses a severe risk of compromising the public enforcement effort.

13. Moreover, it creates an administrative anomaly: providing investigative files to external private plaintiffs before the investigated entity has exercised its due process right to review the evidence (during the administrative hearing phase) distorts procedural fairness. The potential exposure of sensitive third-party documents further threatens the working methods of the ICA in enforcement procedure.

14. Accordingly, the Freedom of Information Law itself sets forth exemptions to requests for information, permitting the authorities to refuse the disclosure of such information. Included among these exemptions is the provision protecting the trade secrets of third parties, as well as the refusal to disclose information in order to prevent the exposure or compromise of the authority's operational methods.

2.2.2. Procedural Sequencing and Stays of Proceedings

15. Often, plaintiffs file class actions before the ICA reaches a final decision. Once aware of a parallel ICA probe, plaintiffs logically seek to stay their civil proceedings to benefit from the evidentiary advantage of a potential Director General determination.

16. A more complex challenge emerges when a defendant company seeks a stay. ICA enforcement procedures, particularly concerning complex violations, are inherently protracted, involving extensive data collection, economic analysis, hearings, and supplementary reviews. Defendants possess a strategic interest in tethering the civil case to this administrative timeline, routinely requesting a stay to prevent "conflicting decisions." By strategically delaying the administrative process (via extension requests or appellate proceedings), defendants can inadvertently or intentionally freeze private litigation for years. In such instances, courts generally request ICA's position on the requested stay.

2.3. Case Study: El Al Airlines (Excessive Pricing during Wartime)

17. The ICA recently navigated this exact dynamic during its enforcement procedure against El Al Airlines for allegedly charging excessive prices for flights following the outbreak of the war on October 7, 2023. Following an investigation initiated in late 2023, the Director General summoned El Al to a hearing regarding an intended financial sanction of 121 million NIS, citing the exploitation of its dominant market position (The enforcement procedure is still ongoing, currently in the hearing phase).

18. Months prior to this summons, a motion to certify a class action was filed against El Al on similar grounds. Following the summons, the plaintiffs sought discovery of the ICA's investigation file, while El Al moved to stay the class action pending the conclusion of the ICA's proceedings citing the risk of conflicting decisions between the Authority and the court. Consequently, the civil court hearing the claim requested the ICA to submit its position on these applications

19. The ICA refused to disclose documents pending the hearing to preserve the integrity of the investigation. Notably, the ICA also formally opposed the defendant's

motion to stay the civil proceeding. The ICA argued that the proceedings protect distinct interests and lack total factual overlap (e.g., varying relevant timeframes). The ICA emphasized that an administrative decision not to enforce does not automatically negate civil liability, whereas a decision to enforce would merely serve as prima facie evidence for the plaintiffs. Thus, parallel adjudication is legally and practically viable.

20. The civil court, in a very short "technical" decision, adopted the ICA's position and denied the stay. The court highlighted the independent consumer protection objective of the class action, noting its significance regardless of the ICA's final administrative posture. Though procedurally brief, this ruling fundamentally reinforces a critical legal principle: private enforcement stands on independent grounds. It effectively prevents investigated entities from leveraging parallel public investigations to stall civil litigation, cementing private enforcement as an autonomous and robust pillar of Israeli competition law.