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Working Session

"Damage claims in competition matters: The dawn of a new era?"

Antitrust Commission

Litigation Commission

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National Report of Israel

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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QUESTIONNAIRE

DISCLAIMER – PLEASE READ BEFORE ANSWERING THE QUESTIONNAIRE BELOW

The list below is intended as a guideline to compiling an overview of the status quo and developments in private enforcement proceedings in the national reporters' respective jurisdictions. It is left to the discretion of you as the national reporter to decide for each of the questions below if answering it is possible and will lead to useful information on the topic in your jurisdiction. The general reporters suggest that the national reporters answer those questions that they deem relevant and noteworthy for their national report. If a question is not answered, please indicate the reason for not including it in your national report.

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. **How would you summarize in few lines the status quo of private enforcement in your jurisdiction?**

    a. ***[For Non-EU Member States]*** **Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)**

Private antitrust enforcement is founded in Section 50 of the Antitrust Law, under which any act (or omission) that contravenes the provisions of the Law, including instructions or conditions imposed by Director General, automatically constitutes a tort actionable in terms of the Torts Ordinance.

Section 3 of the Torts Ordinance provides that any person who is injured or has suffered damages due to a tort committed in Israel is entitled to a remedy from the infringer, as provided for in the Torts Ordinance.

Section 4 of the Class Action Act, 2006 (the "**CAA**") sets out the requirements for standing to bring a class action suit. As regards natural persons, the claimant must have standing to bring a personal claim in the matter in order to have standing to bring a claim on behalf of a class. A public authority or organisation may also bring a class action acting in furtherance of an issue related to the field in which it engages and in which there are significant factual or legal questions common to the group of persons represented in the class action (note that as a condition for approving a class action brought by an organisation, the court must usually be convinced that the claim cannot be brought by a natural person[2]). Where one of the bases for the class action is

[2] Recently, the District Court in Tel-Aviv ruled on what is the correct interpretation of the class action laws requirement to prove that under the circumstances of the case, it would be difficult to bring the petition in the

damages, then it is sufficient for individuals to show that prima facie they suffered damages. Similarly, a claim that damages were suffered by a member of the group represented by a public authority or an organisation will suffice where the class action is brought by such public authority or organisation on behalf of that group.

If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

For private actions – see (a) above.

A class action may be brought only pursuant to the laws specified in the second supplement of the Class Action Law, or in other specific law/s which explicitly enables the submission of class actions. The Class Action Law specifically lists claims (or certain types of claims) from the following fields of law: consumer protection, antitrust, insurance, banking, securities, environmental hazards, equality and prohibition of discrimination, employment, claims against public authorities and claims against publishers of spam.

An antitrust damage claim can be submitted both as a stand-alone action and as a follow on action.

b. **[*For EU Member States]* Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?**

If yes, are they able to submit both stand alone and follow-on actions?

2. ***[For EU Member States]* Has your country already implemented/started implementing the private enforcement Directive?**
   - **If No: Do you believe that your country will meet the deadline?**
   - **If Yes: Please give the status quo of the implementation by highlighting in few lines what you consider the most important aspects of the implementation of the private enforcement Directive into national law in your country.**

CHAPTER II: COURT AND PROCEDURE

3. **What is (are) the court(s) in charge of antitrust private enforcement?**

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name of a natural person. Class Action 2484-09-12 *Hatzlacha The Consumers' Movement for the Promotion of a Fair Society and Economy v. Cohen et al.*, 18 February 2013, published in Nevo.

Where civil claims for damages based on violations of the Antitrust Law are concerned, the magistrate court is the competent court in respect of both a private claim and a class action for damages of up to ILS 2.5 million (approximately EUR 0.5 million).[3] Claims for higher damages are in the jurisdiction of a district court.[4] (In practice, most class actions, if not all, are submitted to the district courts, due to the high volume of the overall damages being claimed).

a) **Is there a specialized court specifically for antitrust based claims?**

Unlike in case of administrative and criminal proceedings, there is no specialized civil court for antitrust based claims. Civil claims in competition matters will be heard by the competent court having jurisdiction over the matter, depending on the total amount claimed, as specified in section 3 above.

If No: are there specific chambers for antitrust claims within the civil/commercial courts?

There are no specific chambers or judges within the civil courts who are formally designated for antitrust claims. However, in the District Courts – in which many of the antitrust based claims are filed – there are certain judges who have accumulated considerable experience in handling claims in competition matters and they seem to preside over most of the relevant cases.

If Yes: is the court composed only by judges, also economic experts and/or other persons?

b) May the court impose interim measures?

Yes.

Section 75 of the Courts Act [combined version], 1984 authorizes any civil court to give any type of remedy it considers appropriate regarding the case at hand.

Regulation 295E(a) of the Civil Procedure Regulations, 1984 provides that the plaintiff in a civil action may submit, together with the main claim, a motion for an interim measure.

Where the cause of action is based on the violation of the Antitrust Law, e.g., the applicant argues that a certain contractual obligation is a restrictive arrangement, the courts do not usually decide on the matter in the framework of an application to an interim measure; instead, they may defer the discussion to the main proceeding. However, this rule does not apply in cases in which the Director General has already

[3] The Courts Act, 1984, s. 51(a)(2); the Class Actions Act, 2006, s. 5(b).

[4] The Courts Act, 1984, s. 40.

determined that a certain agreement is a restrictive arrangement according to the power granted to him by section 43(a) of the Antitrust Law; in such case the court that reviews a motion for an interim order assumes that the agreement at hand is a restrictive arrangement. Note, however, that the Director General's determination that a certain agreement is a restrictive arrangement does not bind the court in the main proceeding and the defendant may still refute the presumption created by such determination.

c) May the trial proceed in parallel and independently of a National Competition Authority investigation?
If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

Private enforcement of the Antitrust Law may be carried out alongside the public enforcement by the Israeli Antitrust Authority (the "**IAA**"). The court's decision whether or not to suspend the case up to the IAA's decision will depend on the specific circumstances of the case.

d) Is the decision subject to appeal?
If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

The general rule is that first appeal is as of right, while a further appeal requires leave from the higher court (which will be the Supreme Court in antitrust cases).

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?

Private civil proceedings against foreign entities are subject to the rules of service outside the state of Israel as provided in the Civil Procedure Regulations, 5744-1984 (CPR). Particularly, in the case of a foreign defendant who is not personally present in Israel, a plaintiff needs the court's approval to serve its claim outside the jurisdiction, as a precondition for the court's jurisdiction over that defendant.

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 CPR. Regulation 500 stipulates a list of 10 situations in which service outside the jurisdiction will be permitted (Fulfilment of one of the grounds for the service out of the jurisdiction under Regulation 500 will allow the court to properly exercise jurisdiction over foreign entities, subject to compliance with the forum convenient doctrine). The common denominator of the factors detailed in the CPR is the existence of a nexus between the dispute and Israel. For instance, recognised are matters in which relief is sought against a party domiciled in Israel or that concern real estate located in Israel, matters that concern a breach of a contract entered into in Israel or breach of a contract that occurred in Israel, irrespective of where the contract has been made.

The issue of extraterritoriality in antitrust cases has not yet been firmly decided by

the courts in the context of a claim for damages or in a criminal proceeding.

The most pertinent ground for service outside of the jurisdiction in antitrust civil claims is set forth in Regulation 500(7) of the CPR, which requires that the claim be founded on an act or omission, within the state of Israel.

According to the Israeli case law, Regulation 500(7) requires certain nexus to Israel in addition to the damage: the mere occurrence of damage in Israel does not amount to 'an act, or omission, within the state of Israel', and accordingly, does not confer the Israeli court jurisdiction over the foreign defendant. However, two recent rulings of the Israeli district courts (given ex parte) in respect of service outside of the jurisdiction to foreign corporations which allegedly engaged in illegal global cartels, seem to apply a different reasoning and granted service permit. Note, however, that since both decisions were issued ex parte, the respondents still retain the right to submit motions to revoke leaves to serve outside the jurisdiction. Therefore, it remains to be seen whether Israeli case law will apply the nexus test of Regulation 500(7) to alleged global cartels formed outside of Israel solely by foreign entities with no Israeli subsidiaries or 'agents'.

5. **How long does a single (or collective) antitrust private enforcement action in first instance usually take?**

The period for private antitrust proceedings varies according to the specific circumstances of each case. However, the accumulated experience to date suggests that the full hearing of civil claims may take a few years. When it comes to class actions, this process might be even longer because of the complexity of the proceedings and the necessity to receive an approval from the court to hear the claim as a class action.

6. **Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?**

The court may oblige the losing party in a civil action (including in a class action) to pay the winning party legal costs in an amount according to its judgment.

7. **In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?**

8. **Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?**

    - **If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?**

- **Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?**

- **How is it coordinated with the individual actions' framework?**

Israeli law enables collective redress in antitrust matters.

Article 11 of the CAA provides that the mechanism for inclusion in a group in a class action is an "opt out" mechanism. Namely, where the Court certifies a petition for the approval of a class action, all of the members of the group defined by the court will be deemed to have agreed to the filing of the class action on their behalf, unless they actively opt out of the group.

An individual wishing to be excluded from the group may give notice to the court of his desire not to be included in the group, within 45 days from the date on which the Court's decision to approve the class action was published, or on such later date prescribed by the court.

A class action claim and a private action can by carried out simultaneously against the same defendant/s, for the same violation.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. **Are National Competition Authority decisions relevant for individual antitrust claims, in particular**
    - **as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)**
    - **in terms of the *quantum* of the compensation?**
    - **for the limitation period?**
    - **else?**

Special evidentiary significance is attributed to the following public enforcement measures:
a the findings and conclusions of a final verdict of the court, convicting the defendant in the criminal proceeding, serve as *prima facie* evidence in a civil proceeding to which the defendant is a party; and
b a determination of the Director General of the IAA made in terms of the Antitrust Law shall constitute *prima facie* evidence in any legal proceedings. (Inter alia, the Director General may determine that a certain arrangement constitutes a restrictive arrangement, in contravention of Section 4 of the Antitrust Law, or that a monopolist has abused its market position in contravention of the provisions of Section 29A of the Antitrust Law).

10. What are the relevant limitation periods (taking into account question 9 above)?

Where a civil claim for damages is brought under the Antitrust Law, the Statute of Limitation Act 5718-1958 applies. Sections 5(1) and 6 of the Act direct that a claim (not in respect of immoveable property) will prescribe seven years from the date on which the cause of action arose. However, if the plaintiff was unaware of the facts that constituted the cause of action for reasons that were independent of it, and that, even using reasonable caution, could not have known, the period of limitation will commence on the day that the facts became known to the plaintiff.

Section 89 of the Torts Ordinance directs that the date on which the cause of action arose will be the date on which the relevant act or omission occurred; where the act or omission is a continuing act or omission, then the date on which such act or omission ceased will be the date on which the cause of action arose. Specifically, however, where the claim is a claim for damages, including pecuniary damages, caused by a tortious act or omission, then the date on which the claim arose will be the date on which the damage was incurred. However, should such damage only be discovered at a later date, the cause of action arises on this date – subject to a maximum period of 10 years. Since damage is one of the elements of a cause of action brought under the Antitrust Law, the latter rule of Section 89(2) should apply to such cases, provided that the plaintiff shows a causal link between the argued action (or omission) and the damage.

In *Straus Group et al v. Carmit Candy Industries Ltd*, the Supreme Court considered the question on which day the plaintiff became aware of the facts constituting the cause of action. The case involved an action for damages brought by Carmit, the Israeli distributor of Cadbury, against Strauss Group for alleged abuse of dominant position by exclusionary practices aimed at forcing Cadbury chocolates out of the market. The court ruled that the day on which the plaintiff became aware of the facts constituting the cause of action was not the date on which Carmit became aware of the defendant's salespeople's behaviour and threats to the retailers, but later – when Carmit revealed for the first time that this was part of a strategic decision of the defendant's management to exclude Cadbury from the market. This information was revealed to Carmit only when the investigation of the IAA against the defendant became public.

The inclusion of a person as a claimant in a class action group has the same effect in terms of tolling the statute of limitations as if that person had issued the summons in the matter. In addition, should the court deny an application for approval, the prescription period of the claim of a person included in the group deriving from that cause of action does not end prior to one year after the date on which the decision on the application for approval becomes final, provided that person's claim had not been tolled prior to the date on which the application for approval was filed.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

The general rule is that responsibility lays on the specific entity that committed the offense. However, if evidence points at a certain degree of involvement by the parent company, and/or at no real separation between the parent and the subsidiary, these findings may have consequences regarding the liability of the parent company – depending, of course, at the specific circumstances of the case at hand.

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

Parties may be found liable jointly as joint wrongdoers in a civil action for damages. In these circumstances, the court may rule on the amount of damages for which each co-respondent is liable (i.e., liability for damages may be apportioned among the co-respondents, such as in *Tower Air* case).[5] Where a party has not been cited as a co-respondent, he or she may be joined by the respondent as a co-respondent by submission of a third-party notice, such that that party contribute to or indemnify the respondent against the damages claimed (To date there does not appear to be a civil antitrust damages ruling in which this procedure has been used).

In the case of administrative financial sanctions imposed by the IAA, the antitrust Law and the guidelines require that the amount of the financial sanction be determined based on various considerations, *inter alia* considerations that are specific to each infringing party, such as: its part in the violation and the impact it had on committing the offense, previous infringements of that party and its turnover. Therefore, it is very unlikely that joint and several liability be determined by the IAA in the framework of financial sanctions. However, joint and several liability can be agreed upon (and was applied in practice) in the framework of a consent decree.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

- **Is there any pre-trial discovery procedure available?**

Pre-trial discovery procedure is allowed by the Civil Procedure Regulations, 5744-1984 (CPR). According to the CPR, both parties are obliged, among other things, to disclose,

[5] Civil Action (Haifa) 1114/99 *Tower Air Ltd. v. Flight Services Ltd. (*published in Nevo).

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.

- **Is there any evidence protected by legal privilege?**

Section 48 of the Evidence Ordinance (New Version) 5731-1971 provides for legal privilege for documents and information exchanged between attorneys and their clients. The privilege extends solely to documents exchanged in the context of the professional services provided by the attorney to the client. Importantly, the right and duty of non-disclosure attaches to the attorney. Thus, unless the client has waived his or her right to claim legal privilege, an attorney is not obliged to produce for evidence documents or information that were exchanged with his or her client and related to the professional services provided by the attorney to the client.

Privilege for documents exchanged between an attorney and client related to the professional services provided by the attorney may apply regardless of 'the geographical location' of those documents. Therefore, privilege may apply also to documents such as e-mails and text messages that are held by the client or saved in the client's computer.
Note that the courts have held that legal privilege may be invoked in respect of documents prepared for purposes of obtaining legal advice in connection with legal proceedings, which proceedings are either then currently under way or are expected. This privilege applies even where such documents have not yet been exchanged between the attorney and the client or where such documents were prepared by a third party in accordance with the request of either the client or the attorney.

Further, Section 23 of the Law of Commercial Wrongs, 5759-1999 directs that a court, an authority, a person or a body with judicial or quasi-judicial authority may grant an order, at its own initiative or on the request of a person, ensuring the confidentiality of a 'commercial secret' disclosed in proceedings before it. Thus, a party may claim confidentiality in a document or information submitted to a government authority on the basis of its containing 'commercial secrets'.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

The CPR govern discovery and inspection of documentation in civil proceedings. 'Laying your cards on the table', and not surprising the opposing litigant with evidence of which such litigant may not have been aware, is viewed as both efficient and in the interests of determining the truth in respect of the issue in dispute.
The emphasis in the discovery process is on the relevance of the documents to be discovered (i.e., relevance being determined by whether such documents may shed light on the dispute). The range of documents permitted to be requested in a discovery application is wide and the courts have allowed not only actual documents of the parties to be discovered, but information contained in other forms (e.g., recordings and the transcripts of recordings, video recordings, and information including lists and records contained in magnetic or electronic form). Note, however, that the courts have emphasised that a

distinction must be made between appropriate discovery applications and 'fishing expeditions'. Fishing expeditions will not be granted by the courts.

Usually, litigants (any litigant, not necessarily an opposing one) must disclose by way of affidavit the documents that pertain to the matter at hand or that were under their control or possession. The affidavit must describe the documents that are relevant to the matter at hand and that are or were in the possession or under the control of the litigant disclosing them. The concept of relevance is interpreted broadly and includes both documents that are damaging to the litigant discovering them as well as documents that may prove useful to the opposing party.

A litigant may also obtain information through a questionnaire, submitted to another litigant. The questionnaire may cover information that is not limited to documents. Although the questionnaire itself and the answers thereto do not form part of the court file and automatically become admissible as evidence, any party to the proceedings may use the information provided in the answers of the other party, in whole or in part, as part of its evidence. The court may also order the inclusion of further information provided by a litigant in its answers to the questionnaire, should the court find that such further information is closely connected to the information already submitted as evidence.

Third-party testimony is regulated by the CPR and the Courts Law (combined version) 5744-1984. CPR 178(a) stipulates that litigants may summon third parties to provide testimony before a court on their behalf. Such third parties may also be summoned to present documents to court. The court may not prevent such third-party testimony on the basis that, in its opinion, such testimony will not assist the litigant who summoned the third party in the furtherance of his or her matter.

As with expert evidence, the court may also call on witnesses to testify as to matters before the court or to produce documents that are either in their possession or under their control.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

The claimants or the courts do not have access to the IAA's file. However, there are various ways to try to get access at least to part of the documents contained in the IAA's file, for example through the Freedom of Information Act, 1998, or in the framework of the disclosure procedure (in case the defendant already received copies from documents that appear in the IAA's file).

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

While the 'indirect purchaser' doctrine was expressly asserted in several matters before the

courts, ultimately the cases were settled without the court ruling on the issue. In *Howard Rice*,[6] the Supreme Court noted that even under the assumption that the plaintiff was able to prove that the fee charged by the defendant was excessive or unfair, it would be difficult to approve the class action since the damage was partly passed on to the plaintiffs' customers and was not suffered by the plaintiff alone.

On the other hand, in November 2013, the Central District Court rejected a motion for dismissal of a class action application, having determined[7] that the existence of a conflict of interest between the members of two distinct sub-groups of the class action group (direct and indirect injured members) does not deny the possibility of providing compensation to any of the group's members. This may be the path for rejecting the 'pass-on defence' doctrine in antitrust private actions. Note, however, that this issue was not the core of the debate there and was not the subject of the decision.

17. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

This question has not yet been addressed by Israeli courts.

18. Is the passing-on defence allowed?

Please refer to section 16 above.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations? In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

In the case of private antitrust claims for infringement of the Antitrust 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 punitive damages or treble damages are available currently. However, in October 2013 the IAA introduced a treble damages legislative proposal (Antitrust Bill Amendment No. 14) aiming at improving private enforcement of the Antitrust Law in Israel.

CHAPTER VI: QUANTIFICATION OF HARM

6 Supreme Court, Permission for Civil Appeal 2616/03 *Isracard Ltd. v. Howard Rice*, 14 March 2005, published in Nevo.

7 Class Action 10538-02-13 *Hatzlacha The Consumers' Movement for the Promotion of a Fair Society and Economy v. Elal Israeli Airways*, 12 November 2013, published in Nevo.

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

In a claim of which cause of action is the engagement in illegal restrictive arrangements: the plaintiff has to prove the engagement in an arrangement, the arrangement being restrictive (unless the arrangement is recognized by the law as restrictive per-se) and the damage caused to it.

In monopoly cases: the plaintiff has to prove that the defendant is a monopoly pursuant to section 26 of the Antirust Law, that the monopolist abused its dominant position or engaged in illegal refusal to deal, and that it suffered a damage as a result. The IAA considers three defences that could justify a refusal to deal: (1) the defendant proves that it is not a monopoly; (2) the monopolist proves that the refusal to deal was reasonable and economically justified; (3) that the refusal to deal neither injures the public nor harms competition or excludes rivals.

In merger cases: the plaintiff has to prove that the defendants engaged in a "companies' merger", that the merger met the notification threshold and that the plaintiff suffered a damage as a result.

A determination by the IAA that a certain arrangement is a restrictive arrangement, that a certain entity is a monopolist and/ or that the monopolist abused its position, or that a certain transaction is a companies' merger, serves as prima facie evidence in court, thus the plaintiff is not required to prove same. However, the defendant may still refute such presumptions.

21. Is there a difference between stand alone and follow-on actions?

A follow-on action grants evidentiary advantage – see section 9 above.

22. How is damage quantified?

A private litigant injured monetarily by contraventions of the Antitrust Law may bring a claim for tortious damages in terms of the Torts Ordinance. The purpose of damages under Israeli law, which derives from the English law, is to place injured parties in the position they were prior to the commission of the tort. In general, the damage caused by a restrictive arrangement would depend on the price of the product at hand, had the anticompetitive conduct not occurred (see *Tower Air*). Where there is no information regarding the accurate damage, the damage may be quantified by way of estimation, based on the information brought before the court (*Tower Air*).

In class actions, the court may determine various compensatory damage awards. Section 20 of the Class Action Law directs that the court may order compensation to be paid to each member of the group who has proven his or her entitlement thereto or may order that each member of the group prove the actual damages he or she has suffered. The court may also

order global compensation to be paid and divided among the members of the group, so long as where global compensation is granted, the amount of damages is capable of precise calculation in accordance with the evidence presented to the court. In *Dan Reichart v. the Heirs of Moshe Shemesh*, the Supreme Court discussed the different methods of calculating or proving damages. Where individual damages are awarded to each member of the class, each member must show the amount of damages personally suffered, for example, by way of production of documentary proof such as receipts. On the other hand, various methods exist to determine global damages, such as having regard to the accounts and documents of the respondent, the use of statistics or the use of mathematical models. Of course, the advantage of the class action mechanism is usually that each member of the group is not required to prove his or her personal damages, which in light of the usually relatively small amounts of individual damages suffered, would be inefficient to the point of being prohibitive.

The Supreme Court in *Dan Reichart* also approved a third method for determining damages – estimation of the amount of damages based on the information that has been brought before it. In the court's opinion, however, this latter method should be reserved for exceptional circumstances.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

The defendant may try to prove that a block exemption applies to a restrictive arrangement to which it is party.
In addition, there are several defences that are specific to criminal enforcement but do not apply to civil enforcement, such as reliance on a legal advice, defence for employees, etc.

24. What is the role of economic experts, if any?

Economic experts have an important role in civil antitrust cases, both for the assessment of the relevant market and the competitive impact of the alleged violation of the law and for the purpose of damage assessment.

Regulation 20 of the Evidence Ordinance [New Version], 5731-1971 (the Evidence Ordinance) entitles the court to receive into evidence the opinion of an expert relating to issues of science, research, art or professional knowledge. Economic assessments to establish antitrust violations and prove competition damages would certainly fall within the scope of expert evidence permitted to be received by a court hearing a civil antitrust claim for damages.

Litigants may choose to present expert evidence to the court to substantiate or prove their arguments. In addition, the court also may, on its own initiation and at any stage of proceedings, appoint an expert to give evidence on an issue on which the litigants disagree.

In practice, as the popularity of civil enforcement of the Antitrust Law increases in Israel, the use of experts to determine damages also increases. In *Tower Air*, for example, involving a civil claim for damages due to financial injury caused by anti-competitive behaviour, both parties presented expert evidence to the court to substantiate their damages calculations and assessments of the competitive harm that was suffered. In that case, however, while the court did rely on the expert evidence presented to it to determine several aspects of the anti-competitive conduct, such as price discrimination, the court chose to reject both parties' conclusions regarding the amount of pecuniary damage caused and instead estimated the amount of damages itself based on all the information that had been presented to it.

In recent years, the courts have required class action applicants to support their motions for class action approval with an expert opinion, to satisfy the requirement of providing prima facie evidence by anti-competitive conduct or impact.[8]

25. What other types of experts are typically engaged in your jurisdiction?

The necessity to use experts from other fields of expertise will depend on the case at hand (*inter alia*, based on the business sector that is the subject matter of the claim).

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

Not necessarily, but this could be the case. See for example in section 29 below (the banks case).

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction?
If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Antitrust law disputes may be referred to arbitration, however with limitations. Section 3 of the Arbitration Law directs that an arbitration agreement will have no validity in matters that cannot be a proper subject for arbitration between the parties.

In December 2011, the Tel Aviv District Court annulled an arbitration award[1]

8 Supreme Court, Permission for Civil Appeal 2616/03 *Isracard Ltd v. Haward Rice*, 14 March 2005, published in Nevo; Central District Court, Civil Case 1817-08-07 *Johanan and others v. Partner Tikshoret Ltd, Cellcom Israel Ltd, Pelephone Tikshoret Ltd*, 19 January 2011, published in Nevo.

stating that the arbitration award in effect enforced a memorandum of understanding (MOU) that was illegal according to the Antitrust Law. The court determined that the MOU was an agreement between two competitors in the cement industry and its purpose was to prevent the respondent from competing with the applicant and to allocate the market, thus amounting to an unenforceable restrictive arrangement (Tel Aviv District Court, Originating Summons of Arbitration 1039-08 *Ardan – Cement Industries Ltd v. Dan Tmir*).

However, in cases where the restrictive arrangement did not seem to be the expression of a hard core illegal motivation, or in other special circumstances, the recognition of such clauses by arbitrators was upheld:

In February 2015, the District Court rejected a motion to partially void an arbitration award after ruling on substantial antitrust-related matters. The arbitrator rejected a petition for declaratory relief finding a non-competition clause in a partnership agreement between lawyers was unreasonable and constituted a restrictive arrangement.

Specifically, the arbitrator ruled that not all non-competition clauses that limit the freedom of occupation are unreasonable and contrary to public policy, and that in this specific case the non-competition clause was reasonable in light of its limited scope. Further, the arbitrator stated that the non-competition clause was set in accordance with reasonable and acceptable practices, and therefore was not considered a restrictive arrangement according to Section 3(8) of the Antitrust Law (Section 3(8) states that an obligation by the seller of a business sold in its entirety, towards the purchaser of the business not to engage in the same type of business, provided such obligation is not contrary to reasonable and accepted practices, shall not be deemed a restrictive arrangement). Moreover, even if the non-competition clause constituted a restrictive arrangement, it falls within the application of the Block Exemption for Agreements of Minor Importance (*de minimis*). The District Court upheld the arbitrator's ruling, without analysing in detail the application of Section 3(8) of the Law and the said block exemption. The Court added that even if the arbitrator erred in the application of the substantive law, such error does not establish grounds for the revocation of the arbitration award.

It is important to note that the general rule is that the Israeli Antitrust Law does not provide arbitration procedure or clause any immunity from the antitrust law and its sanction. Thus for example, in the early 2000, two traffic light companies were criminally charged with bid rigging allegations, and were convicted. (all antitrust violations in Israel are also considered a crime, and criminal enforcement is a major part of the Antitrust Authority's task), the fact that the bid rigging of the companies was done under the umbrella of an arbitration procedure not only did not provide them with immunity, but the arbitrator himself was convicted in adding and abetting a restrictive arrangement, and was imposed with a fine (CA 7829/03 *the State of Israel v. Ariel et al.*)

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:

- **settlements requiring court approval;**
- **settlements outside of proceedings;**
- **timing of settlement;**
- **etc.**

Section 79A of the Courts Law provides that parties to a civil proceeding may reach a settlement agreement, either of their own accord or proposed to them by the court, and the court may, with the consent of the parties, enforce such settlement agreement. A court-enforced settlement agreement has the effect of a judgment.

In the case of a class action, the parties may request that the court approve a settlement that was agreed to by the parties. A member of the group represented in the class action, however, may elect to be excluded from the settlement. The court may not approve a settlement agreement in a class action unless it determines that the terms of the agreement are fair and reasonable as concerns the interests of all the members of the class and that the termination of proceedings by means of settlement is the most efficient manner in settling the dispute between the parties.[9] Further protection to the members of a class is provided by the requirement that the court, prior to granting a settlement agreement, hear the opinion of a court-appointed expert in the relevant field. The court may dispense with this requirement, however, if it determines that such evidence is unnecessary.[10] The court must substantiate its decision regarding approval of a settlement agreement by addressing the following issues: the delineation of the group subject to the settlement agreement; the legal claims, the significant questions of fact or law common to the class and the remedies requested; the main aspects of the settlement agreement; the difference between the remedies requested in the claim than those agreed to in the settlement agreement; any opposition entered to the settlement agreement; the stage of the proceedings; the recommendations contained in the expert opinion; and the risks and likelihood of success in the class action in comparison to the settlement agreement.

As part of the settlement agreement in the class action, the court will determine the professional attorneys' fees and any remuneration due to the claimant, and in so doing, may take into account any recommendation of the parties proposed in terms of the settlement agreement.[11] Finally, the Class Action Law provides that should the settlement agreement not be approved by the court or should the court's approval thereof be subsequently annulled by the court, any determinations made in terms of the settlement agreement and

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9 Class Action 42756-06-13 *Nasser v. Amusement City Company Ltd*, 15 December 2015, published in Nevo.

10 Section 19(b)(1) of the Class Action Law.

11 The terms of the settlement agreement may not contain agreement as to professional attorneys' fees and remuneration for the claimant but may contain a recommendation as to these amounts.

any statements made in the framework of the settlement proceedings will not be admissible as evidence in civil proceedings.[12]

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

In June 2014 the Antitrust Tribunal approved a consent decree between the IAA and the five largest banks in Israel, which was reached during an appeal submitted by the banks against a determination of the Director General stating that the banks engaged in a restrictive arrangement by repeated exchange of information regarding their fees. In the framework of the consent decree the banks undertook to pay to the State Treasury the sum of 70 million shekels. It was also agreed that if eventually the class actions brought against the banks regarding the alleged coordination of fees come to an end by way of a settlement, this amount of money will be directly passed on to the consumers. This unusual solution created, for the first time, a link between administrative and private enforcement measures. In April 2015 a revised motion to certify a class action was submitted against the banks regarding the alleged coordination of fees. In May 2015 the Tel Aviv District Court approved a settlement agreement between the parties which implemented the provision of the consent decree after finding that it is a proper, fair and reasonable arrangement.[13]

12 Section 19(g) of the Class Action Law.

13 Tel Aviv District Court, Class Action 1714/08 *Einav Kaplan Basharis v. Bank Leumi*, 31 May 2015, published in Nevo.