

Israel's District Court Sets the Standards for Follow Up Litigation Against Members of Alleged Foreign Cartels

Private enforcement of the Competition Law in Israel (and particularly class actions) has been vibrant in recent years. One of the most noticeable trends with respect to such enforcement are follow up class actions, which typically involve a local plaintiff seeking compensation for alleged harm incurred in Israel as a result of an international cartel. These actions are typically based on a decision or a settlement agreement reached between foreign competition authorities and alleged cartel members. In most of these cases, the plaintiff does not produce any evidence proving implementation of the cartel in Israel or direct impact on prices in Israel. In many cases, the plaintiff would simply **assume** such impact exists as a logical assumption and seek a broad disclosure of documents to substantiate its case.

The Israel District Court (Central District) handed down a few days ago (September 8, 2019) an important decision, which curtails the ability of local plaintiffs to bring forward class actions against alleged international cartel members, that are solely based on foreign administrative decisions or settlements.

The decision concerned discovery proceedings initiated by the plaintiff in *R.L.F.I. Agriculture Ltd. v. Man Truck & Bus AG et al.* The discovery proceedings were initiated as part of a motion to certify a class action against several international truck manufacturers, alleging that the truck manufacturers were party to an international cartel that adversely affected competition in Israel. The class plaintiff (the movant) relied on a decision issued by the European Commission in July 2016, according to which the truck manufacturers infringed the European competition laws by coordinating gross list prices of trucks sold in Europe, the timing for the introduction of emission technologies for medium and heavy trucks, and the passing on of costs affiliated with the implantation of these technologies. The European Commission imposed massive fines on the truck manufacturers, cumulatively amounting to almost EUR 3 Billion. The European Commission decision refers solely to the EEA and does not mention Israel nor any country outside the EEA. The movant argued that the Israeli competition law is applicable to the manufacturers' conduct – although originated outside Israel and not aimed at the

Israeli market – pursuant to the effect's doctrine, which outlines the conditions for extraterritorial application of the Israeli competition law.

In the framework of the certification proceedings, the movant has requested the court to order disclosure of a mass number of documents and data. The court denied the movant's discovery motion almost in its entirety. The court focuses in its decision on the question whether the movant has presented a *prima facie* evidentiary basis for certification of the class action, which is a key prerequisite for granting disclosure at the certification stage. In this respect, the court analyzes the movant's argument that the Israeli competition law is applicable to the manufacturers' conduct pursuant to the effect's doctrine. **The court interprets the effects doctrine narrowly and denies the movant's argument, thereby presenting a significant hurdle on the ability of Israeli plaintiffs to bring forward competition law actions against international companies whose conduct was not aimed directly at the Israeli market.**

More specifically, the court explains that although the Israeli competition law does not explicitly apply to foreign conduct, it has been applied extraterritorially in the past (by the Israeli Competition Authority and the Competition Tribunal) in a few instances, pursuant to the effect's doctrine originated in the United States. The court analyses these instances as well as European and U.S. laws on the matter, and determines that the effects doctrine applies under Israeli law, but only in limited situations where the infringing conduct had a **direct, substantial and intentional effect** on competition in Israel. In this regard, the court states that where the effect on the Israeli market is negligible or indirect, there is no need to bring the case before Israel's courts and the Israeli economy can benefit as a "free rider" from enforcement measures taken by the relevant foreign countries.

The court rules that the movant has not shown that the abovementioned prerequisites (direct, substantial and intentional effect) are met in this case, even under the low evidentiary threshold that the movant is required to meet under the framework of the discovery motion.

In particular, the court rules that the movant has not shown a direct link of the alleged conduct to the Israeli market since all of the truck manufacturers are foreign companies with no independent operations in Israel; the European Commission decision concerns only the EEA; Israel is not

mentioned in the European Commission decision at all, nor does the European Commission decision mention that the alleged conduct was made with an intent to affect the Israeli market.

The court further determines that the movant has not shown that competition in the Israeli market was affected by the alleged conduct (let alone substantially). The court states that the movant should have supported this argument by an expert economic opinion, analyzing the effects of the alleged conduct on the Israeli market.

Referring to other evidentiary difficulties in the motion for certification, the court addresses the manufacturers' arguments that the European Commission decision is inadmissible for the veracity of its contents, being among others, a decision handed down by a foreign administrative authority. The court states that such argument is of substantial weight (without conclusively ruling on this matter).

These findings by the court set a more meaningful bar for local plaintiffs seeking compensation for alleged harm stemming from a foreign conduct and may also affect cases already pending before the Israeli courts.