Antitrust Enforcement of the Prohibition of Excessive Prices: The Israeli Experience

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Abstract Until recently, there was no antitrust enforcement of a prohibition of excessive pricing in Israel. However, in recent years, a large and growing number of motions to certify class actions alleging excessive prices have been filed, although so far, only one class action has been certified by the court and it may take years before a final verdict is issued. Given this trend and given that courts are yet to clarify what excessive prices are and when high prices are deemed excessive and violate the Israeli Antitrust Law, monopolies in Israel face a high degree of legal uncertainty. In this chapter, I review these developments in detail and discuss the lessons that can be drawn from the Israeli experience.

1 Introduction

Under the Israeli Antitrust Law, it is unlawful for a monopoly to set "unfair purchase or selling prices." Until recently, this provision was generally interpreted as referring to low predatory pricing, intended to force rivals out of the market. Things changed however quite substantially in the past few years.

First, the Director General of the Israeli Antitrust Authority (IAA) issued in 2014 Guidelines 1/14, which state that unfair prices include high excessive prices. The guidelines also state that the IAA will begin to enforce the prohibition of excessive pricing and it presents the considerations and rules that will guide the IAA in its

For helpful comments and discussions, I thank Itai Ater, Michal Gal, David Gilo, Nadav Miyara, Yannis Katsoulacos, and Amir Vang. Disclaimer: I am involved as an economic expert in two pending class actions concerning excessive pricing. In the first case, I submitted an expert opinion on behalf of the plaintiff, Israel Consumer Council, in a class action that alleges that the price of prepackaged yellow cheese was excessive. In the second case, I submitted an expert opinion on behalf of the defendant, the Central Bottling Company, in a class action that alleges that the price of 1.5 L bottles of Coca-Cola was excessive.

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enforcement efforts. Although Guidelines 1/14 were replaced in early 2017 by Guidelines 1/17, which adopt a more reserved approach, the new guidelines still maintain the view that setting an unfairly high price may, under the appropriate circumstances, be regarded as an abuse of monopoly position.

Second, under Israeli law, private plaintiffs may file a class action and seek damages for breach of the Antitrust Law. Two recent District Court decisions from 2016 to 2017 on class actions ruled that setting an excessive price violates the Antitrust Law. Moreover, the 2016 decision certified a class action alleging that the price of cottage cheese was excessive, and for the first time, a class action concerning excessive pricing has proceeded to trial.

Following the publication of Guidelines 1/14, and especially after the District Court certified the cottage cheese class action, a large number of motions to certify class actions concerning excessive pricing were filed. Currently, there are 22 such motions pending in court; this is in addition to the cottage cheese class action, which has already been certified. These motions involve a wide range of products and services, ranging from dairy products and soft drinks to trading platforms, recovery and tracking services for stolen cars, and burial services. This trend, which is likely to continue at least in the near future, implies that nowadays, monopolists in Israel face a real risk of being sued for having set excessive prices. While this risk may discourage monopolists from raising prices, it may also discourage them from cutting prices, because price cuts may open the door for claims that past prices were excessive or that prices in other markets, or geographical areas, are excessive. That is, monopolists may have a strong disincentive to engage in price discrimination either over time or across markets. Since price discrimination may enhance aggregate consumer surplus, this is not necessarily a good thing. More generally, monopolists may have hard time deciding on their pricing policies, given that any price change may trigger a class action alleging that prices are excessive now or were excessive in the past.

In this chapter, I review the above developments in detail and discuss the lessons that can be drawn from Israeli experience. I begin in Sect. 2 by discussing the legal background and then review key court decisions in Sect. 3. I then discuss Guidelines 1/14 and 1/17 which state the IAA's position on excessive pricing in Sect. 4, and in Sect. 5, I review the academic debate that took place in Israel regarding excessive pricing. In Sect. 6, I discuss several issues that are worth bearing in mind when evaluating the current situation in Israel concerning the prohibition of excessive pricing. Concluding remarks are in Sect. 7.

2 The Legal Background

The main objective of the Israeli Antitrust Law is to protect competition by preventing the creation of market power in the first place and by ensuring that suppliers and buyers do not abuse their market power when they already have it.[1] A supplier or a buyer whose market share exceeds 50% is considered a monopoly under the law and is then subject to various conduct prohibitions intended to ensure that it will not engage in specific practices that are presumed to lessen competition or harm the public.[2]

Apart from conduct prohibitions, the Israeli Antitrust Law enables the Director General of the IAA to declare a supplier (a buyer) as a monopoly in the provision (purchase) of a specific good or service. The declaration serves as prima facie evidence for the supplier's or buyer's monopoly position in any court proceeding and allows the Director General to issue directives to the declared monopoly to prevent it from abusing its position. A declaration of monopoly greatly facilitates class actions on antitrust grounds, including those alleging excessive pricing, because the plaintiffs do not need to prove that the supplier or buyer they sue is a monopoly. This saves plaintiffs the need to engage in the lengthy and complex task of defining the relevant market, which typically requires a lot of data that private plaintiffs may not have.

Until 1996, the Israeli Antitrust Law has only provided in Section 29 that a monopoly "may not unreasonably refuse to supply or purchase the asset or service over which the monopoly exists." In 1996, the Antitrust Law was amended (Amendment 2).[3] The newly added Section 29a states in Section 29a(a) that "A monopolist shall not abuse its position in the market in a manner liable to lessen business competition or harm the public." Section 29a(b) presents a non-exhaustive list of specific abusive practices, which are presumed to lessen competition or harm the public and which a monopoly is not allowed to engage in. These presumptions, which parallel those listed in Article 102 (formerly Paragraph 86) of the Treaty on the Functioning of the European Union (TFEU), include the following[4]:

1. "Setting unfair purchase or selling prices for the asset or service under monopoly"

[1] For an overview of Israeli Antitrust Law, see OECD (2011a).

[2] More precisely, the Antitrust Law defines a monopoly as "concentration of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of a service, in the hands of one person."

[3] Antitrust Law (Amendment no. 2) 5756–1996, book of Laws 1573, 149.

[4] The proposed legislation of Amendment 2 of the Antitrust Law in 1996 explained the need for Section 29a as follows: "... it is recommended to adopt the regulations of restrictive business practices that are common in other countries (and particularly with the necessary modifications, the supervisory program specified in the laws of the EU, in Paragraph 86 of the 1957 Treaty of Rome), and to state in a clear and comprehensive manner that a monopolist is subject to norms of behavior." See Legislative proposal 2446, 229, https://www.nevo.co.il/law_word/Law17/PROP-2446.pdf (accessed on March 14, 2018).

2. "Reducing or increasing the quantity of the assets or the scope of the services offered by the monopolist, not within the context of fair competitive activity"
3. "Applying dissimilar conditions to equivalent transactions in a manner which may grant certain customers or suppliers an unfair advantage vis-à-vis their competitors"
4. "Making the contract regarding the asset or service under monopoly conditional on terms that, by their nature or according to commercial usage, are not related to the subject of the contract"

It is important to emphasize that according to the Israeli law, "a monopoly is not prohibited, but bears a special responsibility."[5] Section 29a(b)(1) provides that one special responsibility is to refrain from "setting unfair purchase or selling prices." The question of course is what constitutes "unfair prices" and whether unfair prices are low predatory prices, intended to drive rivals out of the market, or high prices, intended to extract surplus from consumers.

These questions were addressed in several class actions brought against monopolies, alleging that they violated Section 29a(b)(1) of the Antitrust Law by setting excessive prices for their products or services. In the next section, I review these class actions.

3 Key Class Actions Concerning Excessive Pricing

Before starting, it is important to bear in mind that in Israel, a class action is a two-step procedure: it begins with a preliminary motion to certify the class action.[6] If the court grants the motion, the case proceeds to trial. One of the conditions for certifying a class action in Israel is that "there is a reasonable possibility that [the decision] will be in favor of the class."[7] Experience shows however that Israeli courts are quite stringent in applying this standard.[8] In fact, so far, only one class action, the one alleging an excessive price for cottage cheese, has been certified and proceeded to trial.

[5]See, monograph (Antitrust Authority) 1/93 The Director of the Antirust Authority v. Dubek Ltd., 1995 Antitrust 3,005,459, http://www.antitrust.gov.il/subject/140/item/26311.aspx (accessed on March 14, 2018). The Antitrust Tribunal, which made the decision, resides within the Jerusalem District Court and has exclusive jurisdiction over noncriminal administrative antitrust proceedings.

[6]For detail about class action procedures in Israel, see Plato-Shinar (2007) and Taussig (2007).

[7]Section 8(a)(1) of the Israeli Class Actions Law, 2006.

[8]Klement and Weinshall-Margel (2016) examine all motions to certify class actions submitted in Israel from April 2006 to August 2012 and find that out of the 2056 motions that were filed, only 49 were certified by the court, 122 were rejected, and the rest were either withdrawn (800 motions), settled before the motion was certified (206 motions), or were closed for other reasons.

3.1 The Howard Rice Case

The first important excessive price case involves a motion to certify a class action, filed in 1998 by Howard Rice (a pharmacy owner from Tel Aviv and, at the time, the chairman of the Israeli Pharmacists Association) against CAL, which, until mid-1998, was the sole issuer and acquirer of Visa credit cards in Israel.[9] The motion alleges that CAL abused its monopoly position by setting excessive merchant fees of over 2% for the acquisition of Visa card transactions. The motion was based on the claim that following the entry of a new credit card company, Visa Alpha, into the Visa market in mid-1998, merchant fees have dropped to 2%, indicating that the pre-entry fees were excessive in accordance with Section 29a(b)(1) of the Antitrust Law. Accordingly, Howard Rice claimed for damages on the difference between the actual merchant fees charged by CAL and 2% for all Visa card transactions acquired by CAL from May 1996 (the time in which Amendment 2 was enacted) to August 1998 (Visa Alpha's entry into the Visa market). The total damages were estimated by Howard Rice at more than 1 billion Shekels.

The Tel Aviv District Court has certified the class action, but did not explicitly consider whether Section 29a(b)(1) applies in the case of excessively high prices. The Supreme Court decided on appeal to reject the class action on the grounds that the merchant fees following Visa Alpha's entry into the market are not a valid benchmark to evaluate whether CAL's pre-entry merchant fees were excessive.[10] The decision was based on the fact that the motion to certify the class action was filed just one month after Visa Alpha's entry into the market. Consequently, it is not obvious that merchant fees of 2%, cited in the motion, represent an equilibrium outcome (the court argued that these fees may in fact represent temporary introductory offers), especially given that Visa Alpha collapsed and went out of business shortly after entering the market. Importantly, the Supreme Court did not rule on whether Section 29a(b)(1) applies in the case of excessively high prices and left the issue open for further consideration.

3.2 The Bezeq International Case

The second important case concerning excessive pricing is the motion to certify a class action against Bezeq International.[11] The motion, filed in 1997, is in many ways similar to the Howard Rice case. Until July 1997, the market for international phone calls in Israel was monopolized by Bezeq, which, at the time, was a government-owned regulated monopoly. Following a market reform in July 1997,

[9] See D.C.M. (T.A) 106,462/98 Howard Rice v. Cartisei Ashrai Leisrael Ltd., P.M 2003(1).

[10] See Permission for Civil Appeal 2616/03 Isracard Ltd. v. Howard Rice, P.D. 59 (5) 701 [14.3.2005].

[11] See, D.C.A (T.A) 2298/01 Kav Machshava v. Bezeq Beinleumi Ltd. (Nevo, 25.12.2003).

the market was opened for competition, and two new firms entered the market. Prices then fell by 80% virtually overnight. Kav Machshava, one of Bezeq's corporate customers, filed a motion to certify a class action, alleging that Bezeq's pre-entry prices for international phone calls were excessive. The Tel Aviv District Court certified the class action, but the Supreme Court decided to reject it on appeal on the grounds that Bezeq's prices had been set by a regulator prior to the 1997 reform, meaning that Bezeq did not set its own prices and hence did not abuse its monopoly position either.[12]

Neither the District Court nor the Supreme Court has considered directly the question of whether a high price (here the pre-entry prices that Bezeq charged for international phone calls) can be deemed "unfair" and violate Section 29a(b)(1) of the Antitrust Law. Nevertheless, the case suggests that had Bezeq been in control of its own prices prior to the market reform in 1997, the court may have been open to the argument that Bezeq's prices were excessive. Similarly to the Howard Rice case, this case also suggests that high pre-entry prices may be deemed excessive if a monopoly (Bezeq in this case) cuts prices significantly following the entry of rivals into the market.

3.3 The Cottage Cheese Class Action Case

The next major development came in 2011. Following a steep increase in food prices in Israel since 2005, and following a series of news articles describing the surge in food prices and the general high cost of living in Israel, a Facebook event was created on June 14, 2011, calling for a boycott of cottage cheese until its price drops from over 7 New Israeli Shekels (NIS) to 5 NIS.[13] Cottage cheese is a staple food in Israel and one of the best-selling food products. The cottage cheese market is highly concentrated, and the market leader, Tnuva, which is also the largest food supplier in Israel and a declared monopoly in dairy products since 1988, has a market share of over 70%. The rest of the market is served by Strauss, the second largest food supplier in Israel, and by Tara, which is a subsidiary of the Central Bottling Company and the fourth largest food supplier in Israel and the franchisee of Coca-Cola in Israel.

The Facebook event was widely covered by radio, TV, and newspapers, and tens of thousands of Facebook users joined it. The effect was immediate: the average price of cottage cheese dropped virtually overnight by about 24% from over 7 NIS to 5.5 NIS. Shortly after the cottage cheese boycott started, a motion to certify a class action against Tnuva was filed in the Central District Court. The motion alleged that Tnuva has charged an excessively high price for cottage cheese between March 2008

[12]See Permission for Civil Appeal 729/04 State of Israel et al., v. Kav Machshava et al., (Nevo, 26.4.2010).

[13]For a detailed analysis of the Cottage cheese boycott, see Hendel et al. (2017).

and July 2011. The plaintiff based his claim on a comparison of the price of cottage between March 2008 and July 2011 with three benchmarks: the post-boycott price, the price before July 2006 when cottage cheese was subject to price control (the price was then under 5 NIS), and an estimate of the cost of production.

The Central District Court certified the class action on April 5, 2016.[14] Importantly, the court held that the wording and intent of the Antitrust Law support a broad interpretation of Section 29a, which embraces all forms of abuse of monopoly position that are liable to lessen competition or harm the public, including the setting of high unfair prices. It is also important to note that in its decision to certify the class action, the court took into account Guidelines 1/14 issued by the Director General of the IAA in 2014. In these guidelines, which I discuss in detail in Sect. 4.1 below, the Director General argued that Section 29a(b)(1) of the Israeli Antitrust Law applies to excessive pricing and stated the IAA's intention to begin to enforce the prohibition of excessive pricing. The court held that while it is under no obligation to accept the General Director's guidelines, the guidelines of the relevant regulator do carry important weight in interpreting firm behavior, albeit not a decisive one.

Interestingly, Tnuva did not appeal the District Court's decision to the Supreme Court like the defendants in the Howard Rice and the Bezeq International cases. As mentioned above, in both cases the Supreme Court has reversed the District Court's decision to certify the class actions. One can only speculate that Tnuva, which had already faced two other class actions—one that alleges excessive prices for white cheese (soft, spreadable cheese) and heavy cream and the other that alleges excessive prices for prepackaged yellow cheese (yellow cheese is the generic name in Israel for hard cheese)—felt that, perhaps, it is better off without a Supreme Court's ruling on whether excessive pricing is unlawful under Section 29a(b)(1) of the Antitrust Law.

Having been certified, the cottage cheese class action went into trial, with evidentiary hearings scheduled for the summer of 2018, 7 years after the class action was filed. Hence, it remains to be seen how the case will be decided in the end. Regardless of the final outcome, the case is important because it was the first time that a court explicitly ruled that Section 29a(b)(1) applies in the case of excessive pricing, and it is also the first, and by now the only, class action concerning excessive pricing that has been certified.

3.4 The Potash Class Action Case

Another important legal decision came in January 2017 when the Central District Court approved a settlement of a motion to certify a class action against Dead Sea Works (DSW).[15] The motion, filed in 2014, alleged that DSW, which was declared a

[14] See Gilo (2016b) for detail.

[15] Class Action (Central District Court) 41,838–09-14 Weinstein v. Dead Sea Works, Inc. (Nevo, 29.1.2017)

monopoly in the provision of potash in 1989, violated Section 29a(b)(1) of the Antitrust Law and set an excessively high price for potash in Israel. The allegation was based on the fact that DSW sold potash in Israel at a much higher price than overseas and on the fact that the price of potash rose from $200 per ton in 2007 to close to $1000 per ton in 2008–2009 and then fell to $200–400 per ton in 2010–2013.

DSW argued, among other things, that excessive pricing is not recognized as an abuse of monopoly position by Section 29a and is not recognized in practice as an unlawful in other countries, and there are substantial reasons not to recognize it as such. Furthermore, DSW argued that even if excessive pricing is recognized as an unlawful abuse of monopoly position under the Israeli law, its potash price was neither excessive nor unfair and merely represented the price at which it can sell potash overseas.

After some negotiations, DSW and the plaintiff reached a settlement that was approved by the court in January 2017. In its decision to approve the settlement, the court held that as a matter of principle, Section 29a(b)(1) does recognize excessively high prices as an abuse of dominant position, and hence, the relevant question is how to interpret and enforce the prohibition of excessive pricing. The court argued that this question is still open and there are legitimate differences of opinion about it.

The court based its conclusion that Section 29a(b)(1) prohibits excessive prices on four considerations. First, the court held that the wording of the Antitrust Law makes it clear that the legislator intended to prohibit both predatory pricing and excessive pricing. The court held that it is inconceivable that when using the word "unfair," the legislator only meant that the price is "too good" for the customer (i.e., the selling price is below marginal cost). Moreover, the court argued that if the legislator had only intended to prohibit predatory pricing, he would have used this terminology and, at the very least, would have clarified that unfair prices refer to cases in which the entry of rivals is deterred.

Second, the court held that the main source of inspiration for Section 29a is the European competition law, which recognizes excessively high prices as an abuse of dominant position.

Third, the court held that the main goal of the Israeli Antitrust Law is to protect the public against socially harmful business practices. Although the main means of achieving this goal is through the promotion of competition, there are some cases in which market structure renders competition impossible. In these cases, the court argued, the legislature granted the IAA and courts complementary tools to deal with inefficient business practices, and the prohibition of abuse of monopoly position is a clear example of this.

Fourth, the court held that excessive prices set by a monopolist are a concrete example for exploitative practices, which are generally prohibited under Israeli law, including the contract law, the consumer protection law, the banking law, the insurance law, and even the criminal law. In this respect, the court held, the prohibition of excessive pricing, expresses a policy that takes into account not only efficiency considerations but also distributive justice considerations.

As in the cottage cheese class action, here too the court took into account Guidelines 1/14 of the IAA's Director General. In particular, the court stated that while it is possible, and in some cases also appropriate, to disagree with the methodology set forth in Guidelines 1/14 regarding the implementation and enforcement of the prohibition of excessive pricing, the Director General's view that excessive pricing is prohibited under the Israeli law is indisputable.

3.5 The Natural Gas Case

More recently, in September 2017, the Supreme Court denied an appeal to dismiss a motion to certify a class action against natural gas suppliers, alleging that the price at which they sell natural gas to the Israel Electricity Corporation (IEC) is excessive.[16] The natural gas suppliers share a large natural gas field in the Mediterranean and were declared a monopoly in the supply of natural gas in Israel in November 2012. Moreover, in April 2013, the government placed natural gas under regulation, though the type of regulation is quite minimal and only requires the natural gas suppliers to report their prices and profitability to the government.

The case raises two important questions. The first question is whether excessive pricing is unlawful under Section 29a(b)(1) of the Israeli Antitrust Law. Unfortunately, the Supreme Court once again left the issue open for further consideration and merely stated that the District Court would have to consider this issue in its decision on whether to certify the class action or reject it.

The second question is whether the natural gas suppliers are exempt from Section 29a of the Antitrust Law because they are subject to regulation and because their agreement with the IEC has been approved by the Israel Public Utility Authority for Electricity and by the IAA. The District Court answered the question in the negative. It ruled that since the gas suppliers are only required to report their prices and profitability to the government, but can set prices at their own discretion, they are not exempt from Section 29a. Moreover, the court ruled that none of the regulators who approved the agreement with the IEC has explicitly stated that the price is fair, albeit the approval may carry some weight in later stages of the class action. The Supreme Court upheld this decision and remanded the case to the District Court for further consideration.

[16]Permission for Civil Appeal 9771/16 Nobel Energy Mediterranean Ltd. et al. v. Nizri et al., (Nevo, 28.9.2017).

3.6 Pending Motions to Certify Class Actions

Following the publication of Guidelines 1/14 by the IAA's Director General on April 9, 2014, and especially after the cottage cheese class action was certified in April 2016, a large number of motions to certify class actions concerning excessive prices were filed. The motions were all filed by private plaintiffs, except for the class action in the prepackaged yellow cheese case that was filed by the Israeli Consumer Council, which is a statutory, nonprofit corporation that works to defend consumers and protect their rights.

The following table lists these motions, as well as the cottage cheese class action that has already been certified (Table 1). All cases in the table are currently pending in court.

As the table shows, the class actions involve a wide range of products and services, ranging from dairy products and soft drinks to trading platforms, recovery and tracking services for stolen cars, and burial services, with several firms, including Tnuva, Strauss, the Central Bottling Company, and Bezeq facing multiple class actions. Although it is hard to know how these cases will end, one thing seems quite clear: nowadays monopolies in Israel face a real chance of being sued on the grounds that their prices are excessive. This situation creates considerable legal uncertainty, especially since courts have yet to establish clear criteria for what constitutes an excessive price. As a result, it is hard for monopolies to know which prices they should set if they wish to avoid class action lawsuits. Even worse, this uncertainty is not going to be resolved any time soon given how slow courts are in dealing with class actions: the most advanced class action involving cottage case was filed back in 2011 and is still pending in court. At this point, it is hard to say when a verdict will be issued. And, if the verdict is appealed to the Supreme Court, the case may drag on even longer. Moreover, it is much less clear which consensus, if any, will emerge in the different cases, concerning when prices are excessive and when they are not excessive. In the meantime, managers of monopolies have to live with the uncertainty of not knowing which prices they are allowed to set.

4 The Position of the IAA

Until 2011, the IAA rarely dealt with the exploitative practices listed in Section 29a (b) of the Antitrust Law. Instead, it focused on exclusionary practices, intended to force rivals out of the market. In particular, the IAA had not issued an official position on whether excessive pricing is an abuse of monopoly position, nor did it take any enforcement actions against excessive pricing.

Things changed when Professor David Gilo took office as the General Director of the IAA in 2011.[17] Prior to taking office, Professor Gilo published several academic

[17]For an overview of the IAA position on excessive pricing, see Solomon and Achmon (2017).

Table 1 Pending class actions concerning excessive pricing

	The product/service	The monopoly	When was the class action filed?
1.	Cottage cheese	Tnuva	July 2011
2.	White cheese and heavy cream	Tnuva	February 2014
3.	Natural gas	Noble energy Mediterranean ltd.	June 2014
4.	Prepackaged yellow cheese	Tnuva	November 2014
5.	Milky (dairy chocolate pudding) and dairy desserts	Strauss	April 2015 and May 2016
6.	Stolen vehicle recovery and tracking services	Ituran	May 2015
7.	Infrastructure to transmit data to the tax authority	Bezeq	August 2015
8.	Communication services	Bezeq	November 2015
9.	Cigarettes	Philip Morris	March 2016
10.	Cocoa powder	Strauss	May 2016
10.	Green tea	Wissotzky Tea	May 2016
11.	Electricity	The Israel Electric Corporation	May 2016
12.	Margarine	Unilever	June 2016
13.	Instant coffee	Strauss	July 2016
14.	1.5 L bottle of Coca-Cola	The Central Bottling Company	August 2016
15.	Israeli couscous	Osem (Nestle)	October 2016
16.	Online platform for trading used cars	Yad 2	October 2016
17.	Sport betting	Israel Sport Betting Board	November 2016
18.	Razor blades	Gillette	May 2017
19.	Passenger boarding bridges	Civil Aviation Authority of Israel	July 2017
20.	Baby formula	Materna (Nestle)	September 2017
21.	Coca-Cola Zero and Coca-Cola Diet	The Central Bottling Company	November 2017
22.	Burial services	Chevra Kadisha	October 2017 and November 2017

papers on excessive prices, together with Professor Ariel Ezrachi (Ezrachi and Gilo 2008, 2009, 2010). These papers question the validity of a categorical "hands-off" approach to excessive pricing, which deems excessive prices to be outside the realm of antitrust law, and argue that in many cases, the prohibition of excessive prices may be welfare enhancing.

On April 9, 2014, Professor Gilo issued Guidelines 1/14 in his role as the Director General of the IAA. The guidelines state that unlike in the past, the IAA will begin to enforce the prohibition of excessive pricing, as stated in Section 29a(b)(1) of the Israeli Antitrust Law, and present the considerations and rules that will guide the

Director General when deciding on enforcement measures in excessive pricing cases. In this section, I review Guidelines 1/14, as well as their revision, Guidelines 1/17, that were issued on February 28, 2017, by Professor Gilo's successor, Michal Halperin, who took office as the IAA's Director General in March 2016.

4.1 Guidelines 1/14

Guidelines 1/14 present an explicit framework for the implementation and enforcement of the prohibition of excessive pricing. The guidelines are based on the premise that:

> . . . the prohibition of excessive pricing is one of the central norms that apply to a monopolist, which are the result of his special status in the market and whose goal is to prevent harm to consumers and an increase in the cost of living. Preventing harm to consumers and the inefficiency in the allocation of resources as a result of excessive pricing is at the heart of the antitrust laws.

Guidelines 1/14 came less than 3 years after the social protest that took place in the summer of 2011 and encouraged policymakers to take various measures to lower the high cost of living in Israel. Indeed, the need to deal with the high cost of living is mentioned several times in the guidelines. Among other things, the guidelines claim that:

> [e]xcessive pricing causes a real harm to consumers' welfare and contributes significantly to the cost of living

and

> [a]n approach that categorically rejects adopting measures against a monopolist who charges an excessive price. . . is contrary to the efforts to bring down the cost of living in Israel.

The guidelines acknowledge that the prohibition of excessive pricing is a controversial antitrust doctrine and is not considered unlawful under the US antitrust law. The guidelines though disagree with this "hands-off" approach and claim that the main potential objections to the doctrine are not convincing.

The first potential objection is that excessive pricing can boost the monopoly's incentive to make socially beneficial investments. The guidelines argue however that this objection essentially justifies the existence of monopoly as means of promoting socially beneficial investments and notes that this justification runs contrary to the entire logic of antitrust laws.

The second potential objection to the prohibition of excessive pricing which Guidelines 1/14 discuss is that excessive prices tend to be "self-correcting" because they attract entry into the market. The guidelines note that the objection is in most cases incorrect, because entrants should care about the prices that will prevail in the market after they enter and not the pre-entry prices. Hence, in general, there is no reason to expect that high pre-entry prices will promote entry.

The third potential objection discussed in the guidelines is that determining whether prices are excessive or not is a difficult task. The guidelines admit that in some cases this is true but argue that the IAA can "focus on cases in which it can overcome this difficulty." The guidelines also note that in and of itself, the difficulty in determining whether prices are excessive "does not justify an across-the-board abstention from enforcement" and that "many doctrines in the antitrust laws . . . are also difficult to apply and enforce." In particular, although determining whether prices are excessive may require the agency to estimate costs or profitability, this is also true when dealing with predatory pricing, bundling, margin squeeze, and market definition. Moreover, the guidelines note that calculating cartel damages or damages due to other restraints of trade also requires the agency to estimate the counterfactual price that would have prevailed but for the restraint and that this task is no easier than determining whether a monopolist's price is excessive.

A fourth objection is that the prohibition creates substantial legal uncertainty, because monopolists cannot determine in advance whether their prices will eventually be deemed excessive. Guidelines 1/14 acknowledge this objection and propose a safe harbor test, according to which prices will not be deemed excessive, so long as they do not exceed the monopolist's accounting costs by more than 20%. When prices are more than 20% above accounting cost, they may be deemed excessive, provided that they are "high" relative to cost or relative to some other competitive benchmarks. Importantly, the guidelines leave open the question how high above cost or above some other benchmark a price should be in order to be deemed excessive. Moreover, the guidelines do not explain why a threshold of 20% was chosen for the safe harbor or is appropriate. A priori, it is not clear how many firms meet this safe harbor even in unconcentrated or moderately concentrated industries.

The guidelines argue that with the safe harbor in place, the legal uncertainty "will be of a limited nature" and note that ". . . there are many doctrines in the antitrust laws, as in other areas, that are likely to lead to uncertainty among the entities subject to those laws." The guidelines continue to argue that the legal uncertainty involved with the prohibition of excessive pricing "does not justify refraining from enforcement of the prohibition of excessive pricing by monopolists."

It is quite possible that at the time the guidelines were written, the Director General did not anticipate that only 3 years later, 23 class actions concerning excessive pricing will be pending in court. As I argued above, these class actions create considerable uncertainty, which we do not see when it comes to other antitrust doctrines.

After concluding that excessive pricing is unlawful under the Israeli Antitrust Law, Guidelines 1/14 proceed to propose a legal-economic test that can be used to identify excessive prices. The guidelines start by arguing that ". . .an excessive price is one that exceeds the price that would prevail under conditions of competition." The guidelines then discuss three methodologies that can be used to determine whether prices are excessive: (1) the gap between price and cost, which the guidelines view as the "main methodology"; (2) comparison of the profitability from selling the product in question with the prevailing profitability in the relevant

industry; and (3) comparison of the product's price with its price in other markets, other time periods, or the prices of competing products.

Regarding the cost of production, the guidelines argue that the relevant cost for determining whether prices are excessive should be "the Long-Run Average Incremental Cost (LRAIC), divided by total production." Moreover, the guidelines state that the IAA will use accounting costs to establish the safe harbor test and will use economic costs to identify excessive pricing when prices do not meet the safe harbor test. According to the guidelines, the economic cost of production includes raw materials and packaging materials, direct cost of labor and the cost of energy in production and distribution, depreciation and insurance, municipal taxes (but not corporate taxes), and the costs of distribution and sales. Additional costs, including advertising and marketing, general and administrative costs, financing and hedging, indirect taxes, the alternative cost of tangible and intangible assets, and transfer prices, will be considered on case-by-case basis.[18]

Once the IAA determined the cost of production, it will determine whether the price-cost margin is excessive according to:

> the circumstances of the specific market in which the monopolist is active, and in accordance with the quality of the information possessed by the Antitrust Authority and the ability to identify with relative accuracy the price that correctly reflects the costs of the monopolist and on the basis of other relevant considerations that will be derived from the circumstances of the case, the relevant market, and the characteristics of supply and demand in that market.

Unfortunately, this standard is rather vague and fails to clarify when exactly the IAA will consider a price-cost margin acceptable and when it will consider it to be excessive. This is especially so, if we bear in mind that when it comes to the safe harbor test, the guidelines are highly specific and state that a price-cost margin of no more than 20% is within the safe harbor. The guidelines are also specific when it comes to the comparison of the product's price with its price in other markets, different time periods, and the price of competing products:

> When there is a difference between the price charged by the monopolist in various markets, which is only the result of differences on the demand side, and the gap does not exceed 20 percent, after neutralizing the differences in variable costs, the Authority will not view this gap in prices as an indication of excessive pricing. This rule will enable monopolists to charge different prices on the basis of the characteristics of the demand for the good and to cover its fixed costs in an efficient manner.

Finally, the guidelines state that the IAA will be more inclined to enforce the prohibition of excessive pricing when the relevant industry features high barriers to entry, the price is likely to remain excessive for a relatively long time, the monopolist's market share is consistently large, and the product or service is essential. By contrast, the IAA will be less inclined to enforce the prohibition of excessive pricing when the monopolist acquired its dominant position through competitive advantage,

[18] According to the guidelines, the additional costs will not be taken into account when assessing the safe harbor test.

there is a relevant regulator that can intervene in the market, and the relevant product requires large R&D investments or involves a high level of risk.

4.2 Guidelines 1/17

Although Guidelines 1/14 drew a lot of attention and encouraged class action lawsuits alleging excessive pricing, the IAA did not manage to take actions against excessive pricing before Professor Gilo left office in September 2015.[19] Once Michal Halperin took office as the new Director General of the IAA in March 2016, she decided to reconsider the IAA's position and announced that the IAA is freezing all pending inquiries on excessive pricing.[20] Following a petition by the plaintiffs in the cottage cheese case, the High Court of Justice Court ordered the IAA to continue its inquiries until new guidelines are issued.

The IAA then conducted an extensive public hearing and solicited a consultation paper by Professor Frederic Jenny (Jenny 2018). Based on these, as well as on the IAA's own accumulated experience since Guidelines 1/14 were issued, Michal Halperin issued on February 28, 2017, Guidelines 1/17, which replace Guidelines 1/14, and present the IAA's updated policy on how to implement and enforce the prohibition of excessive pricing.

The starting point for Guidelines 1/17 is that given the District Court's decisions in the cottage cheese and the potash class actions, setting excessive prices, which the guidelines refer to as "unfairly high prices," is unlawful under the Antitrust Law. The guidelines, however, take a much more reserved approach toward excessive pricing than Guidelines 1/14 and state that:

> charging an unfairly high price may, under the appropriate circumstances, be regarded as an abuse of monopoly position.

This statement seems especially reserved if we bear in mind that the premise of Guidelines 1/14 was that "... the prohibition of excessive pricing is one of the central norms that apply to a monopolist."

Guidelines 1/17 justify this reserved approach by noting that Section 29a of the Antitrust Law is based on Article 102 of the TFEU, where the prohibition of excessive prices is rarely enforced, and when it is, competition authorities act in a

[19]Under administrative law, the IAA was able to condemn excessive prices only if they were charged after Guidelines 1/14 were issued in April 2014. Moreover, to examine whether prices meet the safe harbor test, the IAA needed to collect detailed accounting data, but did not manage to conclude any inquiries that found excessive prices before David Gilo left office in September 2015.

[20]In fact, in an antitrust conference held at Haifa University in May 2016, Michal Halperin stated that "...it is preferable that the authority will be modest and know its place ... If the courts rule that there is a cause for excessive price, this will be the law in Israel, whether or not the authority has such an enforcement stance." See "Will monopolies be satisfied? The revolutionary plan of the Antitrust Authority," Ora Koran, The Marker, May 22, 2016, https://www.themarker.com/news/macro/1.2950680 (accessed on March 14, 2018).

relatively restrained manner. The guidelines argue that this restraint reflects the difficulties in enforcing the prohibition, the recognition that direct intervention with prices is not the best route for competition authorities, and the concern for the potential long-run adverse effects of the prohibition on firms' incentive to invest. Accordingly, the guidelines state that the IAA will exercise caution and restraint in enforcing the prohibition and will focus on cases where the economic benefits from intervention clearly outweigh the associated cost.

An additional difficulty raised by the guidelines is that economics, which antitrust laws are based on, does not deal with fairness, and hence it is unclear at which point a high price becomes "unfair." While fairness is not an economic concept, the guidelines caution against defining high unfair prices solely on the basis of legal tools, as this may lead to arbitrary and undesirable outcomes.

Regarding the implementation of the prohibition of excessive prices, Guidelines 1/17 list several considerations, which will guide the IAA when dealing with excessive pricing. First, the IAA will prefer, whenever possible, to rely on structural measures that promote competition, including issuing directives to the monopolist, rather than directly intervene with prices. In a sense then, the IAA views the prohibition of excessive pricing as a measure of last resort that can be used only when other tools are either not available or are ineffective.

Second, given the methodological and practical challenges in identifying excessive prices, the IAA will take enforcement actions only when the monopolist's price is blatantly excessive and significantly exceeds the price that would have prevailed under competition. To establish the latter, the IAA will use, when appropriate, the monopolist's past prices, its prices in more competitive markets, or the prices of rivals. Moreover, an unusually high rate of return or price-cost margin may indicate that prices are excessive. Importantly, the guidelines maintain that, as a rule, the IAA will refrain from basing its conclusions solely on cost-based tests, both because of the theoretical difficulties in measuring cost and the potential adverse effect of using this benchmark on the incentives of firms to cut costs, innovate, and launch new products.

Third, establishing that a supracompetitive price is also unfair is a complex task and involves a value-based judgment. Hence, the IAA will be more inclined to regard a price as unfair if consumers do not have a genuine alternative to the monopoly's product or service and when the direct harm to consumers is large. Moreover, following Evans and Padilla (2005), the IAA will be also more inclined to intervene if high prices exclude rivals from adjacent markets where the monopoly's product or service are used as an input.

Fourth, the IAA will tend not to enforce a prohibition of excessive pricing if a sectorial regulator exists, who has the expertise, experience, and tools to impose price controls.

Fifth, given that excessive price investigations require large resources and have a low chance to succeed, the IAA will generally focus on cases where there are strong indications that the price is substantially supracompetitive and there is no concern for long-run adverse effects on firm's incentives to invest.

Finally, Guidelines 1/17 revoke the safe harbor established in Guidelines 1/14, according to which a price is not excessive if it is no more than 20% above cost. The reason for revoking the safe harbor was based on three concerns. One is that a cost-based safe harbor tends to favor cost-based tests over other tests. The second concern is that the 20% threshold would become, and perhaps had already become, a normative binding threshold for monopoly pricing. Indeed, casual observation suggests that some plaintiffs argued that prices are excessive because they were more than 20% above cost. This is despite the fact that the safe harbor merely stated that such prices may be, but are not necessarily, excessive. The third concern was that a single threshold for the safe harbor may be inappropriate given the large differences between markets and products, meaning that "one size may not fit all."[21]

5 The Academic Debate in Israel About Excessive Pricing

The debate on the antitrust prohibition of excessive pricing was also held in academic circles. It seems that this debate had a considerable influence on courts, as well as on plaintiffs and defendants in various class actions, who cited and discussed some of the arguments raised in the academic debate. In this section, I discuss this debate and point out some weaknesses and strengths of the arguments that were raised.

The first academic contribution to the debate is probably a public lecture by Professor Michal Gal in a conference on the abuse of monopolistic power held at the University of Haifa in 2004. The lecture, which draws on Gal (2004), was extensively cited and discussed by the Supreme Court in the Howard Rice case. In her talk, Professor Gal suggested that a case can be made that unfair prices include high prices, mainly because Section 29a was copied from the European antitrust law, which prohibits excessive pricing. She points out however that the difficulty in defining what constitutes an excessive price, as well as the fact that the European Commission does not act as a regulator, led the Commission to apply minimal resources to the enforcement of the prohibition. Gal proposed that excessive pricing should not be a criminal offense under the Antitrust Law and should not be applied before the legislature provides indications on how to define excessive prices.

Gal and Nevo (2015) take a stronger stance and argue that antitrust law in general and the Israeli Antitrust Law with its peculiarities in particular are not the right way to deal with excessive pricing. Their claim is based on several arguments. First, they express a concern for over deterrence, in part because under the Israeli law, excessive pricing is potentially a criminal offense if accompanied by intent to harm competition or the public. This concern however is largely hypothetical, because both

[21]This concern is not very convincing however because 20% above cost is a narrow threshold, so many cases may fall outside the safe harbor. While this makes the safe harbor ineffective, it is not clear what the harm is. After all, an ineffective safe harbor may still be better than none.

Guidelines 1/14 and 1/17 state clearly that the IAA will not utilize its criminal enforcement powers against excessive pricing.

Gal and Nevo also base their concern for over deterrence on the grounds that there is no pre-ruling process that allows a monopolist to ensure that its price will not be deemed excessive. However, pre-ruling seems impractical when it comes to excessive pricing because, typically, firms offer a wide range of products and services and sell them to a large number of buyers. For instance, cottage cheese comes in various milkfat contents and flavors and is sold to thousands of stores around the country, as well as to institutional buyers like hotels, hospitals, prisons, the army, etc. On top of that, firms update prices periodically, say through promotions and sales. It is clearly impractical to have a pre-ruling each time a firm wishes to change one of its prices.

Second, Gal and Nevo argue that the prohibition of excessive pricing may deter the entry of multinational firms into the Israeli market. This argument is not very convincing either if we bear in mind that excessive pricing is unlawful not only in Israel but also in all OECD countries, except the US, Canada, Australia, New Zealand, and Mexico.[22] Gal and Nevo also claim that the prohibition of excessive pricing may discourage Israeli firms from investing in R&D and in improving their production efficiency. This argument though is probably not very relevant for traditional industries, where R&D investments do not play an important role. Indeed, many of the pending class actions in Israel, listed in Table 1, involve traditional industries like dairy products, cocoa powder, green tea, margarine, instant coffee, Coca-Cola, Israeli couscous, cigarettes, and burial services.

Third, Gal and Nevo argue that some firms may raise prices in order to ensure that their market share stays below 50%, in which case they are not considered to be monopolies under the Antitrust Law and therefore not subject to the prohibition of excessive pricing either. Such price increases to avoid a monopoly status will only exacerbate the high price problem. While this concern sounds valid in principle, in reality, it is hard to believe that a firm can fully control its market share and ensure that it stays just under 50%. This is because a firm's market share also depends on the actions of customers and rivals and is in general subject to random shocks. Moreover, firms learn their precise market shares only in retrospect, because in real time they have only limited information about the sales of rivals. Hence, to avoid an inadvertent monopoly status, a firm may have to keep its market share well below 50%. It is not clear how many firms, if any, would be willing to sacrifice a significant chunk of sales in order to ensure that they are not subject to the prohibition of excessive pricing.

Fourth, Gal and Nevo argue that monopolies that serve several distinct markets may raise prices in markets with elastic demand in order to avoid an allegation that their price in a market with inelastic demand is excessive. This concern seems more convincing, although the other side of the coin is that the monopolist may also lower its price in the market with the inelastic demand to minimize the risk that its prices

[22]See OECD, Policy roundtable, "Excessive prices," 2011, http://www.oecd.org/competition/abuse/49604207.pdf (accessed on March 14, 2018).

will be deemed excessive. The question then is whether the net effect on consumers is positive or negative.

Gilo and Spiegel (2018) address this question in the context of a game theoretic model. They study both the benchmark that Gal and Nevo mention, which they refer to as a "contemporaneous benchmark" for excessive pricing, as well as a "retrospective benchmark" of the type used in the Howard Rice and the Bezeq International cases. Under a retrospective benchmark, a price cut following a rival's entry into the market is used as an indication that the monopolist's pre-entry price has been excessive.[23] Gilo and Spiegel show that contemporaneous and retrospective benchmarks for excessive pricing induce a monopolist to limit the gap between its prices over time and across markets. As in the case of third-degree price discrimination, this behavior helps consumers in markets where prices would be otherwise high but harms consumers in markets where prices would be otherwise low. In a wide range of cases though, the gain of the former type of consumers outweighs the loss to the latter type, meaning that aggregate consumer surplus is higher when contemporaneous and retrospective benchmarks are used to assess whether prices are excessive.

Gilo and Spiegel also show that a retrospective benchmark makes an incumbent monopoly reluctant to cut prices following the entry of a rival into the market and therefore facilitates entry, contrary to what Gal and Nevo claim. Moreover, they show that a retrospective benchmark is more effective in restraining the monopoly's pre-entry behavior when the probability of entry is high. This is because the monopoly realizes that a high pre-entry price makes it harder for it to compete with the rival if it enters since post-entry price cuts may expose the pre-entry price as excessive. This result stands in contrast to the often-made claim that there is no need to intervene in excessive pricing cases when the probability of entry is high because then "the market will correct itself" (see, e.g., OECD 2011b; O'Donoghue and Padilla 2006; Motta and de Streel 2006). While it is true that entry will lower prices without the need for antitrust action, the claim ignores the fact that the prospects of legal action restrain the monopoly's behavior before entry takes place.

A fifth argument that Gal and Nevo make is that courts need to decide whether prices are excessive even though the concept lacks a clear definition, and moreover they also need to compute the counterfactual prices that would have prevailed but for the abuse of monopoly position in order to assess the resulting damages. They argue that this task is complex and requires expertise and resources that courts lack. Moreover, they point out that it is not clear how prices should be updated once a court makes a decision. Gal and Nevo conclude that price regulation is much more appropriate for dealing with high prices, both because prices are set by professional regulatory agencies and because they are set in advance, so firms do not face legal uncertainty regarding whether their prices are lawful. Similar arguments were also made by Evans and Padilla (2005) and Motta and de Streel (2007). Gal and Nevo

[23] A retrospective benchmark was also used in the cottage cheese class action, since the low price following the cottage cheese boycott was used as one of the indications that the pre-boycott price was excessive.

emphasize though that price regulation is itself imperfect and may have unintended negative consequences.

Gilo (2016a) responds to Gal and Nevo (2015) and makes three arguments that I wish to discuss here. The first argument concerns price regulation: Gilo argues that the prohibition of excessive pricing encourages firms to self-regulate their own prices and hence alleviates the need to establish costly regulatory agencies to engage in this task. Moreover, he argues that as a practical matter, it is impossible to regulate all monopolies, and in fact, only a few monopolies in Israel are subject to price regulation. Hence, in general, there is room for the prohibition of excessive pricing to restrain monopoly behavior.

The second argument has to do with the legal uncertainty created by the prohibition of excessive pricing. Gilo claims that this uncertainty is very typical of antitrust law and is in fact inevitable. As an example, he mentions exclusivity arrangements: although these arrangements are often socially beneficial, the parties to such an arrangement cannot be sure that an antitrust agency will not conclude ex post that the arrangement significantly lessened competition.

The third argument is that although deciding whether prices are excessive is a complex task, the same is also true for other tasks in antitrust enforcement. For example, antitrust agencies routinely use the SSNIP test to define markets, despite the fact that this task requires them to estimate the response of consumers to a small price increase, and whether the result is profitable for the firm or not. Likewise, estimating cartel damages involves a complex task of estimating the counterfactual price that would have prevailed but for the cartel. Gilo argues that this task is even harder than establishing whether a price is excessive, because in the latter case, one can use the monopolist's past prices or prices in other markets as benchmarks, whereas in cartel cases, one cannot avoid the need to estimate the but-for price.

Gal and Nevo (2016) reply to Gilo (2016a) and argue that while there is little doubt that high prices may harm consumer welfare, the prohibition of excessive pricing is not the right tool for dealing with the problem. Moreover, they claim that the prohibition of excessive pricing prices may in fact be a "Trojan horse" that significantly harms social welfare due to its chilling effect on R&D and on cost-reducing investments, its negative effect on the incentive of international players to enter the Israeli market, and the uncertainty it creates. Gal and Nevo then advocate the use of ex ante regulatory proceedings, based on a clear rule, in order to curb high prices, whenever this is needed.

6 What Can Be Learned from the Israeli Experience?

Given the recent court decisions in the cottage cheese and the potash class actions and Guidelines 1/14 and 1/17, it seems that the legal debate on whether excessive pricing is unlawful under the Antitrust Law is largely over. It is always possible that the Supreme Court, which is yet to rule on the matter, will decide otherwise, but such a ruling will be quite surprising. It also seems that the IAA is quite reluctant to

enforce the prohibition of excessive pricing. The implication is that enforcement of the prohibition is entirely carried out through class actions. As mentioned above, with the exception of the prepackaged yellow cheese class action that was filed by the Israeli Consumer Council, all other class actions were filed by private plaintiffs.

As Table 1 shows, currently there are 23 class actions pending in court. These class actions allege excessive pricing in a variety of industries, ranging from dairy products and soft drinks to trading platforms, recovery and tracking services for stolen cars, and burial services. It seems that this trend is likely to continue, at least in the near future, and will only grow if some pending cases are decided in favor of the plaintiffs. The question is whether this trend should be viewed as a good thing, which improves matters, or as a bad thing, and a cause for concern. My own impression is that the jury on this question is still out. In what follows, I discuss several issues that are worth bearing in mind when evaluating the current situation in Israel concerning the prohibition of excessive pricing.

But before discussing these issues, I wish to stress that I strongly believe that the best way to deal with the abuse of market power is to simply eliminate market power. This can be done by opening markets for competition, removing barriers to entry, and facilitating consumer switching. These actions benefit consumers by giving them a large number of choices and allowing them to freely choose whom to buy from. Indeed, recent experience in Israel shows that market reforms in mobile telephony, TV services, and airlines, which liberalized these markets and opened them up for competition, benefitted consumers a great deal and lowered prices considerably. The question then is how to deal with cases where competition fails and market power cannot be eliminated through structural remedies.

6.1 Are Courts Qualified to Make Decisions in Excessive Price Case?

Courts in class actions concerning excessive prices face a difficult task: they need to determine if the price set by a monopolist was "unfair," and if it was, they need to determine the price that would have prevailed but for the abuse of monopoly positions in order to determine the resulting damages. Many commentators, including Evans and Padilla (2005), Motta and de Streel (2007), and Gal and Nevo (2015, 2016), argue that this task requires courts to act, in effect, as price regulators, despite the fact that they lack the necessary expertise and resources needed for this task. In fact, Judge Frank Easterbrook famously wrote that "the antitrust laws do not deputize district judges as one-man regulatory agencies."[24] Although under the US antitrust laws it is not unlawful to set high prices, whereas under Section 29a(b)(1) of the Israeli Antitrust Law it is, it is still not clear that a District Court judge in Israel is qualified to act as a "one-man" regulatory agency in an excessive price class action.

[24]See Chicago Professional Sports Ltd. Partnership v NBA, 95 F.3d 593, 597 (7th Cir. 1996)(US).

To make things worse, the various class actions listed in Table 1 are not handled by the same District Court and are not necessarily heard by judges who specialize in excessive pricing cases. Recent evidence from the US suggests that antitrust cases, which involve complex and technical antitrust issues, may be too complicated for generalist judges (Baye and Wright 2011). In particular, they find that economic complexity significantly increases the probability of appeal, while judicial training reduces it.

6.2 *Are Class Actions the Right Tool to Enforce the Prohibition of Excessive Pricing?*

Apart from the fact that courts may lack the expertise and resources to deal with excessive pricing cases, there is another question: is it a good thing that the prohibition of excessive pricing is now private and done through class actions?

I believe that three issues are worth discussing in this context. The first is that typically, private plaintiffs do not have good data on which to base their claims that prices are excessive. Hence, class actions are often based on weak evidence. A case in point is the motion to certify a class action against the Central Bottling Company, alleging that the price of 1.5 L bottles of Coca-Cola is excessive.[25] The economic expert for the plaintiff based his opinion on a few pieces of evidence, all of which are public and available on line for free.

The first piece of evidence was the price of Coca-Cola cans in different countries. This evidence is clearly irrelevant given that the class action concerns 1.5 L bottles of Coca-Cola. Nevertheless, the economic expert used this data simply because it was available on line for free.

The second piece of evidence was a newspaper article that reported the price of family-sized bottles of Coca-Cola in the US, based on an unknown number of receipts that the journalist received from newspaper readers. This evidence though is also questionable at best since a few receipts sent to a journalist by newspaper readers are hardly a representative sample. When cross-examined in court, the economic expert explained that he did not buy marketing research data about the price of family-sized bottles of Coca-Cola in different countries because his agreement with the plaintiff required him to pay for all data. In fact, he went as far as saying that "even if it was 500 shekels, I would not buy it." Clearly, it is hard to compare prices in Israel and in other countries when all you have is a newspaper article and the price of another product.

The third piece of evidence was the financial statements of publically traded soft drink producers in Israel and abroad. This evidence is also hardly helpful given that the financial statements report highly aggregated data on a wide range of products, many of which are not even soft drinks. Moreover, there is no reason to believe that it

[25] As I mentioned earlier, I submitted an expert opinion on behalf of the Central Bottling Company.

is possible to learn the cost of a single product, like the cost of a 1.5 L bottle of Coca-Cola, when the supplier produces many products and has large common costs. There is also no reason to believe that the data of one firm is indicative of the data of another firm.

This brings me to the second issue that I wish to discuss: some class actions are frivolous. To get an idea for what I mean, consider again the class action concerning the price of 1.5 L bottles of Coca-Cola. The motion to certify the class action is still pending, so it is too early to tell what the court will eventually decide. However, one can consider the arguments used by the economic expert for the plaintiff in support of the allegation. First the economic expert argued that the price of a 1.5 little bottle of Coca-Cola back in 1989, when Coca-Cola was under price control, was 1.47 NIS, whereas the average price in 2015 was 6.77 NIS, a 350% price increase. The expert wrote in his opinion that "this fact is an indication for an excessive price." Unfortunately, the expert forgot to mention that since 1989 the consumer price index increased by 462%, meaning that a price of 1.47 NIS in 1989 amounts to well over 8 NIS in 2015 prices.

Second, the economic expert for the plaintiff did not mention that the average price of a 1.5 little bottle of Coca-Cola in 2015 constant NIS virtually did not change between 2005, which is the first year for which data is available, and 2016 and hovered around 6 NIS throughout the period.[26] By comparison, from 2005 to 2011 (the year in which the social protest broke out), food prices grew at an average annual rate of 5% in Israel and 3.2% in the OECD countries (see the Kedmi Committee Report 2012, p. 8). This is hardly consistent with the claim that the price of Coca-Cola was excessive.[27]

Third, a Nielsen report submitted to the court by the Central Bottling Company shows that while the price of 1.5 L of Coca-Cola is higher in Israel than in the US, Spain, Germany, and Italy, it is lower than in Belgium, France, Great Britain, the Netherlands, and Denmark and is below the average price across all countries in the report. This data, which the expert for the plaintiff would not pay for, shows that the price in Israel is no more excessive than in Belgium, France, Great Britain, the Netherlands, and Denmark.

Again, it is hard to tell what the court will decide in the end, but I view the above as strong indications that the class action has no basis. Given that many other class actions are also based on weak evidence and questionable arguments, it would have been much better for either the IAA or the Israel Consumer Council to enforce the prohibition of excessive pricing. Yet, as I already mentioned, the IAA seems reluctant or unable to do that, while the Israel Consumer Council is not very active

[26]The data in question is from a marketing research firm that collects data from cash registers of virtually all supermarket chains and most minimarkets in Israel. Again, data on soft drinks is available only from 2005 onward.

[27]One can always claim that the price of Coca-Cola did not change since 2005 because it was excessive right from the start. This claim however is inconsistent with the fact that when Coca-Cola was under price control in the late 1980s, its price was above 8 NIS in 2015 NIS, which is 30% above its price in 2005.

in this respect. Consequently, the prohibition of excessive pricing will probably continue to be enforced by private plaintiffs through class actions.

The third issue I would like to discuss is that even if class actions were all filed in good faith and were based on solid data, an adversarial process may not the best way to determine if prices are excessive and what they would been but for the abuse of dominant position. Such questions are much more suitable for a regulatory process, which allows a back-and-forth dialogue between firms and policymakers.

6.3 Alternatives to the Antitrust Prohibition of Excessive Pricing: Price Regulation

In the previous two subsections, I argued that courts are not the ideal place to make decisions about pricing, and class actions may not be the best legal procedure to prevent monopolies from abusing their position. The obvious question then is what might be an alternative if we wish to prevent monopolies from setting excessive pricing?

As I already mentioned, many commentators, including Evans and Padilla (2005), Motta and de Streel (2007), and Gal and Nevo (2015, 2016), argue that an obvious alternative should be price regulation. I now consider this possibility and argue that at least in Israel, price regulation is itself highly imperfect and leaves something to be desired.

Price controls were very common in Israel since its inception. As of 1996, the Regulation of Prices of Goods and Services Law enables a government committee to regulate the prices of goods and services if they are deemed essential, supplied by a declared monopoly, or their supply is highly concentrated. Currently, a number of goods are under price control, including basic bread, salt, milk, white and yellow cheese, heavy cream, butter, and eggs.

Yet, price regulation in Israel is highly inefficient. Indeed, Zvia Dori, who was in charge of enforcing price controls on food products in the Ministry of Economy and Industry for 15 years, admitted in a court testimony that[28]:

> [a]fter 15 years of working in price regulation, I do not believe that regulation is effective, and I believe that creating competitive market conditions is far more effective than price controls.

Zvia Dori also expressed her opinion that price controls actually lead to higher prices and that deregulation will boost competition.[29] Indeed, as mentioned earlier, the price of international phone calls fell by 80% when it was deregulated, and the

[28]See "Price Regulation is not the Solution," Meirav Arlosoroff, October 19, 2014, The Marker, https://www.themarker.com/news/1.2461501 (accessed on March 14, 2018).

[29]Interestingly, Zvia Dori's testimony was given at a trial, in which the largest industrial bread bakeries in Israel were convicted of forming a cartel. At least on one occasion, the bakeries met in the offices of a large law firm to discuss common regulatory issues.

market was opened up for competition. Israel is not an exception: Genakos et al. (2018) show that the repeal of maximum wholesale and retail markup regulation in the fruit and vegetable markets in Greece in June 2011 led to a significant decrease of 6% in average retail prices. Moreover, Katsoulacos et al. (2017) identify excessive and low-quality regulation as one of the main impediments to competition and growth in Greece. Of course, this does not mean that regulation always raises prices, but it shows that the converse is also not true: price regulation does not necessarily lower prices as one might hope for.

To get an idea about price regulation in Israel, one can consider the case of basic bread.[30] Back in 2013, the bakeries requested the government to update the regulated price of basic bread. The government decided in 2014 to reject the request and announced its intention to update the methodology it uses to regulate prices. The new methodology was eventually adopted at the beginning of 2017. The government also hired two accounting firms to examine the bakeries' cost structure, as well as the normative retail margin that should be used in setting the regulated price. Using accounting data from 2013 for the bakeries' costs and the retail margin, the government finally decided in 2016 to update the price of basic bread. Following an appeal by the bakeries, the government decided to use accounting data from 2015 for the bakeries' cost structure instead of the 2013 data, but was unable to tell whether the updated price was set according to the new methodology or the old one. The bakeries appealed again, but as of January 2018, the government has still not made a final decision on the updated price of bread. The upshot is that a regulatory process that started back in 2013 and involved many hearings and appeals, is still pending, and is based on outdated accounting data.

Clearly then, price controls are a very imperfect substitute for preventing monopolies from setting high prices. One should also bear in mind that there is an important difference between the two mechanisms: price controls are forward looking and may prevent a dominant firm from abusing its market power in the future, while the antitrust prohibition of excessive pricing is backward looking and sanctions firms for an abuse of monopoly position that already took place.[31]

[30]Disclaimer: I submitted an expert opinion on behalf of one of the largest bakeries in Israel and also participated in a public hearing concerning the regulated price of basic bread.

[31]To appreciate the difference, imagine that a monopolist anticipates that it is going to lose its dominant position in the future, say because its market is going to open up for competition. The threat of price regulation may not deter the monopolist from abusing its monopoly position in the present since the monopoly anticipates that it is going to lose this position in the future in any event. By contrast, a backward-looking antitrust action may restrain the monopolist's behavior in the present.

6.4 Alternatives to the Antitrust Prohibition of Excessive Pricing: Consumer Activism

Another potential mechanism for dealing with excessive pricing is consumer activism. A case in point is the cottage cheese boycott, which I already mentioned in Sect. 3.3 above.[32] As mentioned earlier, the boycott followed a steep increase in food prices in Israel from 2005 to 2011. Cottage cheese, which is a staple food in Israel, was under price control until July 30, 2006. Following deregulation, the price of cottage cheese rose sharply by 43% from about 4.5 to 5 NIS before deregulation to over 7 NIS on the eve of the boycott. By comparison, the mean price of regulated dairy products increased over the same period by only 10%.

On June 14, 2011, a Facebook event was created calling for a boycott of cottage cheese. The event was widely covered by radio, TV, and newspapers and attracted 30,000 Facebook users on the first day, 70,000 after 3 days, and over 105,000 users by the end of June 2011. The effect of the boycott was immediate: the average price of cottage cheese dropped virtually overnight by about 24% from over 7 NIS to 5.5 NIS.[33] In response to the cottage boycott, the government appointed the Kedmi Committee to review the level of competition and prices in Israel. Among other things, the committee recommended structural reforms in the dairy market, including a gradual opening of the market to competition, removing import tariffs, and eliminating the exemptions to produce distributors from antitrust action (see the Kedmi Committee report).

The cottage cheese boycott had a long and lasting effect. In January 2013, the Chief Marketing Officer of Tnuva said in the annual meeting of the Israel Marketing Association that "[t]he cottage cheese crisis taught us a lesson of modesty and humility." Similarly, in July 2013, Tnuva's CEO said that "[t]he cottage protests caused Tnuva to emphasize the opinion of the consumer and his needs. Part of this policy is putting cottage under self-regulation." Moreover, although the government decided to reregulate the price of white cheese at the start of 2014 due to "exceptional profitability," it found no need to reregulate the price of cottage cheese, because it did not find "unreasonable profitability as in the past." Today, almost 7 years after the boycott, the price of cottage cheese is still around 5.5 NIS, similarly to its price after the boycott started.

Shortly after the cottage cheese boycott, in July 2011, the "tents protest," which also started on Facebook, led thousands of Israelis to set up tents in city centers around the country to protest the rising cost of living and demand social justice. The protest led the government to take several initiatives intended to lower market concentration and promote competition. These initiatives include the Promotion of

[32]The material in this section draws on Hendel et al. (2017).

[33]Initially, the sharp decline in average prices was driven by special sales by some supermarket chains. Prices dropped across the board only when Tnuva lowered its wholesale prices about 10 days after the boycott started. For more detail about the cottage cheese boycott, see Hendel et al. (2017).

Competition in the Food Sector Law, the Law for Promotion of Competition and Reduction of Concentration, and the Law for Increasing Competition and Reducing Concentration in the Israeli Banking Market.[34] These initiatives had a significant effect on the mindset of the public and legislators, as well as the mindset of firms; it would not be a gross exaggeration to argue that it also affected the mindset of courts and their inclination to certify class actions alleging excessive pricing by monopolies.

Another consumer protest worth mentioning is the "Milky protest." Milky is a dairy chocolate pudding topped with whipped cream, and is extremely popular, especially among children. It is produced by the Strauss Group, which is a declared monopoly in the dairy desserts market since 1998. The Milky protest began in October 5, 2014 when an Israeli living in Berlin uploaded to Facebook a picture of a supermarket receipt, showing, among other things, that the price of a Milky-like product in Berlin is only 0.19 euros (around 0.9 NIS at the time). At the same time, the price of Milky in Israel was around 2.60 NIS.[35] The protest got a lot of publicity and was widely covered in the media. Several supermarket chains reacted to the protest by offering Milky at a special sale price of just one shekel.[36] Following the protest, the average price of Milky dropped to around 2.30 NIS in early 2015, although it rose again to around 2.50 NIS by 2016.

The cottage cheese boycott, the tents protest, and the Milky protest demonstrate that consumers can get organized and apply effective pressure on manufacturers and retailers to cut prices. Unfortunately though, Israeli consumers seem to be quite passive. For example, a day after the cottage cheese boycott started, Professor David Gilo, who was then the Director General of the IAA, said in an interview with a newspaper[37]:

> There is a kind of indifference with the Israeli consumer. My general impression is that the Israeli consumer is not doing market research, is not willing to invest a little effort and compare competing offers and travel an extra kilometer to go to the cheapest competitor.

Likewise, shortly after the cottage cheese boycott, Professor Oded Sarig, who served as the Commissioner of Capital Markets, Insurance, and Savings, said in a

[34] Ater and Rigbi (2017) study the implications of the Promotion of Competition in the Food Sector Law and show that one of its clauses which requires supermarket chains to post their prices online led to a sharp decline in price dispersion and a 4%–5% drop in supermarket prices.

[35] For more details, see https://he.wikipedia.org/wiki/%D7%9E%D7%97%D7%90%D7%AA_%D7%94%D7%9E%D7%99%D7%9C%D7%A7%D7%99 (accessed on March 14, 2018). For information about the price of Milky, see the expert opinion of Sela Kolker submitted in support of the class action against Strauss, http://ocu6j3ta8d2palbt119d6nsq.wpengine.netdna-cdn.com/wp-content/uploads/2016/07/%D7%9E%D7%99%D7%9C%D7%A7%D7%99-150516-%D7%97%D7%AA%D7%95%D7%9D.pdf (accessed on March 14, 2018).

[36] See "Was there a boycott?" Ilanit Hayut, Globes, October 12, 2014, https://www.globes.co.il/news/article.aspx?did=1000977809 (accessed on March 14, 2018).

[37] See "David Gilo: "Consumer boycott is a welcome phenomenon," Ilanit Hayut, Globes, June 15, 2011, http://www.globes.co.il/news/article.aspx?did=1000654462 (accessed on March 14, 2018).

Knesset's (the Israeli parliament) Economics Affairs Committee meeting that consumers in the pension market are not sufficiently active[38]:

> The most important thing for me is that what happened with cottage will also happen with management fees. People need to understand that they have the power to bargain and they should take advantage of it. . . We allow a person to move from one place to another and compete for his money. I look at the data, de facto it does not happen. . . I can bring the horse to the trough, I can not make it drink.

More generally, an Internet survey conduct by the Israel Consumer Council in September 2015 reveals that Israeli consumers are not very active and have low awareness of consumer rights.[39] Hence, while the cottage cheese boycott and the Milky protest were very effective in restraining market power, these events are probably the exception rather than the rule.

6.5 When Are Prices Excessive?

To establish that a price is excessive, it is necessary to compare it to some competitive benchmark. In principle, there are two approaches that can be used. The first is to rely on a cost-based test and compare the allegedly excessive price to the relevant cost. Examining the firm's profitability is equivalent, because profitability is just the difference between revenue and cost. However, since the prohibition of excessive pricing in Israel is enforced exclusively through class actions, it seems unlikely that cost-based tests could be actually used. The reason is that it is unrealistic to expect that private plaintiffs will obtain the necessary data to determine the monopolist's cost. Moreover, when firms produce multiple products and a large chunk of their cost is common, it is difficult, if not impossible, to determine the cost of an individual product, because this requires common costs to be allocated to individual products, which is, by definition, arbitrary.

A second approach is price-based and involves a comparison of the allegedly excessive price with some other price, which is considered to be more competitive. Here there are four possible benchmarks. The first is a retrospective benchmark of the sort used in the Howard Rice or the Bezeq International class actions, where a price cut following the entry of rivals into the market indicates that the pre-entry price has been excessive.

Conversely, one can use a price hike following deregulation as an indication that the new deregulated price is excessive. This benchmark is also retrospective, except that now, a past regulatory price indicates that the current deregulated price is

[38]The Knesset Economic Affair Committee meeting, Tuesday, November 15, 2011, http://fs.knesset.gov.il//18/Committees/18_ptv_182849.doc (accessed on March 14, 2018).

[39]See Israel Consumer Council, October 8, 2015, http://www.consumers.org.il/item/madad_1015 (accessed on March 14, 2018).

excessive. This type of benchmark was used, for instance, in the cottage cheese, Milky, and prepackaged yellow cheese class actions.

A third possibility is to use a contemporaneous benchmark and compare the allegedly excessive price with the price the monopolist charges for the same product in another market, where it faces competition. For example, in the potash class action, the price in Israel was deemed excessive in comparison with the average price that DSW charged overseas.[40] Another example is the British Leland case, where the European Court determined that the price that British Leyland charged for issuing certificates for left-hand drive cars was excessive by comparing it to the price it charged for issuing certificates for right-hand drive cars.[41] Likewise, the OFT has determined in the NAPP case that the price charged in the UK to community pharmacies for sustained release morphine was excessive by comparing it to the price charged to hospitals.[42]

A fourth possibility is to compare the monopolist's price with the prices charged by smaller rivals in the same market or to prices of other firms in other markets for similar products. This comparison is problematic however because we cannot be sure that we are comparing oranges with oranges. For instance, when comparing the monopolist's price with the prices of smaller rivals in the same market, one has to wonder why the monopoly is the dominant firm in the market, while rivals have much smaller market shares. This disparity in market shares suggests that consumers view the monopolist's product as superior, and hence there is no reason to expect that its price and the prices of rivals will be similar. The comparison is even more problematic when it involves the monopolist's price and the prices charged by other firms in other markets, since then it is even less likely that we are comparing oranges with oranges.

In any event, unlike cost data, plaintiffs in class actions should be able to obtain price data from marketing research firms such as Nielsen or, in the case of Israel, from Storenext.[43] Hence, it seems that, so long as the prohibition of excessive pricing is enforced through class actions, claims that prices are excessive will be based on price comparisons.

The question then is which price difference is sufficiently large to indicate that the monopoly has charged an excessive price? Unfortunately, the Israeli experience does not help in this regard since courts in Israel are yet to rule on this matter. In some sense, the question involves a value judgment, which is not very different than the judgment needed to decide the meaning of "substantially lessons competition."

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[40]One can argue that the court was actually using a cost-based approach, because it viewed the price of potash abroad as the alternative cost of selling potash in Israel, based on the assumption that DSW would have been able to sell abroad the potash it did not sell in Israel.

[41]See Case 226/ 84 British Leyland Public Limited Company v Commission [1986].

[42]See "Napp Pharmaceutical Holdings Limited and Subsidiaries (Napp)," Decision of the Director General of Fair Trading, No Ca98/2/2001, 30 March 2001.

[43]Storenext is a marketing research firms that gets data on sales and prices of consumers goods directly from the cash registers of 2200 stores across Israel.

My own view is that it would be hard, perhaps even futile, to try to come up with a clear definition of excessive prices, which would fit all cases. My inclination, based on the Israeli experience, is to enforce the prohibition of excessive pricing only in cases where it is obvious that the monopolist has abused its monopoly position. That is, to adopt the same approach that Judge Potter Stewart adopted toward pornography when he wrote that[44]:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . .

For example, it would be hard to argue that the British CMA erred in the Pfizer case when it decided in 2016 that the price for phenytoin sodium capsules, which are used to treat epilepsy, was excessive after it was raised by 2300–2600%.[45] It would be equally hard to claim that the Italian Market Competition Authority erred when it decided that Aspen charged excessive prices for four anticancer drugs after raising their price by 300–1500%.[46]

7 Conclusion

The Israeli experience is interesting because the enforcement of the prohibition of excessive pricing in Israel is entirely private and carried out through class action lawsuits. Currently there are 23 cases pending in court. This large number gives rise to considerable legal uncertainty, which is particularly large today, before courts have established clear legal rules concerning excessive prices. It may also confirm the concern of Gal and Nevo (2015, 2016) for over deterrence of the prohibition, albeit they emphasize different reasons for this concern. Moreover, some of the motions to certify class actions are based on weak evidence, which increases the legal uncertainty and makes it hard for courts to make well-informed decisions. In addition, the many pending class actions force courts to get into highly technical and complex pricing issues, which courts are probably not best suited to deal with.

However, as I claimed above, the alternatives to prevent monopolists from setting excessive prices are also highly imperfect. Price regulation in Israel is inefficient and may also be ineffective. Regulatory proceedings drag for years and are often based

[44]See Jacobellis v. Ohio, 378 U.S. 184 (1964).

[45]See Gov.UK, Press Release, Published December 7, 2016, https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs (accessed on March 14, 2018). Interestingly though, in early June 2018, the UK Competition Appeal Tribunal found that the CMA misapplied the test for unfair pricing, and decided to remit the matter that deals with abuse of dominance to the CMA "for further consideration as it sees fit." See http://www.catribunal.org.uk/237-9687/1276-1-12-17–Pfizer-Inc-and-Pfizer-Limited.html (accessed on July 4, 2018).

[46]See The National Law Review, Monday, October 17, 2016, https://www.natlawreview.com/article/italy-s-agcm-market-competition-authority-fines-aspen-eur-5-million-excessive (accessed on March 14, 2018).

on outdated data. Consumer activism may be very effective when consumers get together and protest, but this activism seems uncommon; for the most part, Israeli consumers tend to be passive.

So what is the solution? It seems to me that given that neither solution is ideal, there is no quick fix for the problem. Of course, the best way to curb market power is to promote competition by opening up markets and by reducing barriers to entry and to consumer switching. This way, consumers are able to vote with their feet and choose which supplier they wish to buy from. But then, Section 29a(b)(1) of the Antitrust Law is meant to deal with situations in which competition fails and consumers do not have enough choices. In this case, we have three imperfect options: regulate prices directly, rely on class actions to discipline firm, and rely on consumer activism to discipline firm. The preferred option in specific cases should be the lesser of three evils.

In any event, I believe that given that the antitrust prohibition of excessive pricing creates considerable legal uncertainty and given that it requires courts to determine prices, despite lacking the necessary expertise or resources, it would be best to proceed cautiously and enforce the prohibition only in blatant cases, where there is little doubt that the monopoly has abused its dominant position and where the harm to consumers is clear.

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