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LEGAL OPINION REGARDING BUSINESS ASSOCIATIONS AND THEIR ACTIVITIES

On November 21, 2013, the General Director for Restrictive Trade Practices publicized a draft opinion for public comment regarding business associations and their activities. This topic has lately been in the General Director's crosshairs. The General Director is concerned that the activities and meetings of the professional associations (such as the contractor, industrial, food producers unions and etc.) are creating a joint table and a fertile ground for cooperation among competitors that are members of the same association. The concern is that the meetings and connections via email, and conversations that fall under the seemingly legitimate umbrella of a professional organization, will allow for the transfer of business information, price and profit coordination, market or amount division, cooperation against a new competitor in the market, boycotts of competitors, and the causation of barriers for entry into the market, the intermingling of business relations between different links in the supply chain, and the determination of an activity line that may injure competition. For example, the association may recommend to its members a certain method of conduct, determine certain membership conditions that are injurious or not equitable, commend certain past behavior that in its nature involves a restrictive trade practice, determine codes of conduct that "recommend" to the members to act according to them, or determine professional standards that are not realistic and may injure competition.

In anti-competition language, the General Director is concerned that the ties that are formed between members, as sponsored by the professional association, will be negatively exploited for the purposes of a restrictive trade arrangement and the creation of a cartel.

Indeed, in the past years we have been witness to investigations and the commencement of criminal proceedings by the General Director for restrictive arrangements against professional associations and members of the associations (the private hospitals case, the Gaza perimeter protected space contractors case).

In the opinion, the General Director surveys the advantages of professional associations, and the main concerns resulting from their work, and lists a number of recommendations – in different areas – that, if accepted and fully implemented, will allegedly protect the business associations and their members against criminal and administrative proceedings.

A business association is a body, whether corporate or not corporate, which is intended to advise its members, to develop the areas in which it operates through the gathering of information and professional experience, and, through this, to increase demand for the products, to lower costs, determine quality and safety standards, determine ethical rules, and to generally improve the branch in which it operates. For the most part, the members of the association are competitors in the branch in which the association operates, and this is the main reason for the General Director's concern.

The Restrictive Trade Practice Law determines that a chain of production that was determined or

recommended by a business association – whether if corporate or not, whether if it executes independent business activities or not, whether if it is called an “association”, “bureau”, “union”, “committee”, and so on – is prohibited and may result in a restrictive arrangement. In such a case, each member of the association will be a party to the restrictive arrangement.

In light of the above, and to minimize the lack of certainty of business associations which operate often in the business market and in various branches, the General Director enumerates a number of methods of conduct that when fully implemented are supposed to provide a type of protection to those associations. These rules also apply to any union of competitors, even when it is not sponsored by a business association, and even when it is ad-hoc. We will review a number of examples.

Association Meetings and Meetings among Competitors

The General Director determines that in the context of meetings between competitors, no matter that is sensitive from a competition point of view will be discussed (sensitive information from a competition point of view has been defined in the past by the General Director – in general – as information that is not public and that is difficult to locate, and that may include a competitive advantage to the competitor that receives the information. Among others, sensitive information from a competition point of view is also information that relates to prices, pricing policy, individual information relating to clients or supplies, strategy, and so on), including in the preparation proceedings for such meetings, in working documents, and etc. In preparation for the meeting, a list of matters that will be discussed at the meeting will be given to the participants in advance, which list will not include sections labeled “miscellaneous” or “general”, and there will be no deviating from that list of topics except in extenuating circumstances. At the beginning of the meeting the chairman of the meeting will emphasize that there will be no discussing sensitive information from a competition point of view, and he will even warn of the danger of the creation of a restrictive arrangement. The meeting in its entirety, including its resolutions, will be recorded in real time.

Recommendations by the Association

The association will not determine or recommend any instructions or direction which may imply an operations line or a restrictive arrangement. Thus, the association will avoid publicizing or distributing such recommendations, from coming to any decisions, giving any instruction, recommendation or professional advice in the matters of prices, pricing policy, conditions, benefits, exchange rates, promotions, costs and methods of calculation, strategy, business development, tenders and everything related to them, engagement or avoiding engagement with a supplier, client, competitor, and so on.

Information Held by the Association

A business association which requests to collect information in order to publicize it in a processed manner among the members of the branch, as a part of the activity and content of the association, is requested to behave carefully to make sure the information does not leak and thus harm competition. The General Direction distinguishes between two types of information. The first kind is information that is not public, is especially sensitive, and which the business association will not hold or disseminate at all. Included among this information are prices, competitive strategy, costs, profit margins, production capacity and plans, and so on. The second type of information is information that is sensitive from a competition point of view but which is not listed in the first type of information in the opinion. This information will not be revealed to a person without permission, and this information which is forward-looking, or which is less than six months old, will not be gathered. As such, the lowest level of detail which does not allow “reverse-engineering” of the information must

be relied upon. In the gathering of the information the association will turn to all the relevant members for the purpose of collection or to a representative sample, and it will avoid any obligation to transfer the information.

Activities Opposite Government Agencies

An opinion that was publicized in the past in the matter of cooperation among competitors in activities opposite government agencies clarified the General Director's approach toward this issue. Without derogating from that, at times competitors turn to a business association for help with a government agency for the purpose of furthering the business interests of the competitors or the branch, or for the purpose of furthering a change in regulation of the branch. For every such turn to the government agency, the General Director determined that the parties should explicitly define the content of the submission and should not deviate from that definition. As such, in every transfer for information that relates to the subject of the submission, the competitors will conduct themselves according to the instructions given in relation to association meetings and meetings among competitors, as listed above. In relation to the presentation of the information and its transfer to the government authority, the association and the individuals submitting must conduct themselves as they would for information held by the association. The association would in good faith represent its members, and therefore would not present the position of only one or a few of the members of the group. In addition, the association will not present to its members an interpretation for matters of law, it will not pressure a regulator, and it will not advise or recommend to competitors a method of conduct following a change or non-change of regulation.

Conditions for Membership in an Association

In every association which gives its members access to assets, information, or services, the conditions for membership will be equitable, reasonable, and based on objective standards. The association will not condition membership on the agreement of existing members of the association, and it must include an objective appeals tribunal for the examination of its decisions and rejection of membership requests.

Professional Conferences, Fairs, and Etc.

All information which may be presented or transferred in the context of a conference, professional fair, presentation or the sponsorship of these, must be presented subject to the guidelines for association meetings and meetings among competitors.

Self-Regulation and Standardization

Professional Conferences, Fairs The determination of standards for a certain branch is likely to be welcomed, so long as it does not create barriers of entry for new players or products, or does not result in the dismissal of existing players or products from the market. The determination of conduct rules is possible so long as it does not make it easier for coordination between members and does not diminish competition, in the product, service, or variety. Accordingly, every standardization must serve the public interest, be done by professional individuals only, and the process for the arrangement – including oversight – will be managed by objective, transparent, clear and determined criteria and the collection of a fee for participation in the process is only possible if it is reasonable. The association will notify in advance of the arrangement process, and the results of the arrangement will be available to the public.

The General Director determines that joint ventures, such as a joint acquisition, joint research and

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development ventures, joint marketing, and so on, must serve the purposes of the Restrictive Trade Practice Law and they will be examined based on the joint ventures laws.

The General Director recommends to a business association, to include among its articles of association or in a similar document an instruction in which the association undertakes to follow the restrictive trade practices laws in the context of its activities, and that it must promise that it will do everything within its power to prevent its offices or activities from turning into a grounds for prohibited coordination, and will bring this to the knowledge of its members.

In the past years various new associations in different fields were created. The rules that the General Director outlined in the opinion draft will result in a significant economic cost and the necessity of close legal accompaniment. A business association is not an economically-wealthy entity in its nature. For these reasons, it seems that it will not be easy for a part of these business associations to fulfill the criteria that the General Director outlined – from a professional and efficiency of the organization point of view, as well as from an economic point of view.

In this respect, the opinion does not help the business associations, rather, it delays and creates difficulties for their activities, by giving legitimacy to the presentation of claims against them and against their members for every activity that in the opinion of the General Director is not consistent with that which is stated in the opinion.

We would be happy to assist you in a review of the topics mentioned above. Please contact advocates Ronit Amir Yaniv (ronita@arnon.co.il), Ron Gutman (rong@arnon.co.il) and Lior Sendziewski (liors@arnon.co.il).

The information given here is legal general legal information that is not a substitute for a private legal consultation.