



Public Statement 3/14

In the matter of Trade Associations and Their Activity

1. Preamble

1. The subject of this public statement is the activity of trade associations from the point of view of competition law. Trade associations are abundant in economic life as well as in the Israeli business landscape. When a trade association acts pursuant to applicable law to promote legitimate interests of such sector, its activity may serve the interests of consumers and other agents that are affected by the activities in that sector as well.¹ Nevertheless, from the point of view of competition, the trade association is the link between competing businesses that may be abused to accommodate restrictive practices and prohibited lines of action.
2. In view of the competitive sensitivity embedded in it, a trade association that wishes to avoid a violation of applicable law and the office holders therein must take the reasonable measures required to avoid a violation of antitrust law in the framework of the activity of such trade association or as a result of it, commencing from its establishment and throughout its existence. A trade association and the office holders therein that do not take such measures may be found liable pursuant to applicable law to such violations.
3. The purpose of this public statement is to present to position of the General Director of the Antitrust Authority (“**the General Director**”) in relation to the conduct of trade associations, members therein, office holders therein and

¹ OECD policy roundtables trade associations: potential pro-competitive and anti-competitive aspects of trade, trade associations), p. 15 (2007). Available at <http://www.oecd.org/regreform/sectors/41646059.pdf> (hereinafter: "**OECD Roundtable**").

anyone acting on behalf of a trade association or as an agent on its behalf, by way of do and do-not-do rules, and by posting warning signs against prohibited conduct in the framework of a trade association or under its sponsorship. This public statement does not constitute an exemption of any kind and does not make an exemption on behalf of the General Director or the court redundant, if one is required. In addition, the current public statement does not discuss enforcement measures that the Authority will take in the event of a violation of the law by a trade association or office holders therein.²

4. Bona fide and meticulous fulfillment of the rules set forth in chapter D below as to the matters set forth therein, will be deemed by the Authority as best practice as to the conduct of a trade association in connection with such subject matter and as taking reasonable measures to ensure compliance with applicable law in connection with such subject matter.

2. A trade association from the perspective of competition

General

5. A “trade association” is defined in section 1 of the law as “a body of persons, incorporated or otherwise, the purposes of which, in whole or in part, are the promotion of the business interests of its members”. This definition applies to any body of persons created in order to represent the business interests of its members, regardless of whether it is a corporation or not, regardless of whether it has independent business activity or not, regardless of whether its members are active in Israel or only some of them are active in Israel.³ A trade association may include dealers from various links in the product chain or incorporate dealers for different chains in the product chain or incorporate dealers from separate sectors and in addition there may be a collaboration among several trade associations. A body of persons will be deemed a trade association in the

² See public Statement 1/12 “Guidelines of the Antitrust Authority as to the use of enforcement proceedings of financial sanctions” **Antitrust** 5001998 (24.7.2012).

³ See for example - the Decision of the General Director of the Antitrust Authority “Decision pursuant to section 14 of the Antitrust Law, 5948 - 1988 as to granting an exemption under certain terms and conditions from approval of a restrictive arrangement to Choices” **Antitrust** 5001365 section 4 (15.2.2009) (hereinafter: The “**Choices Decision**”).

meaning of the law pursuant to its essence and not pursuant to its definition or name, be its name “association”, “committee”, “union”, “society”, or otherwise.

6. Collaboration among dealers operating in a certain sector in a trade association does not, in itself, constitute a restrictive arrangement. On the other hand, collaboration in a trade association and membership in it do not confer any protection from liability of parties to a restrictive arrangement, insofar as it exists in connection with the association. Thus, for example, when the articles of association of the trade association constitute a restrictive arrangement, joining such association alone may be sufficient to be deemed as joining a restrictive arrangement. The manner of conduct of the dealers will be inspected by its essence, regardless of whether it is taking place in the framework of a trade association or not, and regardless of whether the participants in it are members of a trade association or not.
7. The trade association itself, is distinguished from a joint venture or a merger, as typically its establishment does not change the map of players in the sector and their status as independent competitors, and most times it is not intended to serve as a separate source of profit, and in any event, not a significant source of profit.⁴ Joint venture law may apply to a trade association acting independently in the competitive arena as well.⁵

Activity of a trade association

8. As a general rule, the collaboration in a trade association allows the know-how and professional experience of the participants to be harnessed to the benefit of improving the sector and increasing demand for the types of products or services

4 PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION Para. 1477 (2nd. Ed.2006); OECD **Roundtable** above, note 1, page 21.

5 See the Decision of the General Director of the Antitrust Authority “a decision pursuant to section 14 of the Antitrust Law, 5948 - 1988, as to granting an exemption under terms and conditions from approval of a restrictive arrangement for the establishment of a designated corporation to provide services in the field of dental health care by the Israel Dental Association (registered association)”. **Antitrust** 500452 (21.8.2013) (hereinafter: **Decision in the matter of Restrictive arrangement in the Field of Dental Health Care**); A Decision of the General Director of the Antitrust Authority “Decision pursuant to section 14 of the Antitrust Law, 5948 - 1988 as to granting an exemption from approval of a restrictive arrangement: An arrangement between the Carriers and Transporters Council in Israel and its members and the Ministry of Defense” **Antitrust** 3018215 (18.8.2003) (hereinafter: **“Decision in the matter of the Carriers and Transporters Council in Israel”**); The Decision in the matter of Choices, herein above note 3 para. 4; Antitrust Rules (class exemption to joint ventures), 5966 - 2006, Regulations File 6483, 793.

offered by the agents active in the sector.⁶ Legitimate activity of the association, not intended to bring about impairment in competition and that cannot prevent or diminish such competition, may be a blessing to the sector. This pertains to activities of the association that may cause a reduction of costs of obtaining professional information, determining standards that may promote efficiency, quality and safety, determining proper professional conduct and rules of ethics to the benefit of the sector and of consumers, the promotion of professional literature, the representation of the sector with various authorities and with the public and more, provided that they do not impair competition.

9. Indeed, many trade associations act to promote the sector to the benefit of the sector and the public. Many of such organizations are fulfilling their duties faithfully and diligently to promote that purpose without any taint of intent to impair competition. Without underestimating the positive aspects of the activity of trade associations and without diminishing from the honest intentions of those acting in their framework, there is no escape from being required to consider the other facet of the activity of trade associations that may bring about impairment in competition.
10. Alongside the blessing that may arise from their activity, trade associations hold real apprehension in terms of competition. The collaboration of competitors in joint meetings or joint actions raises, by its very nature, the apprehension that such competitors will act in a manner that might impair competition, be it intentionally or ancillary to the promotion of another purpose, that may be legitimate in itself. The activity of an association may have a negative impact on competition in additional sectors of activity as well, in which members of the association operate.
11. The apprehension that arises from the collaboration of competitors in a trade association is widespread. The most significant apprehension is that the trade association might serve as a cover for coordinated action in the framework of a cartel or that it will determine or recommend to its members a course of action that might prevent or diminish competition. Meetings of the association, its

⁶ See the Decision of the General Director of the Antitrust Authority “Determination pursuant to section 43(a)(2) of the Antitrust Law, 5948 - 1988: The manner of action of the Private Hospitals for Chronic Patients Association in Israel is a restrictive arrangement” Antitrust 5000740 para. 39 onwards (31.12.2007) (hereinafter: the “**Geriatric Hospitals Case**”).

logistical array and the information that is being kept by it may facilitate the coordination, supervision and enforcement by a cartel. Not for nothing it was found that “the history of competition in Israel proved that trade association took active part in many of the severe cartels discovered in the economy”.⁷

12. In the framework of conduct of the association certain close relationships or common interests may develop between competitors that might bring about a cooling off of the rivalry and competitive passion between them and in addition to a certain submission or dependency of one competitor to another.⁸ Competitors may exchange information around the round table that is sensitive in terms of competition and bridge information gaps between them so as to bring about impairment in competition.
13. A trade association may be used as a platform for banning competitors, suppliers and consumers, constructing barriers in the path of new players in the sector and suppressing incentives of members in the market to expand or develop improved or varied products and services. A trade association may interfere with the business relations or in a business disputes between a member and its supplier or client and t unlawfully restrict the options of action available to such supplier or client. A trade association may act to prevent the development of competition to the association itself. This list is not comprehensive, apparently, and does not describe all the types of apprehension that may arise due to collaboration among competitors in a trade association, all according to the specific circumstances of each case.
14. The potential for harm of a trade association may manifest itself in many ways, such as an instruction or recommendation the purports to be unbinding. The diminished competition due to a trade association may be manifested in the terms of membership in the association as well, in the code of ethics that it wishes to establish in the sector, in the professional standards and ethical

⁷ Michal (Shitzer) Gal, Amir Israeli and Menachem Perlman “Restrictive arrangements - Foundations of the Prohibition”, Michal Gal and Menachem Perlman **Legal and Economic Analysis of Antitrust Law**, Volume A 193, 311 (Nevo Publishing, 2008); See also the Decision of the General Director of the Antitrust Authority “Decision pursuant to section 14 of the Antitrust Law, 5948 - 1988 as to granting an exemption from approval of a restrictive arrangement: the Internet Websites Association in Israel” **Antitrust** 3015425 (28.8.2012); OECD **Roundtable** above, note 1, page 15.

⁸ **Decision in the matter of the Carriers and Transporters Council in Israel, note 5 herein above.**

standards under its responsibility, in the information that it collects or wishes to disseminate among its members and so forth. Prohibited conduct may be initiated by the association or by its direct involvement or when the association is being used as a platform which facilitates the establishment of a restrictive arrangement among dealers.

3. On the course of action and a restrictive arrangement

15. The conduct of a trade association and of its members may amount to a prohibited restrictive arrangement. In view of the special nature of the trade association the legislator found it appropriate to add a special provision the matter of which is determining a course of action by a trade association, and not to settle for the general definition of a restrictive arrangement. Section 5 of the law provides:

“A course of action determined by a trade association for its members or some of them, which is liable to eliminate or reduce business competition among them, or such course of action which the trade association recommended to them, shall be deemed to be a restrictive arrangement as defined in Section 2, and the trade association and any member acting in accordance with such course of action shall be deemed to be party to a restrictive arrangement.”

16. The Superior Court discussed the purpose of section 5 in the Borowitz Case (emphasis added):

“The purpose of section 5 of the Antitrust Law, the way that we see it, is to deal with a situation in which free competition in a certain sector is impaired as a result of the activity of a trade association that provides “recommendations” to its members and the latter act upon them. In this state of affairs there may be a difficulty in imposing liability on the members of the association for a restrictive arrangement offense as set forth in section 4 of the law. This difficulty arises from the fact that there may be a state of affairs in which a member of a trade association acted according to the course of action recommended by the association and that may lead to impairment in competition, without, however, the elements of the restrictive arrangement offense having been fulfilled as regards to it ... **Section 5 of the law intends to enable imposing criminal liability on such person (and even on the trade association itself). Therefore, it provides that a course of action recommended (or determined) by a trade association must be viewed as a restrictive arrangement and a member of the association**

that acted pursuant to it must be viewed as a party to a restrictive arrangement. On the other hand, when the case at hand is of a person and there is no difficulty to prove such person being a “party” to a restrictive arrangement, there is no justification for such person to enjoy from any protection whatsoever against imposing criminal liability only because it carried out such actions in the framework of such trade association. Therefore, there is no prevention to convicting a member of a trade association in the “regular” restrictive arrangement offense if all the elements that are required to perfect the offense are fulfilled in such person”.⁹

17. When the elements of restrictive arrangement are fulfilled, the framework of a trade association will not provide an escape for the parties to the restrictive arrangement from their liability for their share in it. When it is a case of a course of action that was determined or recommended by the association without any specific arrangement, the provisions of section 5 will apply, and the course of action will be deemed a restrictive arrangement, and the association and each of its members that acted pursuant to the course of action will be deemed party to a restrictive arrangement as set forth in section 2 of the law. It is clarified, that the offense of course of action may be committed even if none of the members of the association acted pursuant to it or was not yet able to act pursuant to it.
18. This position is consistent with the purpose of the section, the application of the prohibition on restrictive arrangements also on coordinated actions that may impair competition, arising from a trade association even if such action does not constitute an independent arrangements among persons conducting business¹⁰ and the prohibition on limiting the independent business discretion of persons conducting business or an attempt to direct their activities or coordinate between them in the field of competition.¹¹

⁹ Criminal Appeal 4855/02 **The State of Israel v. Dr. Itamar Borowitz**, Net (6) 776, para. 101 (Published in Nevo, 31.03.2005); In addition, see Criminal Case (District Court Jerusalem) **The State of Israel v. The Phoenix Insurance Company**, decision dated 18.12.2001).

¹⁰ Gal and Perlman, **Legal and Economic Analysis of Antitrust Law**, herein above note 7, on page 311.

¹¹ Different Appeal (Jerusalem) 1049/00 **The Banquets and Events Halls Owners Association in Israel v. the Legal Counsel to the Government** (Published in Nevo, 19.03.2002) (hereinafter: the “Halls Owners Association Case”) **The Geriatric Hospitals Case**, herein above, note 6, in para. 49; The Decision of the General Director of the Antitrust Authority “Determination pursuant to section 14 of the Antitrust Law, 5948 - -1988: Granting an exemption from approval for a

19. Thus, pertaining to an arrangement that is included within section 2(a) of the law and thus as to a restriction that is included within section 2(b) of the law, the matter of which is an arrangement in which the restriction pertains to the price demanded, offered or paid, to the profit made, to the division of the market or to the quantity of assets or services, their quality and their kind. The presumption of propensity to reduce competition of the arrangements set forth in subsection (b) will apply to a course of action just like it applies to any other arrangement between persons conducting business. These statements have been made clearer lately in the judgment in the **Shoham Case**:¹²

“Section 5 was intended to expand the application of the law to the cases set forth therein that do not fall within the term “arrangement” but from a material perspective have a significant potential to impair competition similar to the one posed by an arrangement... The provisions of section 5 reflects the insight that in a trade association there is, by the very nature of things, a significant potential for impairment of competition. Such association facilitates and enables the ongoing exchange of information and messages. As a result, it facilitates coordinated action among competitors. The anti-competition potential embodied in such association is not less, if not more, than that embodied in making an arrangement, in the meaning set forth above. Therefore, where a trade association issued a recommendation to its members pertaining to the way that they determine their prices, there is full justification to apply the conclusive presumptions set forth in section 2(b) of the law...”

20. A course of action may be manifested by way of a binding instruction to the members of the association, accompanied by sanctions or in a “softer” form by way of recommendation¹³, training, suggestion or guidance, that leave the final decision how to act to the discretion of each one of the association members.

restrictive arrangement to the arrangement between Cellcom Israel Ltd., Partner communications Ltd., Pelephone Communications Ltd. and LECG Ltd.” Antitrust 5000601 (12.7.2007).

¹² Criminal Case 4016-06-12 **the State of Israel v. Shoham et al.**, verdict dated 23.2.2014, **Antitrust**, para. 41 (2014) (hereinafter: the “**Shoham Case**”); Additional Civil Hearing 4465/98 Tivol (1993) Ltd. v. Ocean Chef (1994) Ltd., Case Law 56(1) 56, 98 (2001); The **Geriatric Hospitals Case**, herein above, note 6, para. 54 onwards.

¹³ The issuance of a recommendation will be inspected pursuant to a test of essence, regardless of its definition or qualifying statements included in it such as “this document does not constitute a recommendation”.

The test is the existence of a message as to the course of action in question.¹⁴ A course of action may be manifested in a provision in the articles of association of the association or in any other establishment document of the association, the dissemination of a document among its members,¹⁵ or words of praise as to past conduct that constituted a restrictive arrangement, which include a recommendation or an allusion, that the same should be practiced in the future.¹⁶ A course of action may exist by recommendation or instruction not to act, such as when an association calls its members not to participate in a tender or issues a recommendation to them not to enter into an engagement with a supplier, client or any competitor or to qualify or condition their participation.¹⁷ The existence of a course of action is not dependent upon association members or some of them acting upon it, but upon the potential harm it may cause to competition.

d. Guidelines for association in a trade association and its manner of conduct

21. In view of the intrinsic apprehension in the mere existence of a trade association and its activity and actions, and association that wishes to ensure that the activity in its framework will not bring about a violation of the law and will not encourage it, to clarify to its members that prohibition on taking any action that amounts to a course of action or a restrictive arrangement and to take all

¹⁴ The **Shoham Case**, herein above note 12, para. 19; Appeal 2/89 **the Carriers Council in Israel v. the General Director of the Antitrust Authority**, (published on the website of the Antitrust Authority **Antitrust** 3001546, 1991) (hereinafter: Appeal in the matter of the **Carriers Council**); The **Geriatric Hospitals Case**, herein above, note 6, para. 47 onwards; the Decision of the General Director of the Antitrust Authority “decision pursuant to section 14 of the Antitrust Law, 5948 - 1988 as to granting an exemption from approval of a restrictive arrangement between the members of the Israel Bar” **Antitrust** 5000697 (14.2.2004) in the matter of an exemption limited in time for providing will making services by the members of Israel at a maximum recommended rate (hereinafter: the **Exemption to the Arrangement Between the Members of the Israel Bar**).

¹⁵ **Appeal in the matter of the Carriers and Transporters Council in Israel**, note 14 herein above. The **Geriatric Hospitals Case**, herein above, note 6, para. 47 onwards; the **Exemption to the Arrangement Between the Members of the Israel Bar**, note 14 herein above.

¹⁶ Criminal Case (Jerusalem) 22847-12-10 the State of Israel the Antitrust Authority v. Nisim Publil et al. a decision dated 7.6.2012, para. 71 (Published in Nevo, 07.06.2012)(hereinafter: the “**Bublil Case**”).

¹⁷ The **Geriatric Hospitals Case**, note 6 herein above; Civil Case (Tel Aviv) 1617/93 **Vulkan Batteries v. the Israel Workshops Association** Dinim District Court, 32(6) 642, 646 (1994); A decision of the General Director of the Antitrust Authority “Determination as to the existence of a restrictive arrangement - the activity of the Actors Agencies Association” **Antitrust** 3003746 (24.5.94).

reasonable action to prevent the abuse of its institutions, installations, forums on its behalf or under its sponsorship (including professional and other conferences, workshops, Internet forums, journals and so forth) in a manner that might bring about impairment in competition. A trade association must also take extra care not only in its actions but also in collective statements that it issues, in particular when such statement refers to the activity that prima facie impairs competition.¹⁸

22. Here as several rules that may aid the association, its members and office holders in it to manage the activity of the association without violation of antitrust law. These are not binding guidelines, but recommendations that the Antitrust Authority collected in view of its experience in the field, and compliance with them will considerably diminish the risk of violation of the Antitrust Law in the course of operation of the association. These guidelines are valid, *mutatis mutandis*, to the collaboration between competitors that is not called “a trade association”, including collaboration of competitors *ad hoc*.

Definitions

23. In this document:

“**Meeting**” - including conference calls, video meetings or meetings by way of any other conversations device that connects between the participants.

“**Sensitive Information as to Competition**” - information that is not public and is not easily identifiable or easily located, that if made known to a business competitor of the information owner might increase the ability of such competitor to anticipate in advance the prices and manufacturing strategy and the anticipated response of the information owner to price and quantity initiatives by such competitor, all pursuant to the specific circumstances of the case.¹⁹

(a) Meetings of the association and other meetings between competitors

¹⁸ The **Bublil Case**, herein above note 16, para. 71;

¹⁹ For more information and details see Public Statement 2/14 “disclosure of information prior to a transaction between competitors”, **Antitrust** 500618 (19.5.2014) (hereinafter: Public Statement **Disclosure of Information prior to a Transaction Between Competitors**).

24. A meeting between competitors around one table, in a notional of concrete sense, raises apprehension at the level of coordination and at the level of information disclosure and “feeling the pulse” between competitors. It may also incentivize the participants to turn to courses of action such as a collective ban. Therefore, the trade association and the participants must take extra care in conducting such meetings and their own conduct during such meeting.
25. A meeting of a trade association and any other meeting organized by a trade association or held on its behalf, in its framework or within its walls, in which competing bodies are represented, will take place as follows:
 1. The meeting will not discuss, directly or indirectly or implicitly, Sensitive Matters in terms of competition and no Sensitive Information as to Competition will be disclosed, including in the framework of preparation material for the meeting, work papers, presentations and so forth.²⁰
 2. A detailed list of the issues for discussion will be determined and brought to the attention of the participants prior to the discussion. The list will not include sensitive matters in terms of competition;
 3. The chair of the meeting or anyone on its behalf will clarify at the opening of the meeting that the participants must refrain from discussing sensitive matters in terms of competition and refrain from disclosing Sensitive Information as to Competition and will clarify to them the such disclosure of information or holding a discussion on sensitive matters in terms of competition, may constitute an unlawful restrictive arrangement, even if they are held prior to the meeting or after its termination. Alternatively, such clarification will be delivered to the association members prior to the meeting, be it in the framework of the invitation to the meeting or be it in any other way, provided that it is simple, clear and prominent.
 4. Detailed minutes of the meeting will be taken in real time and will be kept to be presented upon demand. The minutes will specify, inter alia, the date time and place of the meeting, the names of the participants, the organizational affiliation and the position, the matters on the agenda, any

²⁰ Obviously, the liability of a trade association and office holders therein that hold a meeting or another forum, does not replace the personal liability of each participant to its own statements or to unilateral action on its behalf in the framework of the forum.

resolution, recommendation or summary that were adopted during the meeting and any document submitted or transferred during the meeting or in preparation for it. During the meeting no items will be discussed “off the record”.

26. The provisions of sections 24-25 will apply, mutatis mutandis according to the circumstances of the case, also on other forums held by the association, on its behalf or under its sponsorship such as professional conferences and social events.²¹

(b) Guidelines and recommendations on behalf of the association

27. The association will not determine guidelines or recommendations that may constitute a course of action or a restrictive arrangement among its members and will not take part in their dissemination or publication. Without derogating from the general nature of the above, the association will refrain from adopting a resolution, providing instructions, recommendations or professional advice to its members as well as to other dealers, directly or via a third party, in the following matters:

- (1) Prices, pricing policy, pricing formulas and other commercial terms and conditions, including price lists and rates lists, rates of discounts and benefits, exchange rates, sales offers, payments and credit policy. The aforesaid pertains to the price to which adjectives such as “fair”, “appropriate”, “proper”, and so forth, are attached.²²
- (2) Costs and the manner of their calculation;
- (3) Business strategy, pricing policy, scope of production or activity, variety, business development or competition policy;
- (4) Participation in the tender or another competitive process, or refraining from participation in it, and an assessment as to the viability of such participation.

²¹ It is noteworthy that there is no prohibition on holding a public discussion in matters in which the members of the association find of interest, even if they may pertain to competition in the sector, however, such discussion may not focus on sensitive issues in terms of competition or that such issues are expected to arise during such discussion. The trade association and the office holders therein will not be liable for statements or unilateral action of any of the participants in such forum, however if the discussion shifts to sensitive matters in terms of competition, they must act reasonably to prevent any further discussion in these matters.

²² The **Shoham Case**, herein above note 12, para. 26.

(5) Entering into an engagement with a supplier, client or a certain competitor, or refraining from entering into such engagement, conditioning such engagement by terms or qualifications, banning it, or an assessment as to the viability of entering into an engagement with it.

(c) Collecting, keeping and disseminating information by the association

28. Collecting relevant information on the sector by a trade association may save significant costs of obtaining such information. In addition, the information collected by a trade association may be considered objective and reliable.²³ Nevertheless, disclosure of Sensitive Information in terms of Competition between competitors embodies the apprehension of cooling off competition, facilitating coordinated behavior and express coordination between competitors.²⁴ For this reason, a trade association that wishes to collect information for processing and dissemination to the sector must take extra care with the information that it wishes to collect, and ensure that it is kept in a manner that does not allow the disclosure of Sensitive Information as to Competition to anyone not authorized to be exposed to it and in particular to a competitor or anyone on its behalf or anyone related to it, even if it is an office holder in a trade association, and that the information that it wishes to disseminate is not Sensitive Information as to Competition.
29. The association will not collect, not keep and not disseminate, by itself or through a third person, information that is not in the public domain or that cannot be relatively easily identified or located, relating to a member of the association or to another person conducting business in the sector, in the following matters:

(1) Competitive strategy and current and forward-looking business plans;

²³ The Decision of the General Director of the Antitrust Authority “Determination pursuant to section 14 of the Antitrust Law, 5948 -1988: Granting an exemption from approval for a restrictive arrangement to the arrangement among the members of the Israel Audience Research Board” **Antitrust** 5000600 (17.4.2007); The Decision of the General Director of the Antitrust Authority “Decision pursuant to section 14 of the Antitrust Law, 5948 - 1988 as to granting an exemption under certain terms and conditions from approval of a restrictive arrangement among the Israel Audience Research Board” **Antitrust** 500375 (11.4.2013) (hereinafter:

²⁴ Public Statement **Disclosure of Information prior to a Transaction Between Competitors**, herein above note 19.

(2) Current and future prices, pricing policy, pricing formulas, discounts, sales offers, credit and other sale terms and conditions;²⁵

(3) Current and future costs and the manner of their calculation;

(4) Quantities of a product or service provided now or in the future;

(5) Profit margins now or in the future or profitability targets;

(6) Production capacity and production plans now or in the future;

(7) the business of a particular supplier, client or competitor, potentially or in fact;

(8) Any information that is set forth in subsections (1)-(7) and relates to the past, that has significant potential to indicate as to the present or future state of affairs or assess it in a high rate of probability.

30. If anything relating to the collection of Sensitive Information as to Competition that is not set forth in the categories set forth in section 29 herein above, the following rules will apply:

(1) Sensitive Information as to Competition will not be transferred and will not be disclosed to a competitor of anyone on its behalf or anyone relating to it, even if it is an office holder in the business association. The association will take all reasonable measures in order to ensure that Sensitive Information as to Competition is held by it or by anyone on its behalf will not be transferred and will not be disclosed to such competitor. The association will not transfer Sensitive Information as to Competition to any third party, even though it is not a competitor, unless for the purpose of processing or to a clear other purpose, that was pre-determined and documented, and subject to a confidentiality undertaking.

(2) Information must be used at the lowest possible level of details that may fulfill the purpose for which it was collected, and that does not allow to glean detailed information through “reverse engineering”.

(3) In collecting information, the association must contact all the relevant association members for the purpose of such collection or to a random group out of such members;

(4) In collecting the information, the association will refrain from coercion, demand or instruction to its members to transfer Sensitive Information as to Competition.

31. The association will not disseminate processed information before it took reasonable measures to ensure that Sensitive Information as to Competition may not be tracked using reverse engineering of such information.

²⁵ This provision is not restricted to quoting a price or a final rate or a uniform rate, but also to information as to price components or the parameters to calculate it, from which the price or the final rate recommended may be derived. See the **Shoham Case**, herein above note 12, para. 21.

32. The association will ensure that the manner of dissemination of the information will not grant an unfair advantage to certain competitors over others. The association will ensure material equality in the dissemination of the information and its availability.

(d) Activity with governmental authorities

33. Joint representation of those active in the field may bring before the governmental authorities a wider picture, streamline processes for dealers and for the governmental authority and mainly revalidate the position of the dealers in the sector, one voice speaking for the many.²⁶ Thus in the case of legislation processes as well as in secondary legislation and before judicial and quasi-judicial instances, before administrative authorities and bodies authorized by them or before bodies serving in a public capacity such as determination of standards or professional guidelines.

34. Good faith contact by a trade association with a governmental authority does not constitute, *per se*, a violation of antitrust law. Nevertheless, when the mere contact with a governmental authority may constitute a message to the members of the association to act in a certain way, such contact in itself may amount to a prohibited course of action by a trade association.²⁷ In addition, from a competitive point of view, the meeting of competitors be in the framework of a trade association or be it *ad hoc*, raises apprehension characteristic of a common table, which we discussed herein above. Contact with a governmental authority under one flag may even create a feeling of identification or shared fate among the competitors and dull the feeling of competitive rivalry between them. The joint collaboration may be a slippery slope, sliding towards joint commercial negotiations for all intents and purposes,²⁸ or to full or partial coordination of

²⁶ The **Geriatric Hospitals Case**, herein above, note 6, para. 61 onwards; **Roundtable OECD**, note 1 herein above, pp. 250-251.

²⁷ The **Halls Owners Association Case**, note 11 herein above, para. 15.

²⁸ Decision of the General Director of the Antitrust Authority “Decision pursuant to section 14 of the Antitrust Law, 5948 - 1988 as to granting partial exemption under certain terms and conditions from approval of a restrictive arrangement among the members of the Senior Homes Associations **Antitrust** 5000143 (11.10.2005)

their steps and the business policy of the collaborators in order to create facts in the field, apply pressure on the governmental authority or coordinated preparations for the state of affairs that will prevail after the governmental authority determines what it may.²⁹

35. In the past, the General Director of the Antitrust Authority made public statements as to cooperation between competitors in acting with governmental authorities (Public Statement 1/00) be it in the framework of a trade association or otherwise.³⁰ It is clarified that the statements made in this current public statement reflects the position of the General Director of the Antitrust Authority also pertaining to joint contact of competitors to governmental authorities regardless of whether it is carried out through a trade association or not. This public Statement must be read together with public Statement 1/00, however insofar as the provisions set forth in public Statement 1/00 are inconsistent with the provisions set forth in this public statement, the provisions of this public Statement will govern.
36. The matter of the current public statement is the competitive consequences of collaboration between competitors in contacting governmental authorities, and not the impairment of competition that may possibly be caused by the mere activation of governmental authority. Clearly, when the contact with the governmental authority is insincere, the collaboration between competitors will be inspected according to its essence and not according to its presentation. Contact with a governmental authority based upon misrepresentations or misleading information or unverified information will not be regarded as good faith contact.
37. Contacting governmental authorities in their public-regulatory capacity must be distinguished from contacting them on a commercial basis. When the focus of the contact is commercial engagement with the state or with a particular governmental authority, such contact will be viewed as collaboration between

²⁹ Public Statement 1/00 “Public Statement of the General Director of the Antitrust Authority: Cooperation between competitors in acting with government authorities” **Antitrust** 3007119 para. 3 (6.2.2000).

³⁰ *ibid.*

competitors in a business context and as such the law of joint ventures will apply to it.

38. In collaboration between competitors in contacting a governmental authority, be it in the framework of a trade association or not, directly or be it via a third party, including attorneys, lobbyists, professional consultants and public relations consultants and any other person acting on behalf of the association or any of its members or on behalf of an interested party in the sector, the following guidelines must be complied with:

(1) The purpose of the contact and its content will be clearly defined in advance. The contacts and collaboration between competitors will be limited to the actions reasonably necessary to promote such purpose;

(2) In contacting a governmental authority and in any ancillary activity or preparation for such contact, the provisions set forth in section 23 herein above will apply to the collaborators and any person acting on behalf of the association, *mutatis mutandis*;

(3) If the collaborators for the purpose of such contact wish to present data or information to the authorities, directly or via a third party, based upon Sensitive Information as to Competition or if the transfer of such information is required pursuant to applicable law or by the relevant governmental authority, the provisions of section 23(c) herein above will apply to collecting, keeping, processing and disseminating such information. It is clarified that the duty to refrain from divulging future business moves applies, *inter alia*, to the business moves of the collaborators following the results of the contact with the public authority, be it as it may;

(4) In the contact of a trade association with a governmental authority the association must represent in good faith the interests of its members. It is hereby clarified that when the position of a trade association is dictated, in fact, by another dealer or some of the dealer in the sector and its main purpose or result is to serve the interests of such dealer or dealers and not of the entire sector, however, it is presented as promoting the interest of the entire sector, this type of contact may constitute interference in the independent discretion of the association member the interest of which is not being served by such decision and may even be against their business interest;

(5) In order to prevent an apprehension of violation of the law, a trade association or the collaborators in the contact will take extra care in the coordination of the actions of the members of the association or the collaborators in the contact in connection with the subject of the contact with the governmental authority. The association, or the collaborators in the contact, by themselves or via a third party, including it attorney or a lobbyists on its behalf, will not order, will not declare, will not offer and will not recommend to agents in the sector to take any kind of coordinated business action whatsoever, including

applying pressure or attempting to convince the governmental authority or in order to prepare for the decision of the authority in connection with such contact with it and will not determine or recommend the interpretation of applicable law and the regulatory guidelines in a manner that might impair competition.

(6) The association or any of its members or any of the collaborators in the contact will not authorize a third party, including its attorney, a professional consultant or a lobbyist to decide for members in the association, or for the collaborators in the contact, to recommend or to advise them to take certain action or adopt a policy or to refrain from taking action or from adopting a policy, that if such existed among competitors would amount to a restrictive arrangement, or to express in their name such a position.

(7) The association or any of its members or the collaborators in the contact, will not contact, jointly or by way of a representative, a supervising authority on prices or on other aspects of the business activity, wherein the relevant parameters for such supervision are not completely identical for the various competitors.

39. The provisions of section 38 will apply mutatis mutandis, notwithstanding the representation of the sector with public bodies that are not governmental authorities and in the media.

(e) Terms and conditions of membership in the association

40. When membership in the association grants access to an asset, information or a service that may have material impact on the competitive capabilities of a dealer, or that may grant access to significant economic activity or to significantly facilitate such access, not admitting it to the association or terminating its membership in it may block or limit its ability to compete in the sector and thereby prevent or reduce the competition in the business and even might amount to a ban.³¹
41. If the membership in the association grants access to an asset, to information or a service that may have significant impact of the competitive capabilities of a dealer or that may significantly facilitate such access to an asset or a service or the ability to use it (including when the association has control over the supply of the asset or the service or its operation, or when the association has a part in

31. BELLAMY & CHILD, EUROPEAN UNION LAW OF COMPETITION 386 (7th ed. 2013); AMERICAN BAR ASSOCIATION (ABA), SECTION OF ANTITRUST, ANTITRUST AND ASSOCIATIONS HANDBOOK 63 (2009).

such asset or service or in the provider of such service, or when it has an impact on the access or the ability to use such asset or service), the association will ensure the fulfillment of the following provisions pertaining to determining the terms and conditions of membership in such association and its termination:

- (1) The terms and conditions of membership in a trade association will be equal, clear and based upon objective standards, pursuant to the purposes of the trade association. The association will not determine terms and conditions of membership that are disproportional or unreasonable that unnecessarily restrict the membership in an association of dealers in the sector, such as membership fees, tenure of activity or financial resilience, that are unreasonable taking into consideration the activity of the association and its purposes.
- (2) The association will not condition the membership of a person in a trade association on approval or consent of the association members, or any part of them, or the approval or consent of the office holders in the association, provided, however, that the applicant for association membership complied with the terms and conditions of membership that comply with the provisions set forth in subsection (1) herein above;
- (3) An objective and independent instance exists (including a judicial instance), authorized to discuss the resolutions of the association in the matter of rejecting an application for membership in the association; termination of membership or suspension of membership, or stipulating conditions for membership, payments and fines that are related to membership or to termination of membership. This instance will be accessible to each association member and to each person that wishes to become an association member.

(f) Professional conferences, trade fairs, exhibitions and other trade arenas

42. Conferences, trade fairs, exhibitions and other trade arenas gather together various agents acting in the sector, suppliers and consumers in fact and potentially and provide them with means of exposure and presentation of new products. These events may have great significance in the promotion of the sector, however, naturally, they raise competitive apprehension that characterize a joint table of competitors, that we discuss in chapter D(a) herein above and therefore the guidelines set forth in sections 23-25 herein above will apply to them mutatis mutandis. These guidelines will apply to social events in which competitors take part as well.
43. The provisions set forth in section 40 will apply to a trade association that initiates, organizes, manages or sponsors a professional conference, trade fair, exhibition or a similar trade arena that may have significant impact of the

competitive capabilities of a dealer or that may give access to significant economic activity or significantly facilitate such access, mutatis mutandis, as well as to the initiation, organization, sponsorship or assistance to events or social events that bring competitors together. This, taking into account the circumstances of the case including the nature of the event, the existence of other similar events, the level of exposure or activity that participation in the conference may generate in relation to the entire activity of the sector and so forth.

(g) Self-regulation and standardization

44. Trade associations may be involved in the regulation of the activity of the sector including the determination of ethical standards and professional conduct procedures, involvement in professional standardization (standards, professional standards and uniform professional terminology) and the supervision and enforcement mechanisms relating to them. Similarly, trade associations may participate in the labeling of products or services pursuant to certain criteria, or specific quality standards, that are related to the field of activity or business of the sector. This activity by a trade association may take place pursuant to authorization in applicable law or by a competent authority or voluntarily.
45. The involvement of a trade association in the field of self-regulation and standardization may be beneficial to the sector as well as the general public, whereas its knowledge of the sector and its proficiency in the professional subject matter may significantly contribute to the regulation and whereas the dealers in the sector have real interest in the best professional regulation and an incentive to invest in it. Nevertheless, the activities of a trade association in these fields may be tainted by a principal - agent problem and by apprehension of impairment of competition. The regulation of the rules of conduct and professional standards by the dealers in the sector, which have economic and other interests, that are not identical to the interest of the sector as a whole or those of the general public, may bring about impairment in competition, intentionally or ancillary to the furtherance of essentially legitimate interests.
46. Determining rules of professional conduct or standards, be it in the framework of a trade association or be it otherwise, may be used as a means to make the entry of new players or new products into the sector more difficult or bring about the removal of existing players or products from the market, to facilitate coordination, to bring about diminished competition on the quality of the product or the service and a diminished variety of products or services that are provided. It may also be used as a means of protection of coordination against the threat of entry of new players into the sector.³²
47. A trade association that wishes to act pursuant to applicable law in the field of self-regulation and standardization must conduct its activities in awareness of such apprehension.

³² See for example the analysis of the connection between the determination of a standard that protects the manufacturers of floor tiles and the existence of a cartel in the field of floor tiles by A. Cohen "Public Selection and Purposeful Interpretation" *Law and Government* 11(1), 317, 334 (2007).

(h) Joint ventures of a trade association

48. Trade associations may be involved in various types of business activities. Activities that are distinctively ancillary to the activity of the association which have negligible impact on the competition in the sector or among the competitors, such as procurement of office equipment for the purposes of the association, collecting reasonable membership fees or collecting payment to cover the cost of distinctive association activity, such as issuance of professional publications, do not, generally speaking, raise competitive interest. On the other hand, action pertaining to the heart of the business activity, such as joint marketing, joint procurement or R&D joint ventures will be inspected according to their essence in view of the law pertaining to joint ventures between to competitors.³³
49. Other activities of a trade association may constitute a restrictive arrangement pursuant to the circumstances of the case. A trade association must ensure that, taking into consideration the circumstances of the case, they do not constitute a restrictive arrangement, and alternatively to ensure that a restrictive arrangement is approved pursuant to applicable law.

g. Conclusion

50. The collaboration between competitors in a trade association, even though as a rule would not, *per se*, be deemed a restrictive arrangement, raises a series of apprehensions as to impairment of competition and may under certain circumstances result in prohibited restrictive arrangements. A trade association must conduct itself pursuant to rules of conduct that will minimize such apprehensions and move it and its members away from any violations of the law. These rules of conduct were discussed in this public statement.
51. A trade association that wishes to move away from a violation of the law will include in its articles of association or another document that establishes its conduct a provision which mandates to carry out the activities of the association in a manner consistent with antitrust law. A trade association must act reasonably to ensure as much as possible that its offices, institutions, ongoing activities and special activities, conferences and social events that it holds or that it sponsors will not be an arena for prohibited coordination among business owners or other restrictive arrangements and to bring to the knowledge of its members the rules of dos and don'ts in the conduct of the trade association and of its members.

33 See the decision of the General Director of the Antitrust Authority "Decision pursuant to section 14 of the Antitrust Law, 5948 - 1988 as to granting an exemption from approval of a restrictive arrangement between Kamea for the Representation of Retailers in Israel Ltd. and its members **Antitrust 5000131 (18.2.2008) Decision in the matter of Restrictive arrangement in the Field of Dental Health Care, herein above note 5**; M. Mizrahi "Joint Venture as a Restrictive Arrangement" **Mishpatim 23 213 (5954)**.

Prof. David Giloh

General Director of the Antitrust Authority

Jerusalem, 9 of the month Elul 5974

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