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G-COMPETITION (13.8.13)

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Israel Antitrust Authority imposes restrictions on disclosure of information within the framework of a due diligence process

The Israeli Antitrust Authority issued a proposed Opinion Statement for which it is soliciting public comments, regarding the disclosure of information to a competitor as part of the due diligence process of a proposed transaction between such competitors.

In its proposed Opinion Statement, the Authority expresses the unprecedented opinion that the transfer of competitively sensitive information (such as prices, price lists, costs of product, competitive strategies, market share, business plans, etc.), to a competitor, as part of due diligence, may be considered under certain conditions, as a "restrictive arrangement" under the Israeli Antitrust Law, and in extreme cases, may even be deemed as an execution of a merger without the permission of the antitrust commissioner. The proposed Opinion Statement specifies certain criteria according to which the competitive concerns shall be examined, including the quality of the information disclosed in the due diligence, the process of disclosure and the level of competition in the relevant market.

To avoid the risk of breaching antitrust law provisions, the Authority suggests, in its Opinion Statement, the following cautionary steps that the parties to such a due diligence process should adhere to:

1. Competitively sensitive information shall only be disclosed if it is essential for the due diligence process, after taking into consideration the current stage of negotiations of the deal.
2. The disclosure of information shall be subject to signing a Non-Disclosure Agreement by the parties receiving the information.
3. If possible, the disclosure shall contain only "high-level" information ("from a bird's eye").
4. It is preferable that the information disclosed shall not be the most recent, up-to-date, information available.
5. It is preferable that the person reviewing the sensitive information will be an independent third party, rather than a party to the transaction, such as a CPA, attorney, consultant, etc.). The third party shall deliver his findings at the "bottom line" level only.
6. When the need arises, the party receiving the information, may assign for the due diligence task, employees that are not involved in the pricing/marketing/sales of competitive products. These

employees should sign a confidentiality agreement and deliver their findings at the "bottom line" level only.

7. If the above solutions are inapplicable or unsatisfactory, the party receiving the information should establish a "clean team" of employees (including those employed in pricing and marketing), which, subsequent to their exposure to the sensitive data, will be precluded, for a sufficient period of time, from making decisions in areas related to the sensitive data provided to them.

Of course, these proposed rules are guidelines only, and it is the responsibility of the parties to the due diligence to make sure they took all necessary precautions to prevent competitive concerns.

Please note that this document is a summary only, and is not a substitute for reading the proposed Opinion Statement, or for obtaining legal advice.

We will be happy to answer any questions or provide clarifications, **G-COMPETITION** members:

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