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ISRAEL *and* INTERNATIONAL LAW

EU policy on labelling of products from the "occupied Palestinian territories"

LEGAL BRIEFING

PREPARED FOR ISRAEL ALLIES FOUNDATION

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Conclusions

The European Commission and Court of Justice consider that importers must use mandatory origin labelling on products from territories that the European Union considers as "occupied" by Israel. They also consider that labels must indicate if a product is from an "Israeli settlement".

By confronting consumers within Member States with the EU's non-recognition policy (of Israel's sovereignty over territories beyond the Green Line), the EU is 'policitizing' national food labelling information laws. There are several legal and policy problems with this approach, including -

a. the approach of the Commission and Court politicizes consumer protection law. This conflicts with the purposes of the Regulaiton (consumer protection), and is not allowed under the Regulation, as Member states may only mandate indication of origin or provenance if this is linked to the quality of the food;
b. the statements by the Commission and ECJ that Area C does not belong to the territory of Israel is based on a discriminatory and incorrect interpretation of international law that undermines Israel's sovereignty; it also conflicts with the UN-endorsed peace process, interferes with good faith negotiations under the Oslo Accords, to which the EU is a witness;
c. the Commission's and ECJ's selective focus only on Israel, and Israeli "settlements", is discriminatory;
d. Regulation 1169/2011 requires product information to include EITHER "country of origin" OR "place of provenance" – not both. Regulation 1169/2011 cannot be interpreted as obliging an importer to state both the country of origin and the place of provenance of a product;
e. moreover, the requirement to indicate that a product comes from a settlement opens up a "slippery slope". By stating that consumers' purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question come from geographical places established in breach of the rules of international humanitarian law, the Court has introduced an interpretation of the Regulation that is unprecedented, unclear and impossible to administer;
f. even if origin and provenance may be mandated, the correct description of the country of origin of products made outside the Green Line is to be determined by national authorities, by examining "the presumed expectation in respect of that labelling which a reasonably well-informed and reasonably observant and circumspect average consumer would have as to the origin, provenance and quality of the foodstuff";
g. there is no evidence supporting the ECJ's assertion that European consumers want to be informed about whether a product comes from a place that has been established in breach of international law; in any event, the questions of whether the ethical considerations of an average consumer in a particular Member State includes "Israeli settlements", or whether such a consumer is liable to be misled by particular product information, are questions of fact to be

determined by the relevant national authority; the executive and judicial branches of the European Union cannot determine this;

h. by interpreting “Israeli settlements” as a geographic “place of provenance”, the Commission and Court are effectively imposing an apartheid policy: because the distinction is based not on objective description of a geographic location but on the national identity of the persons living in that location (“Israeli” or “Palestinian”).

EU member states are not obliged to implement the Commission’s Notice. The ECJ ruling in Psagot also has limited application.

Member states have several legal arguments and policy tools available to push back against this politicization of EU consumer protection legislation - at the EU level; and at the national level.

1. Introduction

There is some confusion about the source, status and effect of the rules applicable in Europe to the labelling of food products from outside the Green Line. This is in part because they are contained in several different instruments, each having a different status; and in part because these instruments confuse EU foreign policy with EU rules on consumer protection.

This Briefing analyzes the regulatory framework in Europe governing the labelling of imported food products, and the specific interpretation of these norms developed by the European Commission ("Commission") and European Court of Justice ("ECJ") concerning products produced outside the 1949 Armistice Lines (Green Line). We will also consider current Dutch litigation on this issue.

The relevant regulatory instrument is Regulation of the EU Parliament and Council 1169/2011 (2011). This Regulation has been given a specific Israel-focused interpretation by the European Commission (Interpretative Notice of the European Commission 2015/C 375/05 (2015)) and the European Court of Justice (Preliminary Ruling of the European Court of Justice in the *Psagot* case (2019)).

This Briefing offers a critique of the Israel-focused approach adopted by the European Commission and Court of Justice, and makes suggestions about measures that could be adopted to counter them.

2. Background: the EU's "two states" policy

The EU rules on labelling of food products are governed by Regulation 1169/2011 ("the Regulation"), the purpose of which is "to achieve a high level of health protection for consumers and to guarantee their right to information." The principle in the regulation, on which the labelling requirements are based, is that consumers should not be "misled" by incorrect or false information. The Regulation includes provisions concerning information on products designed to ensure that consumers are not misled about the "country of origin" or "place of provenance" of the products. The Regulation lays down generic rules; it says nothing specifically about products imported from Israel or from occupied territories.

In response to pressure by certain parties arguing for boycotts, divestment and sanctions (BDS) against Israel, in 2015 the European Commission published its Interpretative Notice. This Notice can be seen as part of a set of policy tools used by the European Union to implement its "two-states" policy towards the Israel-Palestine conflict. Under that policy, the EU Council is of the view that the only way of resolving this conflict is through the establishment of a Palestinian state based on the "1967 borders", and accordingly (a) Israel has no valid sovereignty claims to East Jerusalem, the West Bank, Gaza or Golan Heights, and (b) the establishment of a Palestinian state in the whole of the territories captured by Israel in June 1967 (which it calls the "occupied Palestinian territories") is required by law.

In its Notice, the Commission stated that in its opinion, because of the EU Council's non-recognition policy, the concepts of "country of origin" and "place of provenance" in the Regulation should be interpreted as meaning that:

a. the information on goods imported from outside the Green Line (i.e. West Bank/Judea and Samaria, East Jerusalem, Gaza and Golan Heights) may not suggest that the goods are "made in Israel"; and
b. if the goods originate from a so-called "Israeli settlement", the information on the goods must indicate that fact.

In 2019, the European Court of Justice (ECJ) took the same approach in the *Psagot* case, although based on slightly different reasoning (see further below).

Both the Commission and the ECJ based their analysis on the EU Council's foreign policy "parameters" towards the Israel-Palestine conflict. Since the 1970's, the European political leadership (now the EU Council and Commission) has adopted the policy that the Israel-Palestine conflict can only be solved by the establishment of a Palestinian state based on the "pre-1967 borders" with East Jerusalem as its capital. That policy has its origin in the Council's decisions immediately after the Yom Kippur War (October 1973) and was confirmed in the 1980 Venice Declaration. The objective was to placate Arab states that imposed oil embargoes on European countries sympathetic to Israel. Since around 2000, the Council has argued that not only is a Palestinian state desirable, international law requires the establishment of that state. The Council relies on three main legal arguments:

- Israel has no sovereignty in these territories;
- Israel is a "mere occupying power" in the territories captured in June 1967; and
- the Palestinians have a legal right to a state in all of these territories.[1]

It is relevant to note that, in adopting this policy, the Council ignores the Oslo Accords, and interprets and applies international law to the Palestinian-Israeli conflict differently from the way it interprets and applies international law in other comparable situations. In other words, the EU discriminates against the Jewish state, and undermines Israel's position under the Oslo Accords and international law generally.

The EU applies its "two states" policy through a range of implementation instruments. One of those is the EU financing of the Palestinian Authority (PA) and other Palestinian institutions. Another is the EU's collaboration with the PA to advance Palestinian control over Area C of the West Bank/Judaea and Samaria that are legally under Israeli civil jurisdiction, i.a. by illegally building Palestinian settlements/villages there. A third instrument is EU consumer protection law, which is the subject of this Briefing.

The net result is that the EU Commission and the ECJ interpret the Regulation's generic EU consumer protection rules in light of the EU's foreign policy towards a specific conflict – a policy that has nothing

[1] See for a more detailed analysis of these issues: W. Bock, G. Rose and A. Tucker, *Two States for Two Peoples?* Sallux, 2023.

to do with consumer protection or the quality of food, and is based moreover on a selective and discriminatory interpretation of international law.

3. EU Regulation 1169/2011

The EU food product labelling requirements are contained in *Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011* ('Regulation 1169/2011") on the provision of food information to consumers. The purpose of the Regulation is "to allow consumers to make informed choices and to make safe use of food, while at the same time to ensure the free movement of legally produced and marketed food." (see *EC Notice 2018/C 196/01*).[2] The Preamble states –

> "… (3) In order to achieve a high level of health protection for consumers and to guarantee their right to information, it should be ensured that consumers are appropriately informed as regards the food they consume. Consumers' choices can be influenced by, inter alia, health, economic, environmental, social and ethical considerations; …."

According to the Regulation (Preamble (29)), "it is a general principle of food law to provide a basis for consumers to make informed choices in relation to food they consume and to prevent any practices that may mislead the consumer."

In Article 2(2) –

> (a) food information' means information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication; …
>
> (g) 'place of provenance' means any place where a food is indicated to come from, and that is not the 'country of origin' …; the name, business name or address of the food business operator on the label shall not constitute an indication of the country of origin or place of provenance of food within the meaning of this Regulation; …
>
> (i) 'label' means any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed on, or attached to the packaging or container of food;

The key provision is Article 7(1)(a) that provides that "Food information shall not be misleading, particularly:

> (a) as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production; …"

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2018:196:FULL&from=EN

The “country of origin”, in accordance with Articles 23-26, is the country where the food was produced or, if it was produced in more than one country, the country where the last substantial processing took place.

Article 26(2) provides that the indication of the “country of origin or place of provenance” is only mandatory if its omission could mislead the consumer as to the true “country of origin or place of provenance” of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance.

Regulation has direct effect as law in EU Member States.

4. Interpretation of the Regulation by the Commission, the ECJ and Dutch courts

The Commission’s Interpretative Notice (2015)

On 12 November 2015, the European Commission published “Interpretative Notice” 2015/C 375/05 (“Notice”). The Notice is directed to the Member States. The main purpose of the Notice is to implement the EU Council’s policy of non-recognition of Israel’s sovereignty over territories outside the Green Line -

> (1) The European Union, in line with international law, does not recognise Israel’s sovereignty over the territories occupied by Israel since June 1967, namely the Golan Heights, the Gaza Strip and the West Bank, including East Jerusalem, and does not consider them to be part of Israel’s territory, irrespective of their legal status under domestic Israeli law. The Union has made it clear that it will not recognise any changes to pre-1967 borders, other than those agreed by the parties to the Middle East Peace Process (MEPP).

According to the European Commission the Notice was issued in order to “clarify” to consumers, market players and national authorities how EU legislation concerning the indication of origin (e.g., Regulation 1169/2011) applies to products “from Israeli-occupied territories”.

> (2) The application of existing Union legislation on indication of origin of products to products originating in Israeli-occupied territories has been the subject of notices or guidance adopted by the relevant authorities of several Member States. There is indeed a demand for clarity from consumers, economic operators and national authorities about existing Union legislation on origin information of products from Israeli-occupied territories. The aim is also to ensure the respect of Union positions and commitments in conformity with international law on the non-recognition by the Union of Israel’s sovereignty over the territories occupied by Israel since June 1967. This notice also aims at maintaining open and smooth trade, is not hindering trade flows and should not be construed to do so.

The main operative provisions of the Notice are:

> (7) Since the Golan Heights and the West Bank (including East Jerusalem) are not part of the Israeli territory according to international law, the indication ‘product from Israel’ is considered to be incorrect and misleading in the sense of the referenced legislation.

(8) To the extent that the indication of the origin is mandatory, another expression will have to be used, which takes into account how these territories are often known.

(9) For products from Palestine that do not originate from settlements, an indication which does not mislead about the geographical origin, while corresponding to international practice, could be 'product from the West Bank (Palestinian product)', 'product from Gaza' or 'product from Palestine'.

(10) For products from the West Bank or the Golan Heights that originate from settlements, an indication limited to 'product from the Golan Heights' or 'product from the West Bank' would not be acceptable. Even if they would designate the wider area or territory from which the product originates, the omission of the additional geographical information that the product comes from Israeli settlements would mislead the consumer as to the true origin of the product. In such cases the expression 'Israeli settlement' or equivalent needs to be added, in brackets, for example. Therefore, expressions such as 'product from the Golan Heights (Israeli settlement)' or 'product from the West Bank (Israeli settlement)' could be used.

The Interpretative Notice is a guidance document – it is not a juridical instrument that can be considered as "hard-law legislation". Such a guidance document is better qualified as "soft law", meaning that its a document that its non-binding and cannot create any legal obligations to Member States in itself. The Notice only has binding effect in a Member State if the legislation in that specific country implements the Notice. Thus, it remains that the national institutions in the EU Member States are responsible for implementation of the Regulation. The Notice was incorporated into French legislation. As we are aware, the Notice has not been implemented in the legislation of many Member States.

The Notice was the subject of much controversy in the Dutch Parliament since 2015. The then Foreign Minister Koenders, in response to questions in Parliament, answered that the Dutch government regards the Notice as being applicable in the Netherlands.[3] The Dutch Consumer Protection Authority (NVWA) is of the opinion that in interpreting and applying this provision, it is required to comply with the Notice.

The ECJ's *Psagot* Preliminary Ruling (2019)

The European Court of Justice (ECJ) issued on 12 November 2019 its judgment in the *Psagot Winery Case*[4] concerning the question how products imported into Europe from the "occupied Palestinian territories" should be labeled. The judgment was a preliminary ruling on questions posed to the Court by the highest court in France: the Conseil d'État (Council of State). The Council had been petitioned to annul French legislation implementing the Interpretative Notice.

The Council referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does EU law and in particular Regulation No 1169/2011, where indication of the origin of a product falling within the scope of that regulation is mandatory, require, for a product from a territory occupied by the State of Israel since 1967, an indication of that territory and an indication that the product comes from an Israeli settlement if that is the case?

[3] https://zoek.officielebekendmakingen.nl/ah-tk-20152016-947
[4] Organisation juive européenne and Vignoble Psagot Ltd, hereafter the Psagot judgment.

(2) If not, do the provisions of the regulation, in particular those in Chapter VI thereof, allow a Member State to require those indications?'

The ECJ ruled that, in order to ensure that European consumers are not misled about the provenance of imported products, *Regulation 1169/2011* should be interpreted to mean that "foodstuffs originating in a territory occupied by the State of Israel must bear not only the indication of that territory but also, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, the indication of that provenance."[5]

The ECJ used a remarkable chain of reasons to come to that view:

a. the concept of "place of provenance" in Article 26(2)(a) of *Regulation No 1169/2011* requires labels to state "the specific geographical area within the country or territory of origin of a foodstuff", which is not the country of origin;
b. "Israeli settlements", according to the ECJ, are a specific geographical area;
c. Israeli settlements always "give concrete expression to" Israel's settlement policies of population transfer;
d. All "Israeli settlements" are in "breach of article 49(6) Fourth Geneva Convention" (the prohibition on transfer or deportation of civilian population into occupied territory);
e. if a foodstuff from an Israeli settlement fails to mention that place of provenance, consumers "could be led to believe that it comes, in the case of the West Bank, from a Palestinian producer";
f. "consumers' purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question in the main proceedings come from settlements established in breach of the rules of international humanitarian law", and they therefore should be informed about such breaches; and
g. a "breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute fundamental rules of international law".

This line of reasoning questionable (see discussion below). Nevertheless, a preliminary ruling is to be regarded as binding in EU Member States. In practice, this means that the referring court is bound by an interpretation of a provision of European Union law given in a judgment, unless the referring court considers that the judgment is not clear or that it is necessary to reopen a question for a preliminary ruling. For both questions of interpretation and questions of validity, a judgment has (in effect) effect *erga omnes* (for the referring court concerned, as well as for judges and others such as institutions, national authorities and individuals faced with the same question) from the time of its delivery. The Court's ruling on interpretation and validity is in principle *ex tunc*. This implies that the rule must be so interpreted or held invalid from the moment the rule comes into force. The practical consequence of this is that the national authority or court cannot adopt a different interpretation of EU law, as a solution to a dispute. Nor can it disregard the Court's interpretation.

[5] See Para 55 of the Judgment.

However, a national court cannot - so to speak - merely quote or copy the relevant Court judgment from the preliminary ruling. The grounds and solution of the ECJ must be integrated into the decision of the national court. It is important to note that the judgement has limited effect:

- the ECJ only decided that, if the product comes from an Israeli settlement/village, it must "indicate that provenance";
- the ECJ did not say that the words "Israeli settlement" must be used;
- it did not prescribe the exact wording that must be used on the labels of such products;
- the ECJ also did not rely on, or confirm the validity of, the Interpretative Notice; rather, it decided that the Regulation (not the Notice) required such labeling.

The Dutch *IPC/NVWA* Case (2019 -)

The Dutch corporation *Israel Products Centre* (IPC) imports products from Israel, as well as some products produced outside the Green Line – including wines. BDS activists alerted the Dutch Food Safety Authority (NVWA) to this fact. Following an inspection on 11 April 2019, IPC received a written warning from the responsible Minister on 27 May 2019. During that inspection, IPC had been found to be selling wines from beyond the Green Line on which "Israel" was listed as the country of origin on the label. According to the minister, that indication was in violation of the provisions of Article 7(1)(a) of EU *Reg. 1169/2011*, which is a violation of Article 2(6) of the Dutch *Commodities Act Decree on Food Information*.

Following the ECJ's *Psagot* judgment of 12 November 2019, IPC put a new sticker "Product from an Israeli village in Judea & Samaria" over the labels on all wines produced in the West Bank, to replace the original label "Product of Israel".

The BDS activists were not content with this, and on 10 July 2020, two NVWA supervisors carried out a (re)inspection at IPC's premises. The supervisors found that IPC sold four wines produced near Hebron, on which the sticker "Product from an Israeli village in Judea & Samaria" was affixed. The supervisors decided that the designation of origin "Israel" or "Israeli village in Judea & Samaria" is misleading as to the country of origin or place of provenance of the foodstuff.

Suspecting that a the NVWA's decisions might be influenced by political considerations, in July 2020 IPC submitted a request for disclosure of information under the Government Information (Public Access) Act ("Wob") to NVWA, requesting disclosure of documents relating to the decision and to any political and administrative consultations that may have taken place between the NVWA and the Minister of Foreign Affairs. The NVWA took a long time to respond. Eventually, documents were released that suggest that the Dutch Minister of Foreign Affairs was involved in influencing the NVWA to use its powers to ensure that the Commission's Notice be applied.

On 16 October 2020, the minister announced his intention to impose an administrative fine on the applicant totaling €2,100 (four times €525) for misleading information regarding the country of origin or place of provenance of the four wines. IPC requested that the decision be stayed until its Wob request

was decided. The minister rejected this request and issued the penalty decision on 8 April 2021. The IPC lodged an objection with the NVWA.

Shortly before the objection hearing on 7 October 2021 the applicant's Wob request was decided on and the applicant was given access to a number of disclosed documents. These redacted NVWA documents did not reveal new information to the IPC but the delay in their provision delayed preparation of the objection.

In November 2022 the Minister upheld the administrative fine. IPC appealed this decision to the Rotterdam Administrative Appeals Court. In its decision on 21 March 2023, the Court upheld the lawfulness and proportionality of the administrative fine imposed on IPC, and rejected all of IPC's grounds of appeal. The Dutch court's reasoning was brief, unquestioningly assuming as facts and laws all positions and policies of the EU. It considered IPC's label to be misleading, but did not specify what label would not be misleading. The result is confusion. An appeal has been lodged.

5. Discussion

There are many problems with the complex and opaque set of rules.

Is it mandatory to state the country of origin or place of provenance?

The EU's flawed interpretation of international law

The underlying problem is the flawed approach to international law in its "two states" policy. The ECJ judgment basically follows (without further analysis) EU Council policy that discriminates against one specific case among many cases of "occupation" in the world and subjects it to condemnation. That is morally unfair, and it is an illegal breach of Israel's right to be treated equally. These ECJ's conclusions reflect an incomplete, imbalanced and distorted view of the history of these territories and of Israeli policy, as well as a fundamental misinterpretation of international law.

Status of the territories and the "pre-1967 lines"

The ECJ reasons that "under the rules of international humanitarian law, these territories are subject to a limited jurisdiction of the State of Israel, as an occupying power, while each territory has its own international status distinct from that of that State." Further, citing the International Court of Justice Advisory Opinion in the *Wall Case* (2004), the Court states that "the West Bank is a territory whose people, namely the Palestinian people, enjoy the right to self-determination." All of this means, according to the Court, that these territories are not "in Israel", and therefore an indication that the producst is "made in Israel" would be "liable to deceive consumers."

These statements are simply wrong or at best misleading. The International Court of Justice did not decide in 2004 that the territory outside the Green Line does not belong to the State of Israel.

(a) Even if the territories captured in 1967 are "occupied" within the meaning of the law of belligerent occupation (debatable), and even if the Palestinians have a right to self-

determination in the whole of those territories (debatable), this does not necessarily mean they are part of "Palestine", or that they are not and cannot be part of the State of Israel. The law of occupation does not determine the sovereign status of a territory. The law of occupation simply imposes certain obligations and prohibitions on the occupying power, pending the finalization of a peace treaty to resolve the dispute. It is quite possible under international law for territory to be both "occupied" and "disputed". Both Israel and the Palestinians make claims to these territories. Those claims are to be settled through negotiations, as agreed in the Oslo Accords. It is not the prerogative of the European Court of Justice to make a determination on this.

(b) There are very strong arguments that some of, if not all, the territories captured in 1967 already belonged to the territory of Israel, based on the Mandate for Palestine (1922), and preserved under the Oslo Accords (1993-1995). In brief: the State of Israel emerged in May 1948 as a result of the Mandate for Palestine (1922), the core purpose of which was the creation of a 'Jewish homeland in Palestine'. The Mandate conferred on the Jewish people the right to settle in the territory of Palestine – which included all territory west and some of the territory east of the Jordan River. It was undoubtedly intended that Jews should have a right to live in what is now known as East Jerusalem and the West Bank. After termination of the Mandate, and pending the establishment of a Trusteeship (which, in the case of Palestine, never happened, as Arab authorities rejected it), Article 80 of the UN Charter expressly preserved the pre-existing rights of the Jewish people under the Mandate.

When Israel was created on 14th May 1948, upon the termination of the Mandate, its borders were arguably – on the basis of the principle of *uti possidetis juris* – the pre-existing administrative boundaries under the Mandate – in accordance with the same principle that has determined the borders of all other States emerging out of Mandates such as Iraq, Syria and Lebanon, as well as many other states in the world.

Jordan (with other Arab states) attacked the State of Israel on the day of its birth, 15th May 1948, resulting in Jordan's control of East Jerusalem and the West Bank until 1967. This attack was clearly illegal and could not have resulted in Jordan acquiring any territorial sovereignty over these territories. So, when Jordan 'abandoned' its claims to East Jerusalem and the West Bank in 1988, it could not confer on the Palestinians more rights than it itself possessed.

(c) Further, it is simply not true that the Palestinian people have an international legal "right" to statehood in all of the West Bank and East Jerusalem territories captured by Israel in 1967. On the contrary, international law requires that the right to self-determination cannot infringe the territorial integrity or security of neighboring states. The territorial scope of their right to self-determination is precisely one of the topics of negotiation under the Oslo agreements. In the Oslo Accords, the PLO itself agreed to a process for achieving self-determination, in which it agreed (Article V, Oslo I) that issues like borders, settlements and Jerusalem would be the subject of permanent status negotiations. In other words, the parties themselves agreed that

the status of these territories is under negotiation, and at least some of these territories could in fact be part of the territory of the State of Israel.

The ECJ simply had no jurisdiction to make a determination in which parts of these territories do not belong to Israel. The most it should have done is conclude that the status of the territories is disputed. The judgment conflicts with the complex matrix of rights and obligations agreed between two parties (Israel and the PLO) under the Oslo Accords, and with the framework based on UNSC Resolution 242 that has been accepted by the international community, in which the status of the territories is disputed, and Israel is entitled to secure and recognized borders.

Are "Israeli settlements" an expression of illegal Israeli policies?

According to the ECJ, any product that "comes from an Israeli settlement located in one of those territories" must indicate the fact that they are illegal. The Court opines that the settlements established in some of the territories occupied by the State of Israel are characterized by the fact that they give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of general international humanitarian law. The Court's reasoning is incorrect and inappropriate.

The territories are not "occupied" in the legal terms of the Fourth Geneva Convention (even though people seem to think they are, despite the lack of a prior recognized sovereign), and it is not correct that all Israeli persons or businesses operating in these territories are illegal. This cannot be correct, because under the law of belligerent occupation, it is only an Israeli policy to 'transfer or deport' Israeli civilians into those territories that could be said to be illegal (article 49(6) Fourth Geneva Convention). A particular settlement can only be regarded as the product of such a policy if it can be shown that the Israeli person or company concerned is living/working/residing in the occupied territory as a result of an Israeli policy to transfer or deport that person into the occupied territories. The fact is that many Jews, Christians and Israelis, living in these territories are doing so voluntarily. Israel did not compel anybody to establish wineries in Judea or Samaria. At best, the government allowed the wineries to be established. The mere granting of government approval cannot be regarded as 'deportation' or 'transfer' and thus is not sufficient to bring the government's actions within the purview of Article 49(6) FGC.

When is a description of country of origin or place of provenance "misleading"?

The EU Regulation requires that labelling must not be "misleading". According to EU case-law that whether in any case a specific label is misleading is a question of fact to be determined by the Courts, not the legislative branch nor executive branch. And in the system of cooperation between the EU Court and national courts provided by the TFEU (and previous Treaties), it is for the national court to find the facts in the case before it, with power to refer questions of interpretation of legislation to the EU Court where necessary to reach a decision.

Neither the European Commission nor the European Court of Justice has the authority to determine (a) what the expectations are of an average consumer in the different member states, or (b) whether a specific label is likely to mislead the consumer to make a transaction that he/she would otherwise not make. That is the job of the national courts. It is therefore illegitimate for a national government or court to refuse to interrogate the facts in the case before it, or to interpret legislation before it. The NVWA, Awb and Rotterdam Administrative Appeals Court each "hide behind" the EU Notice and the *Psagot* judgment, treating them as if they were mandatory and prescriptive.

In assessing whether a labelling could be misleading to a purchaser, the ECJ ruled in *Teekanne* (2015) that 'the main point to be taken into account is the probable expectation in respect of that labelling which a reasonably well-informed and reasonably observant and circumspect average consumer would have as to the origin, provenance and quality of the foodstuff.'[6]

Another important ECJ case[7] that touches on the concept of ' average consumer' and ' deception' states, inter alia, the following:

> 57 As explained in paragraph 39 of the present judgment, it is for the national court to assess whether the commercial practices in question are misleading from the perception of the average - that is, reasonably informed, circumspect and observant - consumer, taking into account social, cultural and linguistic factors.
>
> 58 The national court must therefore assess - in accordance with Article 7(1) to (4)(c) of Directive 2005/29, taking into account the factual context of the commercial practice at issue, the medium of communication used and, in particular, the limitations inherent in the latter, as well as the nature and characteristics of the product in question - on a case-by-case basis whether the omission of essential information, such as the price, caused or was likely to cause the consumer to take a transactional decision that he would not otherwise have taken (see, to this effect, judgment of 12 May 2011, Ving Sverige, C-122/10, EU: C:2011:299, paragraphs 52, 53 and 58).

In this area, it is important to note that Regulation 1169/2011 specifies the general principles on unfair commercial practices set out in Directive 2005/29. These two frameworks are thus consistent with each other. There should be no light between the interpretation of the concept of "average consumer" in the two contexts. It follows from Directive 2006/29 that if a commercial practice is directed at a particular group of consumers - for example children - the impact of the commercial practice should be assessed from the perspective of the average member of that group (recital 18 and Article 5(2b)). The European Commission's guideline on the interpretation and application of Directive 2005/29/EC states the following about this:

> 'This may be the case, for example, where a commercial practice concerns a unique product, which is advertised through marketing channels to target marketing to a specific and limited

[6] See: CJEU 4 June 2015, C-195/14, ECLI:EU:C:2015:361 (Teekanne), para 36.
[7] ECJ EU 26 October 2016, C-611/14, ECLI:EU:C:2016:800 (Canal Digital), para 50 ev.

> group of recipients, such as a particular professional group. In this case, the average member of that particular group may have more specific knowledge or characteristics that an average consumer does not necessarily have, which directly affects the assessment of the impact of the commercial practice. Given the distinction from the general category of the average consumer, the "particular group of consumers" must be sufficiently identifiable, of limited size and homogeneous. If a particular group is not identifiable, the general measure of the average consumer should be central to the assessment."
>
> "It is also possible that the same commercial practice may concern different consumer groups. For example, the practice may reach or be directed at an average consumer (Article 5(1)(b)), and at the same time the practice may be directed at a group of vulnerable consumers. In general, the assessment should take into account the consumers the practice actually reaches, regardless of whether they are the consumers the trader intended to reach."

Article 7(1)(a) of Regulation No 1169/2011 states that, in particular, food information must not be misleading "especially as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance." With regard to this "misleading standard", it can be considered that it is an "open standard" or "a vague standard", which leaves the addressee to decide "in what way it is to be interpreted", provided that the result is in accordance with the standard. Because the standard in this regulation is open to multiple interpretations by the regulator, in practice this can lead to disagreements on its interpretation between the relevant authority and the person being supervised.

In assessing whether a labelling could be misleading to a purchaser, the Court ruled in the *Teekanne* judgment that 'the main point to be considered is the presumed expectation in respect of that labelling which a reasonably well-informed and reasonably observant and circumspect average consumer would have as to the origin, provenance and quality of the foodstuff. According to the Court, an authority must take into account the factual context of the commercial practice in question when assessing whether it is misleading.[8]

Given the concept of 'the average consumer', case law in other countries is also relevant. For example, in 2014, the highest court in the UK ruled that when purchasing goods from occupied territory bearing the origin marking 'Israel', an average consumer would not act differently in the event of different labelling. The court referred to the consideration of a lower court for its ruling on this, which stated,

> "Whether or not the information given is false…I consider that the number of people whose decision whether or not to buy a supposedly Israeli product would be influenced by knowledge of its true provenance would fall far below the number required for them to be considered as the 'average consumer'. If a potential purchaser is someone who is willing to buy Israeli goods at all, he or she would be in a very small category if that decision were different because the goods came from illegally occupied territory."[9]

[8] CJEU 26 October 2016, C-611/14, ECLI:EU:C:2016:800 (Canal Digital), para 54.
[9] Richardson v. Director of Public Prosecutions, [2014] UKSC 8.

Similar to this is a ruling by a French court in which it ruled in respect of a similar indication of origin that it was neither misleading nor likely to mislead an average consumer.[10]

Must labels use the terms "West Bank" or "Palestine"?

The question arises how the "country of origin" of products originating outside the Green Line must be described. Must labels state that the products are from the "West Bank" or "Palestine"?

The Interpretative Notice states:

> (9) For products from Palestine that do not originate from settlements, an indication which does not mislead about the geographical origin, while corresponding to international practice, could be 'product from the West Bank (Palestinian product)', 'product from Gaza' or 'product from Palestine'.

The Commission does not actually require the words "West Bank" or "Palestine" to be used. In any event, the Commission is not in a position to determine what the perception is of an "average consumer" in any specific Member State, or what he/she experiences as misleading. That is a matter for the national authorities.

Arguably, use of the term "Palestine" would be itself be misleading, because it may suggest that an independent state of "Palestine" exists; which is not the case. In any event, Area C cannot be qualified as part of "Palestine", because under the Oslo Accords Area C is currently under Israeli control, and the status of Area C is the subject of dispute and negotiatation.

Neither does the ECJ specify what term should be used. The Court simply says that the information may not indicate that the products are made in Israel, and the consumer "is informed that those foodstuffs do not originate in that State".

The result is that a national authority must determine what are the expectations of "an average consumer who is reasonably well-informed and reasonably observant and circumspect."[11]

Not permissible to link "settlements" and "quality of food"

Member States may only oblige importers to state the origin or provenance of a product if there is evidence that that origin affects the quality of the food. In other words, it is not permissible to require labels to include information that is not related to the quality of the food.

Article 39 of the Regulation makes clear that this is not permissible:

> *National measures on additional mandatory particulars*
>
> 1. In addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States may, in accordance with the procedure laid down in Article 45, adopt

[10] Tribunal de Grande Instance (TGI), Paris, 4 ch., 2d sec., Jan. 23, 2014, No. 13/06023, para 6.
[11] See *Gut Springenheide*

measures requiring additional mandatory particulars for specific types or categories of foods, justified on grounds of at least one of the following:

1. (a) the protection of public health;
2. (b) the protection of consumers;
3. (c) the prevention of fraud;
4. (d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition.

2. By means of paragraph 1, Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods **only where there is a proven link between certain qualities of the food and its origin or provenance.** When notifying such measures to the Commission, Member States shall provide evidence that the majority of consumers attach significant value to the provision of that information.[12]

Clearly, the fact that a product comes from a "settlement" has nothing to do with the quality of the product.

The requirement to specify "Israeli settlements" as "place of provenance" cannot be derived from the Regulation

But in any event, the question is not what specific term the Commission thinks appropriate, but what an average well-informed consumer expects. The concept of "place of provenance" refers to a geographic location, not the nationality of the inhabitants or their political status. As long as the consumer is informed about where the product comes from, that is sufficient to satisfy the requirements of the Regulation, without a description of the producers' nationality or religion.

In the ECJ *Psagot* judgment, the Court introduced a new concept:

> "the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute fundamental rules of international law (Advisory Opinion of the International Court of Justice of 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, p. 136, paragraphs 155 to 159)."

This extremely unclear misjudgment opens a pandora's box. This politicization of EU consumer protection law is a "slippery slope" which raises many unanswered questions:

- On what basis does the Court come to the conclusion that "consumers' purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question in the main proceedings come from settlements established in breach of the rules of international humanitarian law"? Where is the evidence for that conclusion? The Court does not explain.

[12] Emphasis added.

- Which “breaches of the rules of international humanitarian law” are the subject of “ethical assessments capable of influencing consumers’ purchasing decisions”?
- How is a producer or importer to know what are the expectations of consumers in this regard?
- Are importers now required to specify on the labels of products ALL potential breaches of international humanitarian law?
- What does the Court mean by “may be informed”? Is the producer/importer to guess what consumers may or may not be influenced by? Are consumers in The Netherlands, for example, more likely to be affected by alleged breaches of international law by China, than by breaches by Israel?

Discrimination

This leads to the next problem. Why does the Court limit its decision to breaches of international law by Israel? Both the Commission and the Court are imposing a requirement in relation to one specific situation (Israel/Palestine) that it does not apply to other comparable situations. Comparable situations of disputed territory alleged by one of the parties to be illegally occupied by the other but that are not subject to comparable EU regulatory oversight, include inter-alia, Armenia, Australia, Azerbaijan, China, Cyprus, Georgia, Indonesia, Morocco, Myanmar, Nigeria, Spain, Syria, Turkey, and the United Kingdom.

Any national institution that simply adopts the EU Notice to implement its racially discriminatory policies will be infringing the EU principle of non-discrimination (as well as that of subsidiarity).

6. Policy options

We consider that the possible policy responses that can be adopted at both the EU and national levels include:

*Policy options at **EU** level:*

EU member states can:

- urge the European Council to change its policy that determines the legal status of the “occupied territories” as Palestinian;
- urge the Commission to withdraw the Interpretative Notice;
- urge the Council and Parliament to amend the Regulation to clarify that the Regulation does NOT require consumers to be informed of all (potential) infringements of international law (or, conversely, require that consumers be informed of ALL infringements of international law); and/or
- urge the Council and Parliament to amend the Regulation clarifying that the term “place of provenance” in the Regulation does not require product labels to distinguish places of

provenance on the basis of the nationality, religious or presumed legal status of the inhabitants of that place.

*Policy options at **national** level*

EU member states can:

- ensure that national authorities in their country apply EU and international law in a non-discriminatory way;
- ensure that their national legislation requires imported products to specify either country of origin or place of provenance – but not both;
- ensure that their national legislation does not require imported products to specify place of provenance or country of origin unless there is a proven link with the quality of the food;
- issue national legislation or guidelines clarifying that the Interpretative Notice is not applicable, and specifying that whether product information is misleading is a question of fact to be determined by the relevant national authority or court;
- issue national legislation or guidelines clarifying that the concept of "place of provenance" in the Regulation (as implemented in national legislation in that country) does not require product labels to distinguish places of provenance on the basis of the nationality, religious or presumed legal status of the inhabitants of that place; and/or
- issue national legislation or guidelines specifying the form of words acceptable at national level to implement the *Psagot* judgement at national level, e.g. "Product of a Jewish village in Judaea/Samaria under Israeli jurisdiction".