


Memorandum

To:		Department of Special International Affairs Office of the State Attorney Ministry of Justice State of Israel
From:		Van Bael & Bellis
Date:	13 September 2016	

BDS stickers in the United Kingdom on products made in Israel

1. INTRODUCTION

The present memo addresses the issue of potential damage to consumers, supermarket owners and shopkeepers caused by the pro-BDS sticker campaign and sets out the potential criminal and civil liability of those responsible for placing anti-Israel stickers on products and premises. We have set below a legal analysis of the act of placing stickers on products originating in Israel under U.K. criminal and civil law. Our analysis is based on the assumption that BDS stickers were placed on products by pro-BDS activists or shoppers supporting the BDS movement after the products had been put up for sale on the shop floor.

2. POTENTIAL DAMAGE TO CONSUMERS

The U.K. Government has confirmed that it is deeply committed to promoting its trade and business ties with Israel and strongly opposes boycotts.¹ The labelling of Israeli products with offensive and racially discriminatory stickers by pro-BDS

¹ See Foreign and Commonwealth Office Guidance, available at: <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories> (Accessed on 19 August 2016).

activists is harmful not only to the Jewish community, but it is also contrary to the legitimate interests of consumers generally.

Food labelling is strictly regulated in the U.K. and must be, *inter alia*, easily visible, clear, comprehensive and not misleading. This is so that consumers are provided with objective and accurate information so as to allow them to make an informed choice about the products they are purchasing.

The country of origin is considered relevant information to be included on the label of food products. For example, the label for beef, veal, fish and shellfish, honey, olive oil, wine, most fruit and vegetables and poultry imported from outside the EU must show the country of origin. Products must also show the country of origin if customers might be misled without this information, for example if the label for a pizza shows the leaning tower of Pisa but the pizza is made in the U.K. This will be considered misleading.

Pro-BDS stickers go beyond specifying the country of origin by including instructions to consumers not to purchase the products originating in Israel or allegations of human rights breaches based on extraneous offensive and discriminatory claims which do not relate to the characteristics of the product itself. Therefore, the pro-BDS stickers are likely to mislead the consumers as to the nature of the product and therefore contrary to the rules on food labelling.

3. CRIMINAL LIABILITY

3.1 Applicable criminal offences under the Criminal Damage Act 1971

The Criminal Damage Act 1971 is the primary source of offences for damage to property in the U.K. The Act establishes that a person who, without lawful excuse², intentionally destroys or damages any property belonging to another will be guilty of an offence.

Criminal Damage Act 1971

Section 1 Destroying or damaging property

(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any

² Section 5(2) of the Criminal Damage Act 1971 defines lawful excuse as belief in consent or belief in the immediate necessity to protect property. Belief is subjective and must be honestly held (also see Section 5(3) Criminal Damage Act 1971).

such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and

(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

Whilst ‘damage’ is not defined by the Criminal Damage Act 1971, the U.K. courts have construed the term liberally, in the sense that damage is not limited to permanent damage. The damage does not need to be visible or even tangible as long as it affects the value or the performance of the property. Therefore, the act of placing offensive anti-Israel stickers on products or premises may represent criminal damage, since pro-BDS campaigners deliberately place stickers on supermarket products or premises with the intention of deterring customers from purchasing products originating in Israel.

What constitutes criminal damage is ultimately a matter of fact and evidence. It is for the U.K. courts to decide whether an activity amounts to criminal damage. The standard of proof is beyond reasonable doubt.

(A) Racially or religiously aggravated criminal damage

Section 30 of the Crime and Disorder Act 1998 (as amended by the Anti-Terrorism, Crime and Security Act 2001) creates an offence of racially or religiously aggravated criminal damage, based on the basic offence of criminal damage under Section 1(1) of the Criminal Damage Act 1971.

A criminal damage offence under the Criminal Damage Act 1971 will be racially or religiously aggravated if at the time of committing the offence the offender demonstrates hostility based on the victim’s membership (or presumed membership) of a racial or religious group or the offence is motivated (wholly or partly) by hostility

towards members of a racial or religious group based on their membership of that group.³

Following from U.K. case law, hostility can be demonstrated where a defendant has used racially or religiously abusive language in addition to committing the basic criminal damage offence. Furthermore, the victim must also perceive the offence to be racially or religiously aggravated.

It follows that the labelling of products and premises with stickers which are racially and religiously offensive to the Jewish community and potentially morally harmful to Jewish consumers who wish to purchase Israeli origin products may amount not only to a criminal damage offence, but a racially and religiously aggravated criminal damage offence.

3.2 Applicable criminal offences under the Public Order Act 1986

If a person uses words or behaviour which are considered to be either threatening, abusive or insulting and cause, or are likely to cause another person harassment, alarm or distress, this will amount to an offence under section 4 of the Public Order Act 1986 ("POA 1986"). As this offence may be committed in a private or a public place, the placement of stickers on products of Israeli origin in a supermarket with the aim of discrediting the Jewish community may well amount to an offence under the Public Order Act 1986.

This offence extends to racial and religious hatred, under both the POA 1986 and the Racial and Religious Hatred Act 2006.

(A) Actions intended or likely to stir up racial hatred

Pro-BDS activists displaying written material which is threatening, abusive or insulting through which they intend to stir up racial hatred will be guilty of an offence. Importantly 'racial hatred' extends to hatred against a group of persons defined on the basis of their nationality.⁴

Section 19 POA 1986 specifically establishes that a person who publishes or distributes written material which is threatening, abusive or insulting with the purpose

³ Section 28 Crime and Disorder Act 1998 (as amended by Anti-Terrorism, Crime and Security Act 2001).

⁴ Part III POA 1986, section 17 defines 'racial hatred' as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins .

of stirring up racial hatred or knowing that by doing so racial hatred is likely to be stirred up, will be guilty of an offence.

Additionally, a person who has in his possession racially inflammatory material which is threatening, abusive or insulting which they intend to display, publish or distribute will also be guilty of an offence.

Part III Public Order Act 1986

Section 18 Use of words or behaviour or display of written material

(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

Section 19 Publishing or distributing written material

(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(3) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

Section 23 Possession of racially inflammatory material

(1) A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to—

(a) in the case of written material, its being displayed, published, distributed, [or included in a cable programme service], whether by himself or another, or

(b) in the case of a recording, its being distributed, shown, played, [or included in a cable programme service], whether by himself or another,

is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, [or inclusion in a programme service] as he has, or it may reasonably be inferred that he has, in view.

(B) Stirring up religious hatred

Pursuant to the Racial and Religious and Hatred Act, if pro-BDS activists display, publish or distribute written material intended to stir up religious hatred⁵, such as offensive anti-Israel stickers, they will be guilty of an offence and subject to the imposition of a fine or even imprisonment⁶.

The same offence is applicable if a person is found to be in possession of racially or religiously 'inflammatory material' which is threatening abusive or insulting with a view to have it displayed, published and distributed in order to stir up religious hatred.

⁵ Part 3A, section 29A POA 1986 introduced by Racial and Religious Hatred Act 2006 defines 'religious hatred' as hatred against a group of persons defined by reference to religious belief or lack of religious belief.

⁶ See Part 3A, section 29L POA 1986 Procedure and punishment (3) *A person guilty of an offence under this Part is liable— (a) on conviction on indictment to imprisonment for a term not exceeding seven years or a fine or both; (b) on summary conviction to imprisonment for a term not exceeding [12 months] or a fine not exceeding the statutory maximum or both.*

Part 3A, POA 1986 introduced by Racial and Religious Hatred Act 2006**Section 29B Use of words or behaviour or display of written material**

(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred [or hatred on the grounds of sexual orientation].

Section 29C Publishing or distributing written material

(1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred [or hatred on the grounds of sexual orientation].

(2) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

Section 29G Possession of inflammatory material

(1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to—

(a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or

(b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another, is guilty of an offence if he intends [F55thereby to stir up religious hatred or hatred on the grounds of sexual orientation].

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may reasonably be inferred that he has, in view.

3.3 Interference with goods under the Public Order Act 1986

Pursuant to Section 38 of the POA 1986, contamination or interference with goods⁷ with the intention of (a) causing public alarm or anxiety, or (b) causing injury to

⁷ Section 38(5) POA 1986 defines “goods” as including substances whether natural or manufactured and whether or not incorporated in or mixed with other goods.

members of the public consuming or using the goods, or (c) causing economic loss to any person by reason of the goods being shunned by members of the public, or (d) causing economic loss to any person by reason of steps taken to avoid any such alarm or anxiety, injury or loss will amount to an offence.

By way of example, pro-BDS activists placing stickers on products of Israeli origin may cause alarm or anxiety to customers by inducing them to believe that by purchasing products of Israeli origin they are supporting human rights abuses. Similarly, pro-BDS activists placing stickers which are offensive to Israel on products put up for sale in U.K. shops and supermarkets are likely to cause economic loss to shopkeepers as a result of the goods being avoided by consumers. This could therefore be classified as an offence under section 38 of the POA 1986.

Furthermore, it is also an offence under the same provision for a person to be in possession of articles which they intend to use in order to commit the above-mentioned offence.⁸ By way of example, if an activist is discovered to be in possession of offensive anti-Israel stickers which they intend to place on Israeli origin products, they may be found guilty of the offence set out in Section 38 POA 1986, even if they have not yet placed the stickers on the products.

To summarise, the activity of placing malicious pro-BDS propaganda stickers on Israeli products and/or premises selling such products by pro-BDS activists is likely to be considered a criminal offence under U.K. law and will therefore be restricted and prosecuted.

3.4 Who could be held criminally liable?

In the U.K. any person who is found guilty or pleads guilty to a criminal offence will be sanctioned accordingly. Pro-BDS activists and anyone spreading their message in a way which infringes criminal law, such as the placing pro-BDS propaganda stickers on products in shops or supermarkets is likely to amount to stirring up religious or racial hatred and will be prosecuted.

Shopkeepers and supermarket owners cannot be held liable for failing to remove pro-BDS stickers from their products as there is no duty to prevent a criminal offence under U.K. legislation. However, there is scope in U.K. legislation for the shopkeeper in this scenario to be held liable for assisting or encouraging a crime⁹. For this to be proved in court, the prosecution will have to prove beyond reasonable doubt that the shopkeeper intended to encourage or assist the offence.

⁸ Section 38(3) POA 1986.

⁹ Part 2 of the Serious Crime Act 2007 creates, at sections 44 to 46.

3.5 Who could report an offence or bring a criminal case?

Any person is entitled to report a crime in the U.K. irrespective of the type of offence and irrespective of whether this person has been affected by the offence.

In relation to hate crimes, the British Police have advised that all and any form of hate crime should be reported whether it happens to the consumer or someone they know. Therefore, any consumer whether they are affected by the pro-BDS stickers or not, can report the crime on behalf of those who may be affected. Following this principle, a shopkeeper, regardless of whether they are personally affected by the contents of pro-BDS stickers, can report them to the police.

Once a case is reported to the police, the police will investigate the matter and if it considers that a criminal offence has taken place it can arrest the perpetrators. The police will then refer the matter to the Crown Prosecution Service, who is the body responsible for prosecuting criminal cases investigated by the police in England and Wales and is capable of initiating proceedings against the perpetrator. It will be for the UK Court system to find the perpetrator liable and convict them accordingly.

3.6 Relevance of the sticker's type and content

There is no U.K. criminal legislation under which the mere act of labelling constitutes a criminal offence. Indeed, all offences require a substantive element that goes beyond the mere fact of labelling, causing the type and content of the stickers to be of importance. As mentioned above, besides being placed on the products, the stickers' content must:

- promote hostility based on the victim's membership (or presumed membership) of a racial or religious group;
- be threatening, abusive or insulting and cause, or be likely to cause another person harassment, alarm or distress;
- be threatening, abusive or insulting and must be intended to stir up racial or religious hatred; and
- interfere with goods and must be intended to (a) cause public alarm or anxiety, or (b) cause injury to members of the public consuming or using the goods, or (c) cause economic loss to any person by reason of the goods being shunned by members of the public, or (d) cause economic loss to any person by reason of steps taken to avoid any such alarm or anxiety, injury or loss will amount to an offence.

Therefore, a sticker with merely the word 'Israel' on it would not be problematic, as such a sticker would describe an objective characteristic (i.e. country of origin) in relation to the product. On the contrary, a sticker with negative connotations,

including words such as ‘boycott’ or offensive words which do not convey any objective information in relation to the product is likely to entail criminal liability.

4. CIVIL LIABILITY

4.1 The perspective of supermarket owners and shopkeepers

Supermarket owners and shopkeepers will be able to bring a civil claim against the placing of anti-Israeli stickers on products by pro-BDS activists. The supermarket owners and shopkeepers can claim compensation for loss or damage caused by such action. We have set out below the civil claims that can be made by supermarket owners and shopkeepers affected by the pro-BDS sticker campaign.

(A) Defamation

Under the Defamation Act 2013, there are two distinct types of defamation: libel and slander. Libel is a permanent form of defamation. Pro-BDS propaganda that has been published to a third party and has caused or is likely to cause serious harm to the reputation of the Jewish community or Israeli businesses is likely to be contrary to the Defamation Act 2013.

As far as supermarket owners and shopkeepers are concerned, the legislation further clarifies that if the harm has caused or is likely to cause the business serious financial loss¹⁰ it will amount to “serious harm”. Therefore, supermarket owners and shopkeepers may be able to make a claim for any libellous material published as long as they can prove that the statement has caused or is likely to cause them “serious financial loss”¹¹.

In *Brett Wilson LLP v Person(s) Unknown*¹², the court held that the claimant law firm’s evidence that the libellous statement caused it the loss of one potential client was enough to show “serious financial loss”. This illustrates that evidence of financial loss does not necessarily have to be substantial and that the court is willing to consider the relevant circumstances of the libellous publication.

A supermarket owner and shopkeeper can therefore bring a civil action for libel if they have suffered serious financial loss. The supermarket owners and shopkeepers will have to prove to the court that there is a direct causal link between the defamation and the loss suffered. For example, in some cases, this may be loss of

¹⁰ Section 1(2) Defamation Act 2013.

¹¹ Please note that there is a one-year limitation period to bring a libel claim.

¹² [2015] EWHC 2628 (QB); [2016] 4. W.L.R. 69.

clientele or loss of profit. The Court will assess the merits of the claim on the balance of probabilities.

(B) Wrongful Interference with Goods

Under the Torts (Interference with Goods) Act 1977, the placing of stickers onto products which have not yet been purchased on supermarket shelves may amount to wrongful interference with goods. If an individual wrongly interferes with goods of another individual then that individual will have a claim in tort.

The wrongful interference with goods may take several forms, which are set out in the Torts (Interference with Goods) Act 1977, namely:

- Conversion of goods;
- Trespass to goods;
- Negligence so far as it relates to damage to goods; and
- Any other tort which results in damage to goods.¹³

Conversion of goods

Conversion refers to dealing with goods in a manner inconsistent with the rights of the individual who is the true owner, whereby the individual in possession of the goods intends to deny the owners right or to assert a right inconsistent with the owner's rights. The key elements thus to be established are as follows:

- Possession of goods belonging to another; and
- Intent to deny the owner's right or to assert an inconsistent right.

Conversion requires an element of appropriation¹⁴. The concept of appropriation involves adverse interference with, or usurpation of, the rights of the owner, by one act or by a combination of acts, which need not be overt. The precise moment when the appropriation occurred may vary according to the circumstances of the case. Examples of conversion are purchasing goods from a thief, selling another individual's goods, destroying another's goods etc.

¹³ Torts (Interference with Goods) Act 1977, section 1.

¹⁴ The assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

In the case of *Morris, R v and Anderton v Burnside*¹⁵ the House of Lords (now the Supreme Court) held that the defendants, by removing goods from the supermarket shelves and switching their labels¹⁶, had adversely interfered with or usurped the rights of the owners of the goods to ensure that the goods were sold and paid for at the proper prices.

The gist of a conversion action is the infringement of the owner's superior possessory right. Anyone with a superior proprietary interest, such as a supermarket owner, can bring a civil claim under the tort of conversion. Such a claim can be brought against anyone who has interfered with the claimant's possessory right over certain goods, including pro-BDS activists.

Trespass to goods

Trespass is the immediate and direct unauthorised interference with another person's goods. Trespass protects a person's interest in the physical condition of his goods.

For trespass to be proven there must be intention on the part of the defendant to deliberately interfere with another's goods. The U.K. Courts have held that trespass "includes every direct forcible injury or act disturbing the position of the owner, *however slight the act may be*".¹⁷

The difference between trespass and conversion is that trespass does not require an element of appropriation. For example, it would be considered trespass if a pro-BDS activist uses, removes, touches or destroys a product belonging to the supermarket or the shopkeeper. In line with U.K. case-law, taking goods out of the possession of another, moving them from one place to another, or even bringing one's person into contact with them have all been held to amount to trespass.¹⁸

The supermarket owner or shopkeeper, who is the owner of the goods before the goods have been purchased, can bring a claim for trespass to their goods by the placement of anti-Israel stickers by pro-BDS activists.

(C) Nuisance

Private nuisance is defined as any substantial and unreasonable interference with the claimant's land or any right over or in connection with its enjoyment. Private nuisance is divided into three categories, namely: (1) nuisance by encroachment on

¹⁵ [1983] 3 W.L.R. 697; [1984] A.C. 320.

¹⁶ With the purpose of paying a lower price for the product at the check-out point.

¹⁷ Atkin L.J. in *Sanderson v Marsden & Jones Ltd* (1922) 10 Ll. L. Rep. 467.

¹⁸ *William Leitch v Leydon* [1931] AC 90, 106; *Kirk v Gregory* (1876) 1 Ex D 55.

a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land.

There are several requirements in order to prove nuisance. There must be continuous interference over a period of time;¹⁹ the defendant's conduct must be unreasonable²⁰, thereby making it unlawful; and the claimant must prove damage to the land or prevention from enjoying the use of their land.

Malicious behaviour may be regarded as evidence of unreasonableness, but the claimant must still prove material damage to the land itself or the property. Economic loss may in some cases be used as material damage.²¹

In accordance with the above, supermarket and shopkeepers can bring a claim for nuisance if their property rights have been substantially and unreasonably interfered with by pro-BDS activists.

4.2 The perspective of the producer of the goods

A producer of goods which are subject to a BDS labelling campaign could bring a claim against the BDS activists for any damage it has suffered as a result. The legal basis for such claim would be the Defamation Act 1952²², under which there are two distinct types of defamation: libel and slander.

A claim can be brought if the stickers have caused or are likely to cause "serious harm" to the reputation of the Jewish Community or Israeli businesses. In order to show libel, the claimant must be able to prove that the sentence (i) was defamatory; (ii) relates to the claimant; and (iii) has been published to a third party.

It is most likely that producers of Israeli goods may be able to bring a claim for libel against the sticker campaign. Pro-BDS stickers that have been placed on products will be considered to have been published to a third party (i.e. consumers).

The legislation further clarifies that if the harm has caused or is likely to cause the producer "serious financial loss"²³ it will amount to "serious harm". Therefore, producers may be able to make a claim for any libellous material published as long as they can prove that the statement has caused or is likely to cause them serious financial loss.

¹⁹ *De Keyser's Royal Hotel v Spicer Bros Ltd* [1969] 2 All ER 1253.

²⁰ Conduct must be unreasonable under the principle of a reasonable user of land (see *Cambridge Water Co v Eastern Counties Leather* [1994] 1 All ER 53 at 70).

²¹ *Rylands v Fletcher* [1868] UKHL 1.

²² Amended by Defamation Act 2013.

²³ Section 1(2) Defamation Act 2013.

4.3 The perspective of consumers

A consumer faced with Israeli products bearing the pro-BDS stickers could bring a civil claim against the responsible BDS activists.

(A) Protection from Harassment Act 1997

It is possible that the pro-BDS sticker campaign could interfere with consumer rights to the extent that it amounts to harassment. Pro-BDS stickers which have the potential to cause alarm or distress and to put people in fear of violence are likely to amount to offences under section 2 and section 4 of the Protection from Harassment Act 1997.

The definition of harassment was considered in *Plavelil v Director of Public Prosecutions*²⁴, in which it was held that the repeated making of false and malicious assertions against a doctor in connection with an investigation by the GMC could amount to a course of harassment.

Pursuant to the Protection from Harassment Act 1997, consumers can take civil court action to get compensation and an order to stop the perpetrator continuing the behaviour.

(B) Consumer Protection from Unfair Trading Regulations 2008

In the U.K. unfair commercial practices are prohibited by virtue of Part 2 section 3(1) of the Consumer Protection from Unfair Trading Regulations (“CPRs”) 2008, which implement the EU Unfair Commercial Practices Directive 2005/29/EC.²⁵

The CPRs apply to business-to-consumer transactions and apply to conduct prior, during and subsequent to a contract. They also affect business-to-business practices closely connected to consumers.

Under U.K. law, consumers are protected from unfair commercial practices. A commercial practice is deemed to be unfair if, *inter alia*, it “*materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product*”.²⁶ A commercial practice can also be unfair if it is aggressive or if it represents a misleading action or omission.²⁷ A commercial practice is a misleading action if it contains false information and is therefore untruthful or its

²⁴ [2014] EWHC 736 (Admin).

²⁵ OJ 2005 L 149/22.

²⁶ Part 2 section 3(3)(b) Consumer Protection from Unfair Trading Regulations 2008.

²⁷ Part 2 section 3(4)(a)-(c) Consumer Protection from Unfair Trading Regulations 2008.

overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.²⁸

By way of example, the placing of offensive and untruthful anti-Israel stickers on products in a U.K. supermarket may have the effect of materially distorting the behaviour of the average consumer with regard to that specific product. Such action is likely to deceive the average consumer into thinking that by purchasing products originating in Israel they are indirectly supporting human rights abuses, which is clearly incorrect and misleading.

A misleading *omission* refers to the commercial practice of, among others, providing material information²⁹ in a manner which is unclear, unintelligible, ambiguous or untimely³⁰ which causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise. Thus, the failure of a shopkeeper to remove anti-Israel stickers which have been placed on the products in his shop may be equated with hiding the accurate label. This may result in deterring a consumer from purchasing a product they otherwise would have purchased in the absence of the offensive sticker.

Consumers are further protected by U.K. law, as a trader is guilty of an offence if his actions materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to the product.³¹ Therefore, it will be prudent of any shopkeeper to remove any offensive pro-BDS stickers placed on products that are in his control (i.e. his shop or supermarket).

The CPRs are enforced by Local Authority Trading Standards Services (TSS), and the Office of Fair Trading (OFT), using the most appropriate means. Claims under the CPRs may range from informal regulatory procedures to civil actions for an enforcement order and criminal proceedings.

(C) Applicable offences under Food Legislation

It is important to note that consumers in the EU are protected by Regulation 178/2002 and Regulation 1169/2011 which ensure that foods imported into the EU comply with the relevant requirements of food law for the protection of consumers.

²⁸ Part 2, section 5 (2)-(3) Unfair Trading Regulations 2008.

²⁹ See section 6(3)(a) Unfair Trading Regulations 2008: the information which the average consumer needs, according to the context, to take an informed transactional decision.

³⁰ Section 6(1)(c) Unfair Trading Regulations 2008.

³¹ Part 3, section 8(1)(b) Unfair Trading Regulations 2008.

With respect to food products, Article 11 of The General Food Law Regulation (EC) 178/2002 laying down the general principles and requirements of food law provides that foods imported into the EU for placing on the EU market shall comply with the relevant requirements of food law, including those related to the labelling. In this regard, Article 16 of the Regulation requires that the labelling of food shall not mislead consumers.

In the U.K. the Food Safety Act 1990 (as amended) provides the framework for all food legislation. In line with European legislation, according to Section 15 of the Act, falsely describing or presenting food is an offence under U.K. law.

Additionally, the Food Safety and Hygiene (England) Regulations 2013 provides for the enforcement (including imposing penalties) of certain provisions of Regulation (EC) 178/2002, which sets out the requirement that the labelling, advertising and presentation of food must not mislead consumers.

Furthermore, consumers are protected by European Food Information to Consumers Regulation No 1169/2011 on the provision of food information to consumers, which entered into force on 13 December 2014, and establishes the general principles, requirements and responsibilities governing food information, and in particular food labelling for producers and distributors. Article 7(1) of the Regulation states in general terms that food information “shall not be misleading” and Article 7(2) of the Regulation requires food information to be “accurate, clear and easy to understand for the consumer”. The Food Information Regulations 2014 came into force in the U.K. on the 14th July 2014 and enable local authorities to enforce Regulation No 1169.

Additionally, all marketing and advertising in the U.K. must be an accurate description of the product or service; legal; decent; truthful; honest and socially responsible (i.e. not encouraging illegal, unsafe or anti-social behaviour). Placing pro-BDS stickers over labels on products will therefore interfere with the products label and infringe the relevant EU and well as national regulations covering food products.

4.4 Relevance of the sticker’s type and content

As has been detailed above, dealing with goods in a manner which is inconsistent with the rights of the owner may raise a legal claim under several torts introduced by the Torts (Interference with Goods) Act 1977. Therefore, interference with the goods of another may raise legal issues under U.K. in and of itself, not necessarily due to the content of the stickers.

However, as far as product labelling is concerned, in order for a person to sell food and drink products in the U.K, the product label must be: clear and easy to read; permanent; easy to understand; easily visible; and must not misleading.³² Anti-Israel stickers which contain offensive and untruthful words are clearly misleading to consumers. Such content of the sticker is likely to cause serious harm to the reputation of the supermarket owner, shopkeeper or producer of Israeli goods, who are likely to suffer financial loss as a result. This will give rise to civil claims under U.K. law.

5. COUNTERMEASURES: THE REMOVAL OF THE BDS STICKERS

It is important to differentiate between the claims that could be made against pro-BDS activists placing stickers on products and premises by supermarket owners and shopkeepers, as opposed to offended consumers.

On the one hand, the supermarket owner or the shopkeeper is the legal owner of the products that he puts up for sale. As the owner of such property, the shopkeeper in principle has the right to alter, sell or dispose of the products as he sees fit.³³ Consequently, even if removing the BDS stickers would cause damage to the products' original wrapping, this would not seem to amount to any kind of vandalism or criminal damage. The shopkeeper should, however, provide food products which comply with U.K. food labelling and packaging legislation.

On the other hand, it could be argued that offended consumers, by removing the BDS stickers (potentially causing damage to the products' original wrapping), may commit a criminal damage offence in the sense of section 1(1) of the Criminal Damage Act 1971.

6. CONCLUSION

The act of placing offensive anti-Israel stickers on premises and products originating in Israel that are put up for sale in the U.K. is not an innocent expression of one's political views. The fact that such actions can be considered illegal under various provisions of U.K. law, entailing different forms of liability, should dissuade people from participating in similar pro-BDS actions.

³² See U.K. Government Guidance on Food Labelling and Packaging, available at: <https://www.gov.uk/food-labelling-and-packaging/overview> (Accessed on 19 August 2016).

³³ Such right is not unlimited as the shopkeeper is obliged to respect intellectual property rights, including trademarks.

- Criminal liability: under the Criminal Damage Act 1971; Crime and Disorder Act 1998; Public Order Act 1986; and Racial and Religious and Hatred Act 2006, pro-BDS activists (and potentially supermarket owners and shopkeepers) may be held liable for placing (or not removing) BDS stickers on products originating in Israel;
- Civil liability: under the Defamation Act 2013; the Torts (Interference with Goods) Act 1977; the Protection from Harassment Act 1997; the Unfair Trading Regulations 2008; the Food Safety Act 1990; the Food Safety and Hygiene (England) Regulations 2013; and the Food Information Regulations 2014, pro-BDS activists can be held liable for placing BDS stickers on products originating in Israel;
- Consumer interest and freedom of economic activity: placing BDS stickers is harmful to consumers, which are faced with misleading information about the products originating in Israel and interferes with the legitimate right to exercise economic activity.

We trust the above is useful. Please do not hesitate to contact us should you have any further questions in relation to the above.