


Memorandum

To:		Department of Special International Affairs Office of the State Attorney Ministry of Justice State of Israel
From:		Van Bael & Bellis
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BDS stickers in the Netherlands on products made in Israel

1. INTRODUCTION

This memo addresses the issue of potential damage to consumers and companies caused by BDS action in the form of the placement of stickers on food products in shops in the Netherlands. In addition, the paper examines the potential criminal and civil liability of those responsible for placing anti-Israel stickers. Given the lack of specific anti-boycott legislation in the Netherlands, the act of placing BDS stickers on products from Israel needs to be addressed under the general provisions of Dutch civil, administrative and criminal law. Our analysis is based on the assumption that the BDS stickers are placed on the products after they had been put up for sale, by activists or shoppers that feel sympathetic to the BDS movement.

2. POTENTIAL DAMAGE TO CONSUMERS

The Dutch government has expressly stated that it is opposed to the BDS movement and that it does not support it.¹

The labelling of Israeli products by BDS activists does not only offend Jewish consumers of Dutch supermarkets, but is harmful to consumers in general.

Dutch law on food labelling requires information about food to be clear and accurate and not to be misleading. Indeed, food labels are aimed at providing consumers with objective and accurate information about the characteristics of a product in order to allow them to make an informed choice about the product that they purchase. The type of information that must appear on certain products such as food is regulated in the consumers' interest. The origin of a product is generally considered as relevant information in the case of food products. Therefore, a reference to the Israeli origin of a product, provided that it is accurate, is not problematic. It becomes problematic, however, where such origin label is accompanied by statements which imply that the product has certain negative characteristics because of its origin and should therefore not be purchased. A label that calls for the non-purchase of a product on the basis of claims that are extraneous to the product's characteristics and are moreover not officially sanctioned is likely to deceive the consumer as to the nature of the product and, as a result, to distort fair competition.

The risk that such label will confuse and even mislead consumers is all the more serious where such labels are affixed by parties other than the producer, trader or regulatory authority. Since a consumer expects to find objective and accurate information on food labels, he may be induced to believe that the BDS labels calling for a boycott of Israeli products contain accurate information and are issued by an official body.

The labelling of Israeli products is moreover offensive to Jewish customers who are confronted with such products. The BDS labelling of products from Israel pejoratively identifies products of Israeli origin as different from all products of other origins. In view of the frequent equation between Israel and the Jewish people, a negative labelling of Israeli products may be perceived as anti-Semitic and an incitement to racial hatred.

¹ Statements by the Dutch Minister for Foreign Affairs made in the Dutch Parliament, *Kamerstukken II*, vergaderjaar 2015–2016, 23 432, nr. 440, available at <https://zoek.officielebekendmakingen.nl/kst-23432-440.pdf>, p. 28.

3. CRIMINAL LIABILITY

3.1 Applicable criminal offences under the Dutch Criminal Code

The Dutch (DCC) contains several criminal offences to which the act of placing BDS stickers on products originating in Israel can relate. Pursuant to the following provisions, if all substantive elements are fulfilled, the act of placing BDS stickers on products from Israel is expressly declared to be an offence by the law, entailing criminal liability:

- Article 350(1) of the DCC: Criminal damage to property
Any person who intentionally and unlawfully destroys, damages, renders unusable or disposes of any property belonging in whole or in part to another, shall be liable to a term of imprisonment not exceeding two years or a fine of the fourth category.
- Article 137d of the DCC: Incitement to racial discrimination
 1. *Any person who publicly, either verbally or in writing or through images, incites hatred of or discrimination against persons or violence against their person or property because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.*
 2. *If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding two years or a fine of the fourth category shall be imposed.*

Furthermore, the following provisions can also be violated in the context of actions in the form of the placement of stickers on products of Israeli origin:

- Article 138(1) of the DCC: trespass
Any person who unlawfully enters a dwelling or enclosed room or premises in use by another person, or who, unlawfully remaining there, does not leave immediately after having been directed to do so by or on behalf of the entitled person, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.
- Article 429quater(1) of the DCC: discrimination in exercising an office, practicing a profession or running a business
Any person who, in the discharge of his office, practice of a profession or in conducting a business discriminates against persons on the grounds of their race, their religion, their beliefs, their sex or their

hetero- or homosexual orientation, shall be liable to a term of detention not exceeding two months or a fine of the third category.

Depending on the specific circumstances, the act of placing BDS stickers on products originating in Israel is likely to violate Articles 350 and 137d of the DCC mentioned above. Indeed, the anti-Israel stickers used by the BDS activists:

- criminally damage property belonging to the owner of the supermarket where the products are put up for sale; and
- publically incite to hatred or discrimination against Israel as a whole, amounting to racial discrimination².

Furthermore, under Dutch criminal law Article 138(1) of the DCC can, *inter alia*, be violated if a person acts contrary to the internal rules and regulations of a shop which are clearly displayed in the shop. Article 138(1) of the DCC can, therefore, be violated in the present case as follows:

- in case the entry of the BDS activists in the shop is contrary to the internal rules and regulations of the shop which specify, for instance, that groups of activists are not allowed to enter the shop; or
- in case the actions of the BDS activists in the shop are contrary to the internal rules and regulations of the shop which specify, for instance, that it is prohibited to cause nuisance to other customers or to place folders, signs and labels without permission.

With respect to criminal liability under Article 429quater, the legislative history of this provision shows that it was meant to cover a practice by Dutch businesses in the 1970s whereby they signed so-called “non-Jewish declarations”.³ These declarations were to be provided to Arab countries in order to maintain trade relations with them. The scope of Article 429quater was, as a result of this practice, broadened by the legislator to cover also forms of indirect discrimination, for instance if a distinction on the basis of nationality purports to or results in discrimination on the ground of race.⁴ The judiciary followed the legislator in this broad interpretation.⁵

Considering the broad scope of this article, a shopkeeper who allows for the placement of discriminatory stickers and fails to remove such stickers can, arguably, be held liable for indirect discrimination in social-economic life as envisaged by Article 429quater.

² ‘Racial discrimination’ covers discrimination on the basis of national or ethnic origin.

³ *Kamerstukken II* 1979/80, nr. 16 115, nr. 3, p. 3-4.

⁴ *Kamerstukken I* 1980–1981, 16 115, nr. 139a, p. 2–3.

⁵ See, for instance, Dutch Supreme Court 13 June 2000, ECLI:NL:HR:2000:AA6191.

3.2 Who could be held criminally liable?

Pursuant to Articles 1 and 2 of the DCC, the DCC applies to “[a]ny person who commits a criminal offence in the Netherlands”, following the date on which the DCC came into force. It is a general principle of Dutch criminal law that no person may be punished who cannot be personally blamed for the offence.⁶

Under Dutch criminal law, criminal offences are subdivided in serious offences and minor offences. A person can only be held liable for serious offences if a mental element, i.e. *mens rea*, can be demonstrated. Therefore, serious offences will require a certain degree of intent or negligence. By contrast, for criminal liability on the basis of a minor offence no mental element is required.

Articles 350, 137d and 138(1) are serious offences which require proof of intent. Article 429quater is a minor offence and, consequently, no intent or negligence needs to be demonstrated.

In principle, in relation to Articles 350, 137d and 138(1) of the DCC, the most obvious person to be held criminally liable is thus the offender of the action, i.e. the *BDS activist* who wilfully places the stickers on the products from Israel and who unlawfully enters or remains in a shop within the territory of the Netherlands.

As mentioned above with respect to Article 429quater, the *shopkeeper* who allows the BDS activists to enter the shop and place stickers on products of Israeli origin can be held criminally liable for indirect discrimination.

Article 45 of the DCC additionally provides for criminal liability for attempts to commit a serious offence, “if the intention of the offender has revealed itself by a commencement of the performance of the criminal act”. Articles 47 and 48 of the DCC provide for the criminal conviction of certain forms of participation, i.e. *incitement* and *complicity*, for

- “any persons who commit the offence, either personally or jointly, or who cause an innocent person to commit the offence” (Article 47(1)(1°) of the DCC);
- “any persons who, by means of gifts, promises, abuse of authority, use of force, threat or deception or by providing opportunity, means or information, intentionally solicit the commission of the offence” (Article 47(1)(2°) of the DCC);

⁶ See Dutch Supreme Court 14 February 1916, *NJ* 1916/681.

- “any persons who intentionally aid and abet the commission of the serious offence” (Article 48(1)(1°) of the DCC); and
- “any persons who intentionally provide opportunity, means or information for the commission of the serious offence” (Article 48(1)(2°) of the DCC).

Pursuant to Article 48(1)(1°) of the DCC, a shopkeeper who allows the BDS activists to place discriminatory stickers on products in his shop, arguably, “intentionally aid[s] and abet[s] the commission of the serious offence”.

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

First, with regard to the right to report a criminal offence, Article 161 of the Dutch Criminal Procedure Code (DCPC) provides that “[a]ny person who has knowledge of a criminal offence committed may file a report or complaint of said offence” irrespective of the type of offence that has been committed and even if the person has not personally been affected by the offence.

Second, with regard to the right to bring a criminal case, the DCPC distinguishes between offences prosecuted ex officio and offences prosecuted on the basis of a criminal complaint:

- In principle, pursuant to the ex officio principle contained in Article 9 of the DCPC, the Public Prosecution Service has a monopoly on criminal prosecution. A citizen does not have a right to private prosecution nor can a prosecution be started by a civil party. Criminal offences that are prosecuted ex officio are prosecuted irrespective of the wishes of the victim and irrespective of whether or not they are reported.

In the context of BDS stickers on products made in Israel, ex officio prosecution will be the case for all of the abovementioned offences. In case of such ex officio prosecution, the initiation of a criminal case falls within the monopoly of the Dutch criminal justice authorities; the affected shopkeepers, customers or producers do not have the right to bring a criminal case.

- Contrary to the offences prosecuted ex officio, other offences are only prosecuted on the basis of a criminal complaint by the victim. In general, the Public Prosecution Service is not required to obtain leave or permission of others to bring a prosecution. However, for the prosecution of certain offences a complaint by the victim or another person is required.

The monopoly of prosecution and the discretion whether or not to prosecute are subject to various controls. For instance, the Minister of Justice can give instructions to the Public Prosecution Service to commence a prosecution.

In addition, in case a prosecution is not initiated or is discontinued, Article 12 of the DCPC grants interested parties the right to request a court of appeal to order the public prosecutor to prosecute. Interested parties are considered to be parties whose particular interest is directly affected by the non-prosecution.⁷ A legal person can also be an interested party, if the legal person, according to its objects and as evidenced by its actual activities, promotes interests that are directly affected by the decision of non-prosecution or the discontinuance of the prosecution.

3.4 Relevance of the sticker's type and content

Under the DCC the act of labelling items does not constitute a criminal offence in and of itself. Indeed, all offences require an additional substantive element that goes beyond the mere fact of labelling, causing the type and content of the stickers to be of importance. As an example, the sticker must, besides being placed on the products, destroy, damage, render unusable any property belonging in whole or in part to another or in writing or through images, incite hatred or discrimination against persons or violence against their person or property because of their race, religion or beliefs.

The Dutch Criminal Code contains the following broad definition of discrimination:

*“Discrimination” or “to discriminate against” shall be understood to mean any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the field of politics or economics, in social or cultural matters or any other area of social life.*⁸

This definition explicitly recognises that discrimination encompasses the nullification or impairment of human rights and freedoms in the area of social life and, in particular, the field of economics.

In addition, the case law recognises that Jews outside Israel and in the Netherlands feel so closely connected to Israel as a state that they can consider criticism of the state of Israel to be not only an accusation against that state, but also against them.⁹ Therefore, expressions that are meant as political criticism of the state of Israel can be discriminatory for Jewish people on the ground of their origin or national or ethnic

⁷ See, for instance, Dutch Supreme Court 7 March 1972, ECLI:NL:HR:1972:AB4014.

⁸ Article 90quater of the Dutch Criminal Code.

⁹ s-Hertogenbosch Court of Appeal, 22 September 1982, ECLI:NL:GHSHE:1982:AC7722, section 2; upheld by the Dutch Supreme Court, 6 December 1983, ECLI:NL:HR:1983:AB9595.

descent and their belief, if the expression equates or confronts them with an ideology that is aimed at their persecution and extermination.¹⁰

Thus, a sticker with only the word “Israel” would not be problematic, since such sticker merely describes an objective characteristic in relation to the product. By contrast, a sticker with negative connotations (e.g. including words such as “boycott” or “apartheid”) which do not convey any objective information in relation to the product is likely to entail criminal liability.

4. ADMINISTRATIVE LIABILITY

4.1 Applicable administrative offences

Food labelling requirements are to a certain extent harmonized at EU level. The following EU regulations are therefore also relevant in the Netherlands:

- **Regulation 178/2002** lays down the general principles and requirements of food law and provides in Article 16 that information about food shall not mislead consumers;
- **Regulation 1169/2011** on the provision of food information to consumers, which entered into force on 13 December 2014, establishes the general principles, requirements and responsibilities governing food information, and in particular food labelling.¹¹ Article 7(1), 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”.

Both Regulation 178/2002 and Regulation 1169/2011 have been implemented in the Netherlands through, amongst others, the Commodities Act Decree on Foodstuffs Information (CADFI):

- according to Article 2(3) of the CADFI, it is prohibited to act inconsistently with Article 16 of Regulation 178/2002; and
- according to article 2(6) of the CADFI, it is prohibited to act inconsistently with Article 7 of Regulation 1169/2011.

¹⁰ s-Hertogenbosch Court of Appeal, 22 September 1982, ECLI:NL:GHSHE:1982:AC7722, section 2; upheld by the Dutch Supreme Court, 6 December 1983, ECLI:NL:HR:1983:AB9595.

¹¹ It might be worth noting that Regulation 1169/2011 repealed Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs which in the past provided for detailed rules on food labelling applicable to all food products in the EU.

Since the source of the CADFI is EU law, the case law of the Court of Justice of the EU (CJEU) is relevant for the determination whether a certain food label can be considered “misleading” within the meaning of Article 16 of Regulation 178/2002 or Article 7 of Regulation 1169/2011. As clarified by the CJEU in *Geffroy and Casino France*, the question whether the labelling of certain products is misleading should be answered by national courts of EU Member States, however the Court may give clarifications to guide the national court in appropriate cases.¹² The CJEU provided some guidance with respect to the standard of what an average consumer may find misleading:

It is clear from the Court's case-law that, in order to assess the capacity to mislead of a description to be found on a label, the national court must in essence take account of the presumed expectations, in light of that description, of an average consumer who is reasonably well informed, and reasonably observant and circumspect, as to the origin, provenance, and quality associated with the foodstuff, the critical point being that the consumer must not be misled and must not be induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine (see, to that effect, Case C-470/93 Mars [1995] ECR I-1923, paragraph 24; Gut Springenheide and Tusky, cited above, paragraph 31; and Case C-220/98 Estée Lauder [2000] ECR I-117, paragraph 30).¹³

The placement of anti-Israel stickers on products that originate in Israel suggest that the Israeli products are not appropriate or even dangerous for consumers. A reasonably well informed consumer expects to find objective and accurate information on food labels. He may, therefore, be induced to believe that the BDS labels calling for a boycott of Israeli products contain accurate information and are issued by an official body. As a result, the stickers provide misleading information about foodstuffs from Israel to the Dutch consumers.

4.2 Who could be held administratively liable?

The Commodities Act Decree on Administrative Fines (CADAF) contains the administrative sanctions applicable to violations of provisions of the CADFI. According to the CADAF, both natural and legal persons can be sanctioned for violation of the abovementioned provisions of the CADFI. Violations of Articles 2(3) and 2(6) of the CADFI can, depending on the circumstances of the case, be sanctioned with administrative fines in the range of €525- €820,000.

¹² Case C-366/98, *Criminal Proceedings against Geffroy and Casino France*, para. 18 and 20.
¹³ Case C-446/07, *Severi v Regione Emilia Romagna*, para. 61.

The scope of application of Regulations 178/2002 and 1169/2011 is as follows:

- Regulation 178/2002 applies to “all stages of production, processing and distribution of food and feed”; and
- Regulation 1169/2011 applies to “to food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers”.

“Food business operators” within the meaning of Article 1169/2011 are considered to be natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control.¹⁴ The Dutch government confirmed in this regard that it is indeed for food business operators to comply with the provisions of Regulation 1169/2011.¹⁵

It follows from the text and purpose of Regulations 178/2002 and 1169/2011, the CADFI and the CADAF that they primarily concern persons and entities involved in the food chain. It is, therefore, the shopkeeper who can be held administratively liable for misleading stickers on Israeli products.

4.3 Relevance of the sticker’s type and content

The key requirement which flows from Article 16 of Regulation 178/2002 and Article 7 of Regulation 1169/2011 is that information about food is not to be misleading. A food label will, therefore, only amount to an infringement of Article 16 of Regulation 178/2002 and Article 7 of Regulation 1169/2011 if the label is misleading. A sticker on a product of Israeli origin with the word “Israel” will, thus, not be misleading as it describes an objective characteristic of the product. However a sticker with negative connotations (e.g. including words such as “boycott” or “apartheid”) which do not convey any objective information in relation to the product, might create the impression that the products are not appropriate or even dangerous for consumers. Such content can, therefore, be potentially misleading and is likely to entail administrative liability.

5. CIVIL LIABILITY

The act of placing BDS stickers on products originating in Israel put up for sale in Dutch supermarkets can amount to civil liability of those involved in such practices.

¹⁴ See Article 2(1)(1) of Regulation 1169/2011 referring to Article 3(3) of Regulation 178/2012.
¹⁵ Letter of 29 October 2013 of the Minister of Public Health, Welfare and Sport, available at <https://www.rijksoverheid.nl/documenten/kamerstukken/2013/10/29/beantwoording-kamervragen-over-misleidende-informatie-op-etiketten>.

Civil claims against the BDS activists could be brought by supermarket owners, consumers or producers of the affected products.

5.1 The perspective of supermarket owners

A supermarket owner could bring a civil claim against BDS activists placing anti-Israeli stickers on products originating in that country, claiming compensation for loss or damage caused by such action. Pursuant to Article 6:162 of the Dutch Civil Code (DCIC):

- 1. A person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.*
- 2. Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.*
- 3. A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.*

Thus, tortious acts are considered to be (i) the violation of a right and (ii) an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct. The violation of a property right is a violation of a right within the meaning of Article 6:162 of the DCIC and, therefore, constitutes a tortious act. To succeed with a claim under Article 6:162 of the DCIC, the following elements would need to be established: (1) a tortious act; (2) imputability of the act to the tortfeasor and (3) loss or damage, (4) a causal link between the tortious act and the loss or damage suffered. Furthermore, there is only an obligation to repair the damage if the standard breached serves to protect against damage such as that suffered by the person suffering the loss.¹⁶ For instance, in case of tortious act in the form of a violation of a property right which results in damage, only the rightful owner of the good will be entitled to compensation.¹⁷

The burden of proof for showing that loss or damage has occurred rests on the person claiming compensation. In the context of the BDS stickers placed on products made in Israel, a shop owner could claim compensation for damage to the goods and related loss of profit for not being able to sell those goods. He could also claim loss of

¹⁶ See Article 6:163 of the DCiC.

¹⁷ See, for instance, Dutch Supreme Court, 14 March 1958, *NJ* 1961/570.

future profit linked to the fact that Jewish customers may be inclined to avoid his store and, more generally, the fact that less consumers will visit his store due to the actions of BDS activists.¹⁸ Indeed, a BDS campaign of labelling Israeli products will affect not only the daily business activity of the shop owner but will likely also have an impact on its future business performance. In that sense, such campaign unlawfully interferes with the right to do business and may cause a serious economic damage to the owners of affected Dutch supermarkets.

5.2 The perspective of consumers

A consumer faced with Israeli products bearing BDS labels could bring a civil claim against the responsible BDS activists in a twofold manner.

First, consumers could argue that the BDS activists have committed a tortious act which resulted in damage within the meaning of Article 6:162 of the DCIC. Under this provision, a consumer could claim a moral damage suffered due to the presence of the anti-Israel stickers. Given that this provision covers only a direct moral damage, such a claim could be principally made by Jewish consumers.¹⁹

Second, in the event that BDS stickers would be placed on Israeli products by the employees of Dutch supermarkets, a consumer could also bring a claim against the shop owner pursuant to Article 6:170(1) of the DCIC.²⁰ Pursuant to this provision:

The person in whose service a subordinate fulfils his duties shall be liable for damage caused to a third person by the fault of such subordinate if the risk of the fault is increased by the order to perform such duties and the person by whom he was employed had control through such juridical relationship over the conduct constituting the fault.

5.3 The perspective of the producer of the goods

Finally, a producer of the goods which are subject to the BDS labelling campaign could raise a claim against the BDS activists on the basis of the moral (and reputational) damage it has suffered as a result of such a campaign.²¹ The legal basis for such claim would be Article 6:162 of the DCIC, discussed above in the

¹⁸ Compensation for loss of profits can be claimed to the extent that the loss was reasonably foreseeable at the time of the act or omission causing the loss. See, for instance, Dutch Supreme Court, 25 January 1957, NJ 1957/114.

¹⁹ See Amsterdam Court of Appeal, 18 March 1993, JAR 1993/193, para. 7.5.

²⁰ See, for instance, Dutch Supreme Court, 30 October 2009, ECLI:NL:2009:BJ6020.

²¹ See, to this effect, Dutch Supreme Court, 9 October 1987, ECLI:NL:HR:1987:AC1068.

context of the potential claims that could be raised by consumers and super market owners faced with BDS stickers.

5.4 Relevance of the sticker's type and content

The type and specific content of BDS stickers placed on Israeli products is relevant for the purpose of establishing civil liability since the act of labelling products does not appear to raise legal issues in and of itself. Indeed, depending on the type and content of such stickers it will be more or less difficult to prove the existence of material or moral damage. A sticker with only the word "Israel" would not be problematic, since such sticker merely describes an objective characteristic of the product. However, any sticker having negative connotations which have no connection whatsoever with the product, for example, stickers including words such as "boycott" or "apartheid" would be considered as clearly offensive and thus, susceptible of causing moral damage.

6. INCONSISTENCY WITH ADVERTISING STANDARDS

Dutch law on consumer protection does not allow consumers to bring a claim for misleading or unfair product information provided by other parties than a trader or the producer of the product concerned. However, in the field of self-regulated advertising consumers can complain about misleading or unfair product information.

The Dutch Advertising Foundation ("DAF") is a self-regulatory body in the field of advertising. The DAF maintains the Dutch Advertising Code ("DAC") which requires advertising to be fair and not misleading.

The DAC allows consumers and business to file complaints about advertisements that they deem contrary to the DCA. The complaints are heard by the independent Dutch Advertising Authority ("AA") and there is a possibility to bring an appeal against the AA's decisions before the Appeals Board ("AB").

The term advertisement within the meaning of the DAC is broadly defined:

[...] any form of public and/or systematic direct or indirect commendation of goods, services and/or ideas by an advertiser or, either wholly or partly, on behalf of him, with or without the help of a third party;

The term "systematic" is to be contrasted with so-called one-to-one announcements, such as an individual promotion talk.²²

²² See the explanatory notes to the DAC.

The stickers placed by BDS on products of Israeli origin convey something about those goods and are not one-to-one announcements. These stickers can, therefore, be considered advertisement within the meaning of the DCA. Indeed, by analogy, the AA held that a brochure published by a non-profit organisation with claims about Israeli goods is an advertisement within the meaning of the DAC.²³

6.1 Applicable provisions of the DAC

The DAC requires advertisements to be, *inter alia*, fair and not misleading.

Article 7 of the DAC requires advertisements to be fair:

Advertising shall not be unfair. Advertising is considered to be unfair if it contravenes the requirements of professional devotion, and if it substantially disrupts or may disrupt the economic behaviour of the average consumer reached, or targeted, with respect to the product. Misleading and/or aggressive advertising is considered to be (by any means) unfair.

The term “professional devotion” is to be interpreted as to the level of proficiency and care that may be reasonably expected towards the consumer.²⁴

Article 8(2) of the DAC requires advertisements not to be misleading and provides, in relevant part, as follows:

All advertising including incorrect information, or information that is unclear or ambiguous for the average consumer in respect of one or more elements as listed in points a to g hereunder, and which would consequently entice or may entice the average consumer to make a decision on a transaction which he would otherwise not have made, is considered to be misleading:

a. The existence or the nature of the product;

b. The most important features of the product, such as availability, advantages, risks, design, composition, accessories, service and complaint handling, process and date of production or execution, delivery, suitability for use, quantity, specification, geographic or commercial origin, results to be expected, or the results and essential features of tests and controls performed;

²³ Dutch Advertising Foundation, case file 2009/00248.
²⁴ See the explanatory notes to the DAC.

[...]

A sticker placed on Israeli products by BDS activists is in violation of Article 7 of the DCA if the content of the sticker

- contravenes the requirements as to the level of proficiency and care that may be reasonably expected towards the consumer; and
- substantially disrupts or may disrupt the economic behaviour of the average consumer.

A sticker placed on Israeli products by BDS activists is in violation of Article 8(2) of the DCA if the content of the sticker

- is incorrect, unclear or ambiguous for the average consumer with respect to, for instance, the nature, risks, geographic or commercial origin of the product; and
- entices or may entice the average consumer to make a decision on a transaction which he would otherwise not have made.

6.2 Who could be held to act inconsistently with the DAC?

The obligations set out in the DAC apply to advertisers. The DAC defines advertiser as follows: “[t]he advertiser is an organisation or a person, not being a consumer”.

BDS organisations and activists can be deemed advertisers within the meaning of the DAC. Indeed, by analogy, the AA held that a non-profit organisation which publicly disseminates information about Israeli products is an advertiser within the meaning of the DAC.²⁵

6.3 Relevance of the sticker’s type and content

In 2009, the AB heard an appeal against a decision of the AA which was concerned with a brochure of the consumer organisation PEACE that called for a ban on the sale of Israeli products from the settlements.²⁶ The complainant alleged that the following statements in the brochure were contrary to the standards set out in the DAC:

- “In order to be able to sell the products from the settlements Israel has been committing fraud on a vast scale for years with falsified origin documents”;

²⁵ Dutch Advertising Foundation, case file 2009/00248.

²⁶ Dutch Advertising Foundation, case file 2009/00248.

- “The European consumers are also systematically misled by false [origin] labels”;
- “The sale of these products is inconsistent with the policy of the Dutch government and the European Commission”.

The AB acknowledged PEACE’s freedom to express its opinion that the sale of Israeli products from the settlements must be banned, however, the conviction with which it expressed its views required it to be able to demonstrate that the aforementioned statements were correct. The AB considered these statements to be unfair under Article 7 of the DAC and misleading pursuant to Article 8(2) of the DAC. The AB took into account that the average consumer could not be deemed familiar with the topics addressed in the brochure. The AB dismissed PEACE’s claim that its statement concerning the position of the Dutch government and the European Commission could be held truthful in light of the Dutch government’s and the European Commission’s position regarding the legality of the settlements under international law.

It follows from the aforementioned case that statements suggesting that there is something wrong with Israeli products or that they are marketed unlawfully are inconsistent with the DAC. In case stickers placed by BDS activists contain such indications, they can be held contrary to the DAC.

7. COUNTERMEASURES: THE REMOVAL OF THE BDS STICKERS

When assessing the legality of countermeasures that could be taken against the BDS stickers, e.g. the removal of such stickers, a distinction should be made between countermeasures taken by the shopkeeper and offended consumers.

On the one hand, 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.²⁷ 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. However, the shopkeeper must comply with the food labelling requirements as laid down in, amongst others, the Commodities Act Decree on Foodstuffs Information.

On the other hand, it could be argued that offended consumers, by removing the BDS stickers (potentially causing damage to the products’ original wrapping), cause damage to property within the meaning of Article 350 of the DCC. In addition, such

²⁷ Such right is not unlimited as the shopkeeper is obliged to respect intellectual property rights, including trademarks.

damage can give rise to a claim for compensation of the damage caused under Article 6:162 of the DCIC.

8. CONCLUSION

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

- Criminal liability: under the Dutch Criminal Code, BDS activists (and potentially shopkeepers) can be held liable for placing (or not removing) BDS stickers on products from Israel as well as for entering a shop contrary to its internal rules and regulations or taking actions in the shop that are inconsistent with such rules and regulations;
- Administrative liability: under the Commodities Act Decree on Foodstuffs Information and the Commodities Act Decree on Administrative Fines, a shopkeeper can be held liable for selling products with BDS stickers containing misleading information for consumers;
- Civil liability: under the Dutch Civil Code, BDS activists (and potentially shop owners) can be held liable for placing BDS stickers on products from Israel due to the material and moral damage caused by such actions;
- Inconsistency with advertising standards: the placing of stickers by BDS activists can be held inconsistent with the Dutch Advertising Code;
- 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.