

**BDS stickers in Switzerland on products made in Israel****1. INTRODUCTION**

1. We understand that certain BDS activists in Switzerland have called for the placing of anti-Israel stickers on products originating in Israel that are sold in Swiss supermarkets. Such BDS stickers have effectively been placed on certain food products from Israel in at least one of the biggest supermarket-chains in the country.
2. This note addresses the issue of potential damage to consumers and companies caused by such BDS campaign as well as the potential criminal and civil liability of those responsible for placing anti-Israel stickers. Given the lack of specific anti-boycott legislation in Switzerland, the act of placing BDS stickers on products from Israel needs to be addressed under the general provisions of Swiss civil and criminal law. Our analysis is based on the assumption that the BDS stickers in Switzerland were 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**

3. The labelling of Israeli products by BDS activists is harmful to consumers. Indeed, calling for a boycott of Israeli products does not only offend Jewish consumers of Swiss supermarkets but is, in addition, contrary to the legitimate interests of Swiss consumers in general.
4. Food labelling is 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. Information included on the label, even where such information is not mandatory, may not be deceptive or misleading. For instance, a product label may not claim that the product brings health benefits where there is no scientific basis for such claim. 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.

5. 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.

6. 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.

### **3. CRIMINAL LIABILITY**

#### **3.1 Applicable criminal offences under the Swiss Criminal Code**

7. The Swiss Criminal Code (SCC) 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 144(1) of the SCC: Criminal damage

*Any person who damages, destroys or renders unusable property belonging to another or in respect of which another has a right of use is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty.*

- Article 151 of the SCC: Maliciously causing financial loss to another

*Any person who without a view to gain, by making representations or suppressing information, wilfully misleads another or wilfully reinforces an erroneous belief with the result that the person in error acts in such a way that he or another incurs a financial loss is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty.*

- Article 172ter(1) of the SCC: Minor offences against property

*Where the offence relates only to a minor asset value or where only a minor loss is incurred, the offender is liable on complaint to a fine.*

- Article 261bis of the SCC: Racial discrimination

*Any person who publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion,*

*any person who publicly disseminates ideologies that have as their object the systematic denigration or defamation of the members of a race, ethnic group or religion,*

*any person who with the same objective organises, encourages or participates in propaganda campaigns,*

*any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivialises or seeks justification for genocide or other crimes against humanity, [...]*

*is liable to a custodial sentence not exceeding three years or to a monetary penalty.*

8. Depending on the specific circumstances, the act of placing BDS stickers on products originating in Israel is likely to violate all criminal provisions 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, at the very least amounting to a minor asset value or minor loss as the sale of the affected products is likely to decline<sup>1</sup>;
- maliciously cause financial loss to the supermarket owners and the producers of the affected products by making representations, wilfully misleading consumers and reinforcing an erroneous belief, i.e. that the Israeli products are not appropriate or even dangerous for consumers.<sup>2</sup> Such financial loss would be caused by the fact that consumers will be less inclined to buy the affected products, since the label gives the impression that something is wrong with the product. Financial loss would also be caused by the fact that Jewish customers in particular may avoid visiting the supermarket; and
- publicly incite hatred or discrimination against Israel and Jewish people as a whole, amounting to racial discrimination.<sup>3</sup>

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<sup>1</sup> Articles 144(1) and 172ter(1) of the SCC

<sup>2</sup> Article 151 of the SCC.

<sup>3</sup> Article 261bis of the SCC.

### 3.2 Applicable criminal offences under the Swiss Federal Act on Foodstuffs and Utility Articles and the Federal Act against Unfair Competition

9. First, pursuant to Article 2 of the Swiss Federal Act on Foodstuffs and Utility Articles<sup>4</sup>, the Act, amongst others, applies to “the labelling and advertising of foodstuffs”. Due to this broad scope of application, it can be argued that the placing of stickers on foodstuffs by BDS activists falls within the scope of the Act.

10. Article 18 of the Act contains a “prohibition of deception”, providing that:

- (1) *All information relating to a foodstuff, and in particular the properties that it is claimed to have, must be true.*
- (2) *Advertising for foodstuffs and their presentation and packaging must not mislead the consumer.*
- (3) *In particular, information about a foodstuff or the presentation thereof is considered to be misleading if it is liable to deceive the consumer as to the manufacture, composition, properties, method of production, storage life, origin, particular effects or value of the foodstuff.*

11. By placing anti-Israel stickers on products originating in Israel, the BDS activists “wilfully” provide “false or misleading information about foodstuffs” from Israel to the Swiss consumers. Indeed, the stickers suggest that the Israeli products are not appropriate or even dangerous for consumers. By doing so, the BDS activists can face criminal liability on the basis of Article 48(1)(h) of the Act, risking a fine of up to 40,000 francs.

12. Second, the actions of the BDS activists could be claimed to be unlawful under the Swiss Federal Act against Unfair Competition, which has the purpose to “ensure fair and undistorted competition in the interest of all concerned”. Pursuant to Article 2, the scope of the Act is broad, envisaging any conduct that infringes the principle of good faith and which, amongst others, affects the relationship between suppliers and customers. The Act applies to anyone whose actions violate the conditions of fair competition. As such, a direct competitive relationship between the parties is not necessary to bring an action under the Act.

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<sup>4</sup> Pursuant to Article 333 of the SCC, the general provisions of the SCC apply to offences provided for in other federal acts unless these federal acts themselves contain detailed provisions on such offences.

13. More precisely, the BDS activists shall be deemed to have committed an act of unfair competition pursuant to Article 3(1)(a) of the Act, as the anti-Israel stickers disparage the supermarket owners and producers, their affected goods and business activities by the incorrect, misleading and needlessly injurious statements on the stickers. By intentionally doing so, the BDS activists face criminal liability on the basis of Article 23 of the Act, risking imprisonment or a fine of up to 100,000 francs.

### **3.3 Who could be held criminally liable?**

14. Pursuant to Articles 2 and 3 of the SCC, the SCC applies to “[a]ny person who commits a felony or misdemeanour” in Switzerland, following the date on which the SCC came into force. Article 12 of the SCC provides that “[u]nless the law expressly provides otherwise, a person is only liable to prosecution for a felony or misdemeanour if he commits it wilfully”. In principle, in relation to the above provisions, the most obvious person to be held criminally liable is thus the offender of the action, i.e. the BDS activist wilfully placing the stickers on the products from Israel within the territory of Switzerland.

15. However, pursuant to Article 11 of the SCC, a felony or misdemeanour may also be committed by omission, i.e. by “a failure to comply with a duty to act”. Thus, if the shopkeeper of the shop in which products with BDS stickers are put up for sale “does not prevent a legal interest protected under criminal law from being exposed to danger or from being harmed even though, due to his legal position, he has a duty to do so” (in particular on the basis of the law, a contract or the creation of risk), the shopkeeper can be criminally liable by failing to comply with his duty to act.

16. Article 22 of the SCC additionally provides for criminal liability for attempts in case the offender, having embarked on committing an offence, does not complete the criminal act or if the result required to complete the act is not or cannot be achieved. Articles 24 and 25 of the SCC provide for the criminal conviction of certain forms of participation, i.e. *incitement* and *complicity*, for “[a]ny person who has wilfully incited another to commit a felony or a misdemeanour, provided the offence is committed”, “[a]ny person who attempts to incite someone to commit a felony” and “[a]ny person who wilfully assists another to commit a felony or a misdemeanour”.

### **3.4 Who could report an offence or bring a criminal case?**

17. First, with regard to the right to report a criminal offence, Article 301 of the Swiss Criminal Procedure Code (SCPC) provides that “[a]ny person is entitled to report an offence to a criminal justice authority in writing or orally”, irrespective of the type of offence that has been committed and even if the person has not personally been affected by the offence.

18. Second, with regard to the right to bring a criminal case, the SCPC 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 2 of the SCPC, the Swiss state has a monopoly on criminal prosecution, stating that “[t]he administration of criminal justice is the responsibility solely of the authorities specified by law”. 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 if the stickers amount to racial discrimination or false or misleading information about foodstuffs. Criminal damage will only be prosecuted *ex officio* in the scenario of a public riot or major damage.<sup>5</sup> In case of such *ex officio* prosecution, the initiation of a criminal case falls within the monopoly of the Swiss 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 (less serious) offences are only prosecuted on the basis of a criminal complaint by the victim. Pursuant to Article 30 of the SCC, “[i]f an act is liable to prosecution only if a complaint is filed, any person who suffers harm due to the act may request that the person responsible be prosecuted.”<sup>6</sup>

In the context of BDS stickers on products made in Israel, maliciously causing financial loss to another and minor offences against property are always prosecuted on the basis of a complaint. This is only the case for criminal damage if it is not committed during a public riot and if there is no major damage. In case of such prosecution on the basis of a criminal complaint, the victim of the offence (the shopkeepers, customers and producers) will have to file a criminal complaint in order for the offence to be prosecuted.

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<sup>5</sup> Articles 144(2) and 144(3) of the SCC.

<sup>6</sup> Article 31 of the SCC provides that the right to file a criminal complaint pertains to the actual victim of the offence and expires after three months. Pursuant to Article 304 of the SCPC, “[a] criminal complaint must be submitted in writing or made orally and noted down in an official record. It must be made to the police, the public prosecutor or the authority responsible for prosecuting contraventions.”

In addition, Article 23 of the Swiss Federal Act against Unfair Competition explicitly provides that “[a] complaint may be lodged by anyone entitled to institute civil proceedings under Sections 9 and 10”, i.e. (1) the shopkeeper or producer who suffers or is likely to suffer prejudice to his client base, credit or professional reputation, business or economic interests, (2) customers whose economic interests are threatened or prejudiced by an act of unfair competition and (3) organizations devoted to the protection of consumers.

19. Article 7 of the SCPC obliges the criminal justice authorities “to commence and conduct proceedings that fall within their jurisdiction where they are aware of or have grounds for suspecting that an offence has been committed.” There is thus an obligation to prosecute whenever there is evidence to believe that a criminal offence has been committed, meaning that a prosecutor cannot exercise discretion in this regard and cannot take public interest factors into account when making his decision.

### **3.5 Relevance of the sticker's type and content**

20. Under the SCC and the Swiss Federal Act on Foodstuffs and Utility Articles, 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 stickers must, besides being placed on the products, “damage, destroy or render unusable property belonging to another”, “maliciously cause financial loss to another”, “publicly incite hatred or discrimination” or “give false or misleading information about foodstuffs”. 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.

### **3.6 Governmental and non-governmental organisations to contact with respect to violations of the SCC, the Swiss Federal Act on Foodstuffs and Utility Articles, the Federal Act against Unfair Competition**

21. The contact details of the relevant governmental and non-governmental organisations can be found in the table below.

Name of the organisation	Governmental/ non-governmental	Function	Contact details
<b>The Office of the Attorney General</b>	Governmental	Switzerland's investigation and prosecution	Attorney General of Switzerland: Michael Lauber

<b>(Le Ministère public de la Confédération)</b>		authority. It is competent for the prosecution of criminal acts which fall under federal jurisdiction.	Address: Office of the Attorney General Taubenstrasse 16 3003 Berne  Tel.: +41 58 462 45 79 Fax: +41 58 462 45 07  <a href="#">Website</a>
<b>Federal Office for Food Security and Veterinary Affairs (Office fédéral de la sécurité alimentaire et des affaires vétérinaires)</b>	Governmental	Tasked with, amongst others, the enforcement of the Swiss Federal Act on Foodstuffs and Utility Articles.	Address :  Office fédéral de la sécurité alimentaire et des affaires vétérinaires OSAV Schwarzenburgstrasse 155 3003 Berne  Email : <a href="mailto:info@blv.admin.ch">info@blv.admin.ch</a>  Tel. : +41 58 463 30 33  <a href="#">Website</a>
<b>Swiss Chamber of Trade and Industry (La Chambre de commerce et d'industrie suisse)</b>	Non-Governmental	Chamber of commerce.	Address:  Corso Elvezia 16 · Casella postale 5399 · 6901 Lugano  Email: <a href="mailto:info@cc-ti.ch">info@cc-ti.ch</a>  Tel.: +41 91 911 51 11  <a href="#">Website</a>
<b>Swiss Business Federation (economiesuisse, la Fédération des entreprises suisses)</b>	Non-Governmental	Business association representing the interests of Swiss businesses.	Address :  economiesuisse Verband der Schweizer Unternehmen Spitalgasse 4 3011 Bern Suisse  Email : <a href="mailto:bern@economiesuisse.ch">bern@economiesuisse.ch</a>  Tel.: +41 31 311 62 96 Fax: +41 31 312 53 50  <a href="#">Website</a>

<b>Swiss Retail Federation</b>	Non-governmental	The Swiss Retail Federation is the association of medium and large enterprises of the Swiss retail trade. Among its members are department stores, specialty shops, cash & carry markets, independent retailers, food retailers and kiosks.	Address: SRF Swiss Retail Federation Bahnhofplatz 1 3011 Bern Email: <a href="mailto:info@swiss-retail.ch">info@swiss-retail.ch</a> Tel.: +41 31 312 40 40  <a href="#">Website</a>
<b>La Fédération romande des consommateurs</b>	Non-governmental	One of Switzerland's main consumer organisations.	Address: Fédération romande des consommateurs Case postale 6151 CH – 1002 Lausanne Tel.: +41 21 331 00 90  <a href="#">Website</a>
<b>Schweizerische Konsumentenforum kf</b>	Non-governmental	One of Switzerland's main consumer organisations.	Address: Geschäftsstelle Konsumentenforum kf Belpstrasse 11 CH-3007 Bern Tel.: +41 31 380 50 30 Fax: +41 31 380 50 31 Email: <a href="mailto:forum@konsum.ch">forum@konsum.ch</a> <a href="#">Website</a>

<b>Die Stiftung für Konsumentenschutz</b>	Non-governmental	One of Switzerland's main consumer organisations.	Address: Stiftung für Konsumentenschutz SKS Monbijoustrasse 61 Postfach 3000 Bern 23 Email: <a href="mailto:info@konsumentenschutz.ch">info@konsumentenschutz.ch</a> Tel.: +41 31 370 24 24 Fax: +41 31 372 00 27  <a href="#"><u>Website</u></a>
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#### **4. CIVIL LIABILITY**

22. The act of placing BDS stickers on products originating in Israel put up for sale in Swiss supermarkets can amount to civil liability of those involved in such practices. Civil claims against the BDS activists could be brought by supermarket owners, consumers or producers of the affected products.

##### **4.1 The perspective of supermarket owners**

23. 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 41(1) of the Swiss Code of Obligations (SCO), which complements the Swiss Civil Code:

*Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.*

24. Under Swiss tort law, a loss or damage within the meaning of Article 41(1) of the SCO must result from the infringement of certain protected rights ("absolute rights" such as property) or from the infringement of a norm designed to protect the interest of the victim and to prevent the precise loss that has occurred.<sup>7</sup> Purely economic loss or damage is not subject to legal redress.

25. 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 a direct damage to the goods and related loss of profit for not being able to sell those goods. He could also claim an indirect loss of 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. 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 Swiss supermarkets.

26. To succeed with a claim under Article 41 of the SCO, the following elements would need to be established: (1) loss or damage; and (2) a causal link between the unlawful action and the loss or damage suffered.

27. In addition, pursuant to Article 9 of the Federal Act against Unfair Competition, the supermarket owner who suffers or is likely to suffer prejudice to his client base, his credit or his professional reputation, his business or his economic interests in general due to an act of unfair competition – such as the placing of defamatory anti-Israel stickers by BDS activists – may request the court to prohibit an imminent prejudice, remove an ongoing prejudice or establish the unlawful nature of such prejudice. In particular, he may require publication of rectification or judgment.

28. The contact details of the relevant industry organisation can be found in the table below.

Name of the organisation	Governmental/ non-governmental	Function	Contact details
<b>Swiss Retail Federation</b>	Non-governmental	The Swiss Retail Federation is the association of medium and	Address: SRF Swiss Retail Federation Bahnhofplatz 1

<sup>7</sup> The unlawfulness can lie in the violation of a norm enshrined, for instance, in the Swiss Criminal Code.

		<p>large enterprises of the Swiss retail trade. Among its members are department stores, specialty shops, cash &amp; carry markets, independent retailers, food retailers and kiosks.</p>	<p>3011 Bern</p> <p>Email: <a href="mailto:info@swiss-retail.ch">info@swiss-retail.ch</a></p> <p>Tel.: +41 31 312 40 40</p> <p><a href="#">Website</a></p>
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#### 4.2 The perspective of consumers

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

30. First, consumers could argue that the BDS activists have acted inconsistently with Article 2 of the Swiss Civil Code, which requires every individual to *“act in good faith in the exercise of his or her rights and in the performance of his or her obligations”*. This good faith requirement precludes people from treating individuals or groups differently without a reasonable and objective justification.

31. Second, it can be argued that by placing BDS stickers on products originating in Israel, the activists are liable under Article 49(1) of the SCO, which provides that:

*Any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made.*

32. 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. In order to succeed with a claim under Article 49(1) of the SCO, the moral damage suffered by the complainant must be sufficiently serious. It should be noted that in accordance with Article 49(2) of the SCO, apart from monetary compensation the court may also order other types of satisfaction, including public retraction of harmful statements.

33. Third, a consumer could possibly bring a claim under Article 41(2) of the SCO, pursuant to which “[a] person who wilfully causes loss or damage to another in an immoral manner [‘contra bonos mores’] is likewise obliged to provide compensation”. This provision covers acts which do not violate any absolute rights but which are nevertheless inconsistent with certain moral standards of the society. As placing stickers inciting the boycott of Israeli products discriminates against Israeli producers and consumers wishing to acquire their products, it can be argued that such practice is inconsistent with the generally recognized standards of the Swiss society.

34. Fourth, in the event that BDS stickers would be placed on Israeli products by the employees of Swiss supermarkets, a consumer could also bring a claim against the shop owner pursuant to Article 55 of the SCO. Pursuant to this provision:

(1) *An employer is liable for the loss or damage caused by his employees or ancillary staff in the performance of their work unless he proves that he took all due care to avoid a loss or damage of this type or that the loss or damage would have occurred even if all due care had been taken.*

(2) *The employer has a right of recourse against the person who caused the loss or damage to the extent that such person is liable in damages.*

35. In addition, pursuant to Article 10 of the Federal Act against Unfair Competition, consumers whose economic interests are threatened or prejudiced by an act of unfair competition – such as the placing of defamatory anti-Israel stickers by BDS activists – may request the court to prohibit, remove or establish unlawfulness of such practice.

36. The contact details of the relevant governmental and non-governmental organisations can be found in the table below.

Name of the organisation	Governmental/ non-governmental	Function	Contact details
<b>Federal Bureau of Consumption (Bureau Fédérale de la Consommation)</b>	Governmental	The Swiss government's competence center for consumer issues. It contributes to the elaboration and	Address : Bureau fédéral de la consommation (BFC) Bundeshaus Ost 3003 Berne Tel.: +41 58 462 20 00

		the implementation of laws and ordinances in the area of consumption.	<a href="#">Website</a>
<b>Federal Commission against racism (<i>La Commission fédérale contre le racisme</i>)</b>	Governmental	Mandated to address racial discrimination, to promote better understanding between persons of race, colour, descent, national or ethnic origin, different religion, to combat all forms of direct or indirect racial discrimination.	Address : Commission fédérale contre le racisme CFR Inselgasse 1 CH-3003 Berne  Email: <a href="mailto:ekr-cfr@gs-edi.admin.ch">ekr-cfr@gs-edi.admin.ch</a> Tel. : +41 58 464 12 93 Fax: +41 58 462 44 37 <a href="#">Website</a>
<b>La Fédération romande des consommateurs</b>	Non-governmental	One of Switzerland's main consumer organisations.	Address: Fédération romande des consommateurs Case postale 6151 CH – 1002 Lausanne Tel.: +41 21 331 00 90 <a href="#">Website</a>
<b>Schweizerische Konsumentenforum kf</b>	Non-governmental	One of Switzerland's main consumer organisations.	Address: Geschäftsstelle Konsumentenforum kf Belpstrasse 11 CH-3007 Bern Tel.: +41 31 380 50 30 Fax: +41 31 380 50 31 Email: <a href="mailto:forum@konsum.ch">forum@konsum.ch</a> <a href="#">Website</a>

<b>Die Stiftung für Konsumentenschutz</b>	Non-governmental	One of Switzerland's main consumer organisations.	Address: Stiftung für Konsumentenschutz SKS Monbijoustrasse 61 Postfach 3000 Bern 23 Email: <a href="mailto:info@konsumentenschutz.ch">info@konsumentenschutz.ch</a> Tel.: +41 31 370 24 24 Fax: +41 31 372 00 27 <a href="https://www.konsumentenschutz.ch/ueber-uns/kontakt">https://www.konsumentenschutz.ch/ueber-uns/kontakt</a>
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#### **4.3 The perspective of the producer of the goods**

37. 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. The legal basis for such claim would be Article 49(1) of the SCO, discussed above in the context of the potential claims that could be raised by consumers faced with BDS stickers. Arguably, the producer could also claim a violation of Article 41(1) of the SCO in the form of a loss of future profits from selling his products on the Swiss market.

38. In addition, pursuant to Article 9 of the Federal Act against Unfair Competition, the producer could also request the court to prohibit, remove or establish unlawfulness of the placing of anti-Israel stickers on products originating in Israel by BDS activists. He could, in particular, request public rectification.

**4.4 Relevance of the sticker's type and content**

39. 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. In particular, the specific content of the sticker is crucial for proving the seriousness of the 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.

**5. COUNTERMEASURES: THE REMOVAL OF THE BDS STICKERS**

40. 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.

41. 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.<sup>8</sup> 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, pay attention not to supply foodstuffs in such a way that they do not comply with the requirements of the Swiss Federal Act on Foodstuffs and Utility Articles (e.g. by not providing sufficient information and designation).<sup>9</sup>

42. On the other hand, it could be argued that offended consumers, by removing the BDS stickers (potentially causing damage to the products’ original wrapping), commit a “minor offence against property” in the sense of Article 172ter of the SCC. As this offence is prosecuted on the basis of a criminal complaint, such complaint of an actual victim of the offence, i.e. the shop owner, would be necessary for the offence to be prosecuted.

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<sup>8</sup> Such right is not unlimited as the shopkeeper is obliged to respect intellectual property rights, including trademarks.

<sup>9</sup> See Articles 18-21 and 48 of the Swiss Federal Act on Foodstuffs and Utility Articles.

## 6. CONCLUSION

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

- Criminal liability: under the Swiss Criminal Code and the Swiss Federal Act on Foodstuffs and Utility Articles, BDS activists (and potentially shopkeepers) can be held liable for placing (or not removing) BDS stickers on products from Israel;
- Civil liability: under the Swiss Code of Obligations and the Swiss 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;
- Constitutional claims: placing BDS stickers on products from Israel could be held inconsistent with Article 8(2) of the Swiss Constitution, which provides that "*[n]o person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability*";
- 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.