Provisional text

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 13 June 2019(1)

Case C-363/18

Organisation juive européenne,
Vignoble Psagot Ltd
v
Ministre de l'Économie et des Finances

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Request for a preliminary ruling — Approximation of laws — Labelling and presentation of foodstuffs — Regulation (EU) No 1169/2011 — Mandatory indication of the origin of products — Omission likely to mislead consumers — Products from territories occupied by Israel since 1967)

I. Introduction

1. The present request for a preliminary ruling concerns the interpretation of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers. (2)

2. This request was made in the context of proceedings between an association known as Organisation juive européenne ('Organisation juive européenne') and a vineyard company Psagot Ltd ('Psagot'), on the one hand, and the Ministre de l'économie et des Finances français (the French Minister for Economy and Finances), on the other, concerning a notice by which the latter prescribed the indication, on foodstuffs originating in the territories occupied by Israel since 1967 and, where applicable, in settlements within those territories, of the territory in question and, additionally, 'Israeli settlement'.

3. With this request, the Court has been given the opportunity to clarify the scope of the obligation to indicate the country of origin or place of provenance on foodstuffs where the absence of such information would mislead the consumer.

II. Short historical background

4. In the aftermath of a short military campaign in June 1967 Israel occupied certain territories which had been either previously part of or controlled by three other States, namely, Egypt, Syria and Jordan. In the case of Egypt, the territory in question was the Sinai Peninsula and the Gaza Strip. (Egypt had administered the Gaza Strip from 1948 to 1967 although it was not part of Egypt as such.) The Golan Heights were part of Syria and the West Bank and East Jerusalem had been administered by Jordan between 1948 to 1967.

5. In the case of the Sinai, this territory was returned to Egypt as part of the Egypt-Israel Peace Treaty of 1979. Israel evacuated the Gaza Strip in 2005, although it controls access to the territory by land, air and sea. The Gaza Strip is currently under the de facto control of the organisation known as Hamas.

6. Save for a small part of territory returned to Syria in 1974 and a tiny demilitarised zone, the Golan Heights remain under Israeli occupation. The Golan Heights were effectively annexed by Israel in December 1981.

7. East Jerusalem also remains under Israeli occupation. The situation with regard to the West Bank is more complex. Part of it is administered by the Palestinian National Authority, but large swathes of that territory are nonetheless claimed by Israel. Israel has also constructed extensive settlements for its citizens in East Jerusalem, the West Bank and the Golan Heights. It had previously constructed such settlements in the Sinai, but these were dismantled when this territory was returned to Egyptian control. There were also some settlements in the Gaza Strip, but they were also dismantled when Israel evacuated that territory in 2005.

8. This, in very broad summary, forms the historical background to the present request for a preliminary ruling. This request concerns the compatibility with EU law of certain labelling requirements in respect of products originating in these occupied territories, the details of which I will presently outline. For the purposes of resolving this request, the Court will, to some extent at least, have to determine the legality of the present occupation by Israel of which for convenience I propose to call the Occupied Territories. It is, however, important to state at the outset that the Court will of necessity view the issue raised as a purely legal matter, taking its cue for this purpose from international law and drawing for this purpose on relevant UN Security Council and UN General Assembly Resolutions, an important opinion from the International Court of Justice delivered in 2004 and other international law sources. It should be stressed, however, that nothing in either this Opinion or in the ultimate judgment of the Court should be construed as expressing a *political* or moral opinion in respect of any of the questions raised by this reference.

III. Legal context

A. EU law

1. Regulation No 1169/2011

9. Recitals 3, 29 and 33 of Regulation No 1169/2011 state:

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

…

(29) The indication of the country of origin or of the place of provenance of a food should be provided whenever its absence is likely to mislead consumers as to the true country of origin or place of provenance of that product. In all cases, the indication of country of origin or place of provenance should be provided

in a manner which does not deceive the consumer and on the basis of clearly defined criteria which ensure a level playing field for industry and improve consumers' understanding of the information related to the country of origin or place of provenance of a food. Such criteria should not apply to indications related to the name or address of the food business operator.

…

(33) The Union's non-preferential rules of origin are laid down in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [OJ 1992 L 302, p. 1] and its implementing provisions in Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [OJ 1993 L 253, p. 1]. Determination of the country of origin of foods will be based on those rules, which are well known to food business operators and administrations and should ease their implementation.'

10. Article 1(1) of Regulation No 1169/2011, entitled 'Subject matter and scope', provides:

'This Regulation provides the basis for the assurance of a high level of consumer protection in relation to food information, taking into account the differences in the perception of consumers and their information needs whilst ensuring the smooth functioning of the internal market.'

11. Article 2 of Regulation No 1169/2011 is entitled 'Definitions'. Under Article 2(2)(g), 'place of provenance' means 'any place where a food is indicated to come from, and that is not the "country of origin" as determined in accordance with Articles 23 to 26 of [the Community Customs Code]; the name, business name or address of the food business operator on the label shall not constitute an indication of the country of origin or place of provenance of food within the meaning of this Regulation'. Article 2(3) also points out that 'for the purposes of this Regulation the country of origin of a food shall refer to the origin of a food as determined in accordance with Articles 23 to 26 of [the Community Customs Code]'.

12. Article 3 of Regulation No 1169/2011, entitled 'General objectives', provides in paragraph 1:

'The provision of food information shall pursue a high level of protection of consumers' health and interests by providing a basis for final consumers to make informed choices and to make safe use of food, with particular regard to health, economic, environmental, social and ethical considerations.'

13. Article 7 of Regulation No 1169/2011 is entitled 'Fair information practice'. Paragraph 1 thereof provides:

'Food information shall not be misleading, particularly:

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

…'

14. Article 9(1)(i) of Regulation No 1169/2011 provides that the indication of the country of origin or place of provenance is mandatory where Article 26 of that regulation so provides. Under the second paragraph of the latter provision, the indication of the country of origin or place of provenance is mandatory 'where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance'.

15. Article 38 of Regulation No 1169/2011, entitled 'National measures' provides:

'1. As regards the matters specifically harmonised by this Regulation, Member States may not adopt nor maintain national measures unless authorised by Union law. Those national measures shall not give rise to

obstacles to free movement of goods, including discrimination as regards foods from other Member States.

2. Without prejudice to Article 39, Member States may adopt national measures concerning matters not specifically harmonised by this Regulation provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with this Regulation.'

16. Article 39 of Regulation No 1169/2011, entitled 'National measures on additional mandatory particulars' provides:

'1. In addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States may, in accordance with the procedure laid down in Article 45, adopt measures requiring additional mandatory particulars for specific types or categories of foods, justified on grounds of at least one of the following:

(a) the protection of the public health;

(b) the protection of consumers;

(c) the prevention of fraud;

(d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition.

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

2. The Customs Code

17. At the time of the adoption of Regulation No 1169/2011, Article 23(1) of the Community Customs Code provided that 'goods originating in a country [were] those wholly obtained or produced in that country'. Articles 24 of the Community Customs Code specified that 'goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture'.

18. The Community Customs Code was repealed by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (3) (the 'Union Customs Code').In accordance with Article 286(3) of the Union Customs Code, references to the Community Customs Code in other Union acts should be understood as references to the corresponding provisions of the Union Customs Code.

19. Article 60 of the Union Customs Code — which entered into force on 1 May 2016 (4) — corresponds in substance to provisions previously contained in Article 23(1) and Article 24 of the Community Customs Code. According to the first paragraph of that new provision, 'goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory'. The second paragraph states that 'goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture'.

3. Interpretative Notice of the European Commission on indication of origin of goods from the territories occupied by Israel since June 1967

20. On 12 November 2015, in the *Official Journal of the European Union*, the European Commission published a notice entitled 'Interpretative Notice of the European Commission of 12 November 2015 on indication of origin of goods from the territories occupied by Israel since June 1967' (5) (the 'Interpretative Notice').

21. The Commission justifies its approach by the fact that there is 'a demand for clarity from consumers, economic operators and national authorities about existing Union legislation on origin information of products from Israeli-occupied territories'. (6) Its aim is 'also to ensure the respect of Union positions and commitments in conformity with international law on the non-recognition by the Union of Israel's sovereignty over the territories occupied by Israel since June 1967'. (7)

22. This is why, at the end of its Interpretative Notice, the Commission considers that:

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

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

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

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

B. French law

23. On 24 November 2016, referring to Regulation No 1169/2011, the Minister for the Economy and Finances, published in the Official Journal of the French Republic a notice to economic operators concerning the indication of origin of goods originating in the territories occupied by Israel since 1967 ('Avis aux opérateurs économiques relatifs à l'indication de l'origine des marchandises issues des territoires occupés par Israël depuis 1967') (8) (the 'disputed notice').

24. That disputed notice is worded as follows:

'Regulation [No 1169/2011] provides that the labelling particulars must be fair. They must not risk misleading the consumer, particularly as to origin of the products. Foodstuffs from the territories occupied by Israel must therefore be labelled to reflect this origin.

Consequently, the Direction générale de la Concurrence, de la consommation et de la répression des fraudes du ministère de l'Économie et des Finances (GCCRF) draws the attention of operators to the Interpretative Notice.

In particular, it specifies that under international law the Golan Heights and the West Bank, including East Jerusalem, are not part of Israel. Consequently, in order not to mislead the consumer, the labelling of food products must accurately indicate the exact origin of the products, whether their indication is mandatory under Community rules or voluntarily affixed by the operator.

For products from the West Bank or the Golan Heights which originate from settlements, a reference limited to “product originating in the Golan Heights” or “product originating in the West Bank” is not acceptable. Although these terms do refer to the wider area or territory from which the product originates, the omission of the additional geographical information that the product originates from Israeli settlements is likely to mislead the consumer as to the true origin of the product. In such cases, it is necessary to add, in brackets, the term “Israeli settlement” or equivalent terms. Thus, terms such as “product originating in the Golan Heights (Israeli settlement)” or “product originating in the West Bank (Israeli settlement)” may be used.’

IV. The facts of the main proceedings

25. By the disputed notice, the French Minister for the Economy and Finance, referring to Regulation No 1169/2011 specified the terms which could or could not be used for products from the territories occupied by Israel since June 1967.

26. By two applications, the Organisation juive européenne and Psagot (a company specialising in the exploitation of vineyards located in particular in the territories occupied by Israel) seek the annulment of the disputed notice as being ultra vires.

27. According to the referring court, the assessment of the compatibility of the disputed notice with Regulation No 1169/2011 depends on whether EU law requires, for a product originating in a territory occupied by Israel since 1967, an indication of that territory and an indication that the product comes from an Israeli settlement if that is the case, or, if not, whether the provisions of Regulation No 1169/2011 allow a Member State to require such products to carry such labels.

V. The request for a preliminary ruling and the procedure before the court

28. In those circumstances, by decision of 30 May 2018, received at the Court on 4 June 2018, the Conseil d’État (Council of State, France) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘Does EU law, and in particular Regulation No 1169/2011 …, where indication of the origin of a product falling within the scope of that regulation is mandatory, require, for a product from a territory occupied by Israel since 1967, indication of that territory and an indication that the product comes from an Israeli settlement if that is the case? If not, do the provisions of [Regulation No 1169/2011], in particular those in Chapter VI thereof, allow a Member State to require those indications?’

29. Written observations were submitted by Organisation juive européenne, Psagot, the French, Swedish, Irish and Netherlands Governments and by the European Commission. Save for the Dutch Government, all of these parties presented oral argument before the Court at the hearing on 9 April 2019.

VI. Analysis

A. The first question

30. By its first question, the referring court asks, in substance, if EU law and, in particular Regulation No 1169/2011, requires for labelling purposes the indication of the origin of a product which comes from a territory occupied by Israel since 1967 and, if the answer to this is in the affirmative, what is the extent of this labelling requirement.

1. Meaning of ‘country of origin’ and ‘place of provenance’

31. In accordance with Articles 9 and 26 of Regulation No 1169/2011, indication of the country of origin or place of provenance is mandatory where 'failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food'. It is, therefore, necessary to determine, in the first place, the meaning of the terms 'country of origin' and 'place of provenance'.

32. The 'place of provenance' is defined by Article 2(2)(g) of Regulation No 1169/2011 as opposed to the 'country of origin' which is itself defined by reference to Articles 23 to 26 of the Community Customs Code.

33. As the Court has already had occasion to clarify in relation to Article 24 of the Community Customs Code, those provisions provide a common definition of the concept of the origin of goods, but do not concern the content of consumer information. (9) The 'country of origin' within the meaning of Regulation No 1169/2011 merely covers, therefore, goods originating in a *country*, including its territorial sea.

34. In addition, Article 2(2)(g) of Regulation No 1169/2011 also provides that 'the name, business name or address of the food business operator on the label shall not constitute an indication of the country of origin or place of provenance of food within the meaning of this Regulation'. In view of this wording, it is plain that the reference to a 'place of provenance' necessarily refers to a place which is neither a country nor the address of the food business operator on the label.

35. The word 'place' is a common word which refers, in its ordinary meaning, to a *spatial* situation that makes it possible to locate someone or something. (10) It follows, therefore, that the terms 'country of origin' within the meaning of Regulation No 1169/2011 refer to a country, including its territorial sea (11) whereas the terms 'place of provenance' refer to a geographical place which is smaller than a country and larger than the precise location of a building. (12)

36. In addition, however, in accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording, but also its context and the objectives of the legislation of which it forms part. (13)

37. Firstly, the objective of Regulation No 1169/2011 is clearly set out in Article 1: the EU legislator seeks to ensure 'a *high level* of consumer protection *in relation to food information*, taking into account the differences in the perception of consumers and *their information needs*'. (14) It is obvious that the emphasis here is on the consumer's need for information.

38. It cannot be denied that health protection is also ensured by Regulation No 1169/2011. Indeed, its recital 3 states that 'in order to achieve a high level of health protection for consumers and to guarantee their right to information, it should be ensured that consumers are appropriately informed as regards the food they consume'. However, in addition to the fact that this recital considers the protection of consumers' health and their right to information on an equal footing, the same recital confirms that the scope of Regulation No 1169/2011 is much broader than just health concerns. Indeed, recital 3 emphasises the fact that consumers' choices can be influenced, *among others*, by health considerations, but also by economic, environmental, social and ethical considerations.

39. It is perfectly obvious that in a modern environment some purchases are no longer based solely on considerations such as price or the identity of a particular consumer brand. For many consumers, such purchases may also be influenced by criteria such as environmental, social, political, cultural or ethical considerations. (15)

40. Returning to the wording of Article 26 of Regulation No 1169/2011 and the specific obligation relating to the 'country of origin' or 'place of provenance', it must also be admitted that this provision makes no reference to a health issue. On the contrary, Article 26 of Regulation No 1169/2011 is neutral as regards the cause of the risk of deception as to the true country of origin or place of provenance of the food.

41. Secondly, the context of Article 9 of Regulation No 1169/2011 is also relevant in determining the scope of the terms 'place of provenance'. Indeed, this provision — which lists the mandatory particulars — is the first article in Chapter IV of Regulation No 1169/2011, entitled 'mandatory food information'. Before Chapter IV, Chapter II provides some 'general principles of food information' while Chapter III is devoted to 'general food information requirements and responsibilities of food business operators'.

42. In that regard, I note that, as I have already said, the first article of Chapter II of Regulation No 1169/2011 — namely Article 3(1) — insists on the need for final consumers to make informed choices and to make safe use of food 'with particular regard to health, economic, environmental, social and *ethical* considerations'. (16) In addition, Article 4(2) of Regulation No 1169/2011 adds that 'when considering the need for mandatory food information and to enable consumers to make informed choices, account shall be taken of a widespread need on the part of the majority of consumers for certain information to which they attach *significant value*'. (17) Finally, in Chapter IV of Regulation No 1169/2011, Article 7(2) of Regulation No 1169/2011 states that 'food information shall be accurate, *clear* and easy to understand for the consumer'. (18)

43. While it may be true to say that, taken in isolation, a literal interpretation of the term 'place of provenance' might suggest a reference that would be limited to a geographical area alone. These words cannot, however, be read simply in isolation from the rest of the legislative text and its objective. Here it is necessary to draw attention to the neutrality of the wording of Article 26 of Regulation No 1169/2011, the emphasis placed by the legislator on the need to provide consumers with a high level of information, the wide range of considerations that could be relevant for these consumers and the obligation to provide accurate, clear and easily understandable information. All of these considerations suggest an interpretation of the term 'place of provenance' which is not necessarily limited to a purely geographical reference.

44. In other words, while the term 'country of origin' clearly refers to the names of the countries and their territorial sea, Article 2(2)(g) of Regulation No 1169/2011 allows the determination of the 'place of provenance' of a foodstuff by means of words which are not necessarily limited to the name of the geographical area concerned, especially where the use of geographic indicator alone might be apt to mislead.

2. Obligation to indicate the origin of a food originating in a territory occupied by Israel since 1967

45. In the light of these definitions of the terms 'country of origin' and 'place of provenance', the question rather reduces itself to this: could the absence of the indication of the origin or place of provenance within the meaning of Regulation No 1169/2011 of a foodstuff originating in a territory occupied by Israel mislead the consumer?

46. The answer to this question must be found in Article 3(1) of Regulation No 1169/2011. Indeed, it is this provision which provides the criteria likely to influence consumers' choice: the provision of food information shall pursue a high level of protection of consumers' health and interests by providing a basis for final consumers to make informed choices and to make safe use of food, with particular regard to health, economic, environmental, social and ethical considerations. Furthermore, it follows from Article 1(1) of Regulation No 1169/2011 that differences in the perception of consumers and their information needs are taken into account.

47. In addition, it must be noted that if the capacity to be misled by a description on a label must be assessed in relation to the 'average consumer', this does not necessarily mean that it is simply any consumer. On the contrary, it is the average consumer 'who is reasonably wellinformed, and reasonably observant and circumspect, as to the origin, provenance, and quality associated with the foodstuff'. (19)

48. Each of these terms is important. Indeed, if the average consumer is the one who is merely 'reasonably well informed', he or she is also 'reasonably observant and circumspect'. Unlike the first element of the definition of the average consumer, which seems to allow certain passivity, the second element implies a positive approach by the consumer concerned and the third one a greater interest in

information and, consequently, more detailed knowledge. In other words, if the average consumer is reasonably well informed, it is due to his or her own behaviour. (20)

49. In those circumstances, it cannot be excluded that the situation of a territory occupied by an occupying power — a fortiori when territorial occupation is accompanied by settlements — is a factor that is likely to be important in the choice of a reasonably well informed, and reasonably observant and circumspect consumer, in a context where, in accordance with Articles 1(1) and 3(1) of Regulation No 1169/2011, differences in consumers' perceptions and their information needs must be taken into account, including ethical considerations.

50. In this respect, contrary to the argument advanced by Organisation juive européenne at the oral hearing on 9 April 2019, I do not think that the reference to 'ethical considerations' in Regulation No 1169/2011 refers simply to ethical considerations in the context of food consumption only. Certainly, consumers might well object to the consumption of certain foods because of their own religious or ethical beliefs (such as, for example, vegetarianism). One could equally envisage circumstances in which consumers might object to the consumption of certain foods because of the manner in which the animals in question were treated either generally or prior to slaughter. Yet the country of origin information would only rarely be of assistance to, say, a consumer who objected to the presence of meat products in the food they wished to consume.

51. In my view, the reference to 'ethical considerations' in the context of country of origin labelling is plainly a reference to those wider ethical considerations which may inform the thinking of certain consumers prior to purchase. Just as many European consumers objected to the purchase of South African goods in the pre-1994 apartheid era, present day consumers may object on similar grounds to the purchase of goods from a particular country because, for example, it is not a democracy or because it pursues particular political or social policies which that consumer happens to find objectionable or even repugnant. In the context of the Israeli policies vis-à-vis the Occupied Territories and the settlements, there may be some consumers who object to the purchase of products emanating from the territories, precisely because of the fact that the occupation and the settlements clearly amount to a violation of international law. It is not, of course, the task of this Court to approve or to disapprove of such a choice on the part of the consumer: it is rather sufficient to say that a violation of international law constitutes the kind of ethical consideration which the Union legislature acknowledged as legitimate in the context of requiring country of origin information.

52. Indeed, adherence to the requirements of international law is regarded by many — and not just by a limited cadre of experts specialising in the field of international law and diplomacy — as playing a vital role in the maintenance of international peace and security and as a harbinger of justice in an otherwise unjust world. This is perhaps especially true in the context of the citizens of the Union who, even within the lifetime of some, witnessed the destructive impact of brute force in an era where some countries had come to believe that international law was simply an empty promise to the oppressed and vulnerable of the world and that it could be disregarded with impunity.

53. Viewed, accordingly, from the perspective of international law, the Israeli occupation of these territories is illegal. The settlement policy with regard to these territories is also a clear breach of international law, as Article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (21) ('the Fourth Geneva Convention') provides that the Occupying Power (in this instance, Israel) shall not 'deport or transfer part of its own civilian population into the territory it occupies'.

54. In its *Advisory Opinion re the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice concluded that this provision '… prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organise or encourage transfers of parts of its own population into the occupied territory. In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited. The Security Council has

thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and: "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories" (resolution 446 (1979) of 22 March 1979). The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories" as a "flagrant violation" of the Fourth Geneva Convention. The Court concludes that the Israeli settlements in the Occupied Palestinian Territories (including East Jerusalem) have been established in breach of international law.' (22)

55. This passage really speaks for itself. It demonstrates beyond argument that the Israeli settlement policy is regarded as a manifest breach of international law, in particular on the basis of the right of peoples to self-determination, (23) which is a legally enforceable right *erga omnes* according to the International Court of Justice (24) and the Court. (25) A similar view has regularly been taken by the United Nations (UN). (26)

56. In these circumstances it is hardly surprising that some reasonably well informed, and reasonably observant and circumspect consumers may regard this as an ethical consideration that influences their consumer preferences and in respect of which they may require further information.

57. In addition, it might also be observed that the Court itself has already recognised in its judgment in *Brita* (27) — admittedly on a particular aspect of EU law, namely the respective scope of Association Agreements between the EU and Israel (28) and between the EU and the Palestine Liberation Organisation (29) — the need to make a clear distinction between products originating in the territory of Israel and those originating in the West Bank.

58. This analysis is also in line with Article 3(5) TEU, according to which the Union shall contribute to 'the strict observance … of international law, including respect for the principles of the United Nations Charter'. It is also in line with UNSCR No 2334 (2016) which 'calls upon all States … to distinguish, in their respective dealings, between the territory of the State of Israel and the territories occupied since 1967'. (30)

59. One is accordingly coerced to the conclusion that the absence of the indication of the country of origin or place of provenance of a product originating in a territory occupied by Israel and, in any event, a settlement colony, might mislead the consumer as to the true country of origin or place of provenance of the food.

60. For all of these reasons I am of the view that the indication of that information becomes mandatory under Article 9(1)(i) and Article 26(2)(a) of Regulation No 1169/2011.

3. The judgment of the UK Supreme Court Richardson v. Director of Public Prosecutions

61. The representatives of Psagot placed a good deal of reliance on the judgment of the UK Supreme Court of 5 February 2014, *Richardson v. Director of Public Prosecutions*. (31) It is, accordingly, necessary to consider this case in a little detail.

62. This was a case where the defendants had been prosecuted for criminal trespass offences arising from what the Court described as 'a non-violent but determined protest in a London shop'. The shop specialised in selling beauty products derived from Dead Sea mineral material. The defendants' objection was grounded on the facts that (i) those products were produced by an Israeli company, in an Israeli settlement adjacent to the Dead Sea in the West Bank, that is to say in the Occupied Territories and (ii) the factory was said to be staffed by Israeli people who had been encouraged by the Government of Israel to settle there.

63. One of the specific defences advanced was that the products sold in the shop were labelled ‘Made by Dead Sea Laboratories Ltd, Dead Sea, Israel’. This was said to be false or misleading labelling because the Occupied Territories are not recognised internationally or in the United Kingdom as part of Israel. It was accordingly contended by the defendants that the company operating the shop was guilty of certain labelling offences.

64. The principal offence relied upon for this purpose was one contrary to certain United Kingdom regulations which transposed the Unfair Commercial Practices Directive. (32) The relevant offence in question consisted of engaging ‘in a commercial practice which is a misleading action’. (33)

65. The argument before the local court (district judge) was that the products sold in the shop were mislabelled as to geographical origin in that they were labelled as ‘Made by Dead Sea Laboratories Ltd, Dead Sea, Israel’. That amounted, it was said, to representing that the products came from Israel when they did not, because they came from the Occupied Territories.

66. Leaving aside the fact that, as the Supreme Court ultimately ruled, the regulation did not make the selling of mislabelled goods an offence, it is important to stress that the local court had found that there was no basis for saying that the average consumer would be misled into making a transactional decision (i.e., into purchasing the product) when otherwise she would not have done, simply because the source of the products was described as being constitutionally or politically Israel when actually it was the Occupied Territories: the source was after all correctly labelled as the Dead Sea. The district judge found that: ‘Whether or not the information given is false … I consider that the number of people whose decision whether or not to buy a supposedly Israeli product would be influenced by knowledge of its true provenance would fall far below the number required for them to be considered as the “average consumer”. If a potential purchaser is someone who is willing to buy Israeli goods at all, he or she would be in a very small category if that decision was different because the goods came from illegally occupied territory.’ The Supreme Court held that this finding ‘was clearly open to the district judge on the evidence and is fatal to the contention that the offence was committed’.

67. For my part, however, I have found this decision to be of limited assistance. The case really concerns an illegal trespass on a shop premises in respect of which rather fanciful but ingenious arguments were advanced by way of defence in order to justify the defendants’ actions. Furthermore, the Supreme Court was ultimately dealing with this case on a point of law and, critically, was bound by the findings of fact made by the lower court.

68. Nor can I, with respect, necessarily agree with the reasoning of the district judge. For my part, I consider that there may well be many potential consumers who are prepared to purchase Israeli goods (i.e., in the sense of goods produced within the pre-1967 internationally recognised boundaries of Israel), but who would baulk at or even object to the suggestion that they might purchase goods originating in the territories occupied by Israel since 1967 and, where applicable, of settlements within those territories.

4. Extent of the obligation to indicate the origin of a food originating in a territory occupied by Israel since 1967

69. The last problem that must be resolved in order to answer the first question asked by the referring court is to determine the extent of the obligation to indicate the place of origin of a foodstuff originating in a territory occupied by Israel since 1967, in other words, the wording of the mandatory indication.

70. In this respect, it is important to take into consideration Article 7 of Regulation No 1169/2011. Indeed, according to the first paragraph of that provision, food information shall not be misleading, particularly as to the characteristics of the food and, among others, as to its country of origin or place of provenance.

71. On the basis of the interpretation of a similar provision in Directive 2000/13 (34) (repealed by Regulation No 1169/2011), it can be said that Article 7(1) of Regulation No 1169/2011 requires that the

consumer have *correct, neutral and objective* information that does not mislead him. (35) Article 7(2) of Regulation No 1169/2001 adds that food information shall be *accurate, clear and easy to understand for the consumer*.

72. In that context, as Advocate General Mischo explained in a particularly pertinent way in his Opinion in *Gut Springenheide and Tusky* (C−210/96, EU:C:1998:102), a distinction needs to be drawn between information that is objectively correct, information that is objectively incorrect and information that is objectively correct but which could mislead the consumer because it does not reflect the entire truth. (36) Indeed, 'if the information omitted would be likely to shed a [clearly] different light on the information provided, the conclusion must be that the consumer has been misled'. (37)

73. This is also perfectly coherent with the definition of 'misleading actions' within the meaning of the Unfair Commercial Practices Directive, which covers, according to recital 5 of Regulation No 1169/2011, certain aspects of the provision of information to consumers, specifically to prevent misleading actions and omissions of information which must be complemented by specific rules concerning the provision of food information to consumers. Indeed, according to Article 6 of the Unfair Commercial Practices Directive, a commercial practice must be regarded as misleading 'even if the information is factually correct [but] is likely to cause [the average consumer] to take a transactional decision that he would not have taken otherwise'.

74. Furthermore, as demonstrated in the first part of my analysis, I think that while the term 'country of origin' clearly refers to the names of the countries and their territorial sea, Article 2(2)(g) of Regulation No 1169/2011 allows the determination of the 'place of provenance' of a foodstuff by means of words which are not limited to the name of the geographical area concerned.

75. In those circumstances, I think that a reference limited to indicating 'product from the Golan Heights' or 'product from the West Bank' for products from the West Bank or the Golan Heights that originate from Israeli settlements would not be sufficient. While such descriptions might be technically correct, I consider that the consumer might nonetheless be misled. Such descriptions would not reflect the whole truth in respect of a matter which might well affect consumer purchasing habits.

76. Indeed, to paraphrase the Court in *Severi*, (38) among the factors to be taken into account in order to assess whether the labelling at issue in the main proceedings may be misleading, Israeli occupation and settlements could be 'an objective factor which might affect the expectations of the reasonable consumer'. (39)

77. In the light of the foregoing considerations, I consider therefore that the addition of the terms 'Israeli settlements' to the geographical identification of the origin of the products is the only way to provide — as requested by Article 7(1) and (2) of Regulation No 1169/2011 — correct and objective but also accurate, clear and easily understandable information for the consumer.

78. Indeed, the term 'settlement' derives from a situation where there is a territory occupied by an occupying power. In the present case, this approach is, therefore, logical since Israel has been recognised as an 'occupying power' within the meaning of customary international law and the Fourth Geneva Convention. (40) These terms are regularly used to describe the current situation in respect of the Occupied Territories. (41) While I accept that in some senses this nomenclature may be thought by some to have slightly pejorative overtones, these are nonetheless the terms which are in widespread use and which the average consumer would reasonably understand.

5. Conclusion on the first question

79. Accordingly, in the light of the foregoing considerations, I conclude that Regulation No 1169/2011 requires, for a product originating in a territory occupied by Israel since 1967, the indication of the geographical name of this territory and the indication that the product comes from an Israeli settlement if that is the case.

B. In the alternative, the second question

80. By its second question, the referring court asks, in substance, if the provisions of Regulation No 1169/2011 allow Member States to require indication of the territory of a product originating in a territory occupied by Israel since 1967 and, in addition, that this product comes from an Israeli settlement if that is the case.

81. The remainder of this Opinion, accordingly, proceeds on the assumption — contrary to my own view — that Article 9(1)(i) and Article 26 of Regulation No 1169/2011 do not apply in those circumstances.

82. Article 38(1) of Regulation No 1169/2011 is clear, 'as regards the matters specifically harmonised by this Regulation, Member States may not adopt nor maintain national measures unless authorised by Union law'. On the contrary, it follows from Article 38(2) of Regulation No 1169/2011 that Member States may adopt national measures concerning matters not specifically harmonised by that regulation provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with the regulation.

83. Since Article 39(2) of Regulation No 1169/2011, relating to national measures on additional mandatory particulars, is expressly devoted to national measures on indication of origin or place of provenance, it must be admitted that these kind of particulars are not fully harmonised by Regulation No 1169/2011.

84. However, in accordance with Article 39(2) of Regulation No 1169/2011, national measures concerning the mandatory indication of the country of origin or place of provenance of foodstuffs are only authorised where there is 'a proven link between certain qualities of the food and its origin or provenance'.

85. In view of this provision, it is therefore not sufficient that the country of origin or place of provenance has, as such, a certain importance in the consumers' decision. On the contrary, the country of origin or the place of provenance must have a tangible impact in respect of the product itself and, in particular, the quality of the food in question.

86. It seems to me that the fact that a territory is occupied by an occupying power or that a particular foodstuff is produced by a person living in a settlement is not likely to give or modify certain qualities of the foodstuff in relation to its origin or provenance, at least so far as the food products originating in the Occupied Territories are concerned.

87. In the light of the foregoing considerations, I find myself obliged to conclude that Member States may not require for the purpose of Article 39(2) of Regulation No 1169/2011 the indication of the territory of a product originating in a territory occupied by Israel since 1967, nor that such product comes from an Israeli settlement.

VII. Conclusion

88. Accordingly, I propose that the Court should answer to the first question referred by the Conseil d'État (Council of State, France) as follows:

Article 9(1)(i) and Article 26(2) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, require, for a product originating in a

territory occupied by Israel since 1967, the indication of the geographical name of this territory and the indication that the product comes from an Israeli settlement if that is indeed the case.

89. In the alternative, in the event that the Court does not accept my analysis on this first question, I propose that the Court should answer the second question as follows:

Member States may not require the indication of the territory of a product originating in a territory occupied by Israel since 1967, nor that such product comes from an Israeli settlement in accordance with Article 39(2) of Regulation No 1169/2011 as there is no evidence of a proven link between certain qualities of the food produced in the Occupied Territories and their place of provenance.

---

1 Original language: English.

---

2 OJ 2011 L 304, p. 18, and corrigendum OJ 2016 L 266, p. 7. This regulation amends Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004.

---

3 OJ 2013 L 269, p. 1, and corrigendum OJ 2013 L 287, p. 90.

---

4 See Article 288(2) of the Union Customs Code.

---

5 OJ 2015 C 375, p. 4.

---

6 Paragraph 2 of the Interpretative Notice.

---

7 Paragraph 2 of the Interpretative Notice.

---

8 JORF 2016, No. 273, text No. 81.

---

9 See, to that effect, judgment of 16 July 2015, UNIC and Uni.co.pelUNIC and Uni.co.pel (C−95/14, EU:C:2015:492, paragraphs 59 and 60).

---

10 The word ‘space’ is defined as ‘a particular position, point, or area in space’ (*Oxford Dictionary of English*, 2nd ed. (revisited), Oxford University Press, 2005) whilst, for example, the word ‘lieu’ (used in the French version of Regulation No 1169/2011) may be defined as ‘la situation spatiale de quelque chose, de quelqu’un permettant de le localiser’ (Larousse.fr) and the word ‘lugar’ (used in the Spanish version of the same regulation) as a ‘porción de espacio’ (*Diccionario de la lengua española*, Real Academia Española, Edición del Tricentenario-Actualización 2018).

---

11 See Article 23(2) of the Community Customs code.

---

12 It is true that Article 60 of the Union Customs Code is broader since it refers to the 'country *or territory*' (emphasis added) instead of country. However, since 'place of provenance' is defined in Regulation No 1169/2011 as opposed to 'country of origin', 'place of provenance' becomes purely tautological and loses its meaning in the light of Article 60 of the Union Customs Code. Indeed, what is a 'territory' if not a smaller geographical area than a country, in other words: a 'place'? I therefore believe that, in the context of Regulation No 1169/2011, the rule laid down in Article 286(3) of the Union Customs Code, according to which references to the Community Customs Code in other Union acts are to be understood as references to the corresponding provisions of the Union Customs Code, is not applicable.

---

13 See, for recent applications, judgments of 17 April 2018, Egenberger (C−414/16, EU:C:2018:257, paragraph 44), and of 26 February 2019, Rimšēvičs and ECB v LatviaRimšēvičs and ECB v LatviaRimšēvičs and ECB v LatviaRimšēvičs and ECB v Latvia (C−202/18 and C−238/18, EU:C:2019:139, paragraph 45).

---

14 Emphasis added.

---

15 See, to that effect, Conway, É., 'Étiquetage obligatoire de l'origine des produits au bénéfice des consommateurs: portée et limites', *Revue Québécoise de droit international*, vol. 24-2, 2011, pp. 1-51, esp. p. 2.

---

16 Emphasis added.

---

17 Emphasis added.

---

18 Emphasis added.

---

19 See, to that effect, judgment of 10 September 2009, Severi (C−446/07, EU:C:2009:530, paragraph 61). While, in the French version of that judgment, the term used is 'éclairé', the Court also often uses the adjective 'avisé' in judgments relating to consumer protection, the latter seeming to me closer to 'circumspect'. See, for example, judgments of 16 July 1998, Gut Springenheide and TuskyGut Springenheide and TuskyGut Springenheide and TuskyGut Springenheide and Tusky (C−210/96, EU:C:1998:369, paragraphs 31 and 37); of 4 April 2000, Darbo(C−465/98, EU:C:2000:184, paragraph 20); and of 21 January 2016, Viiniverla (C−75/15, EU:C:2016:35, paragraph 25). I even note that, in Teekanne(judgment of 4 June 2015, C−195/14, EU:C:2015:361), the Court uses alternatively 'avisé' (paragraph 23) and 'éclairé' (paragraph 36), both translated as 'circumspect' in English. Furthermore, as in English, the same formula seems to be systematically used in the other language versions (see, inter alia, in Dutch — een normaal geïnformeerde en redelijk omzichtige en oplettende gemiddelde consument —, Italian — un consumatore medio normalmente informato e ragionevolmente attento e avveduto —, Spanish — un consumidor medio, normalmente informado y razonablemente atento y perspicazor —, or Romanian — unui consumator mediu, normal informat, suficient de atent și de avizat).

---

20 See, to that effect, González Vaqué, L., 'La noción de *consumidor medio* según la jurisprudencia del Tribunal de Justicia de las Communidades europeas', *Revista de derecho comunitario europeo*, 2004/17, pp. 47-81, esp. pp. 63 and 64.

---

21 *United Nations Treaty Series*, Volume 75, p. 287.

---

22 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I.C.J. Reports* 2004, p. 136 (paragraph 120).

---

23 See, to that effect, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I.C.J. Reports* 2004, paragraph 155, and also paragraphs 118 and 120.

---

24 See, to that effect, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I.C.J. Reports* 2004, p. 136 (paragraphs 88 and 155).

---

25 See, to that effect, judgment of 21 December 2016, Council v Front PolisarioCouncil v Front PolisarioCouncil v Front PolisarioCouncil v Front Polisario (C−104/16 P, EU:C:2016:973, paragraph 88).

---

26 See, inter alia, for the UN Security Council, UNSCR No 242 (1967) of 22 November 1967 (Middle East); UNSCR No 446 (1979) of 22 March 1979 (Territories occupied by Israel); UNSCR No 465 (1980) of 1 March 1980 (Territories occupied by Israel); UNSCR No 476 (1980) of 30 June 1980 (Territories occupied by Israel); UNSCR No 2334 (2016) of 23 December 2016 (The situation in the Middle East, including the Palestinian question), and for the UN General Assembly, Resolutions No 72/14 (2017) of 30 November 2017 (Peaceful settlement of the question of Palestine); No 72/15 (2017) of 30 November 2017 (Jerusalem); No 72/16 (2017) of 30 November 2017 (The Syrian Golan), and No 72/86 (2017) of 7 December 2017 (Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan).

---

27 Judgment of 25 February 2010, Brita (C−386/08, EU:C:2010:91).

---

28 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, signed in Brussels on 20 November 1995 (OJ 2000 L 147, p. 3).

---

29 Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, signed in Brussels on 24 February 1997 (OJ 1997 L 187, p. 3).

---

30 Point 5.

---

31 [2014] UKSC 8.

---

32 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJ 2005 L 149, p. 22).

---

33 This was defined as stating that a commercial practice is a misleading action if (inter alia): ‘(2)(a) … it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or

its 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 (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise'.

---

34 Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29).

---

35 See, to that effect, judgment of 4 June 2015, Teekanne (C−195/14, EU:C:2015:361, paragraph 32). See also Judgment of 22 September 2016, Breitsamer und UlrichBreitsamer und Ulrich (C−113/15, EU:C:2016:718, paragraph 69).

---

36 Opinion of Advocate General Mischo in Gut Springenheide and TuskyGut Springenheide and TuskyGut Springenheide and TuskyGut Springenheide and Tusky (C−210/96, EU:C:1998:102, point 78).

---

37 Opinion of Advocate General Mischo in Gut Springenheide and TuskyGut Springenheide and TuskyGut Springenheide and TuskyGut Springenheide and Tusky (C−210/96, EU:C:1998:102, point 87). Although the English version uses the adverb 'completely', the adverb 'clearly' seems to me closer to the original language version — which is in French — and uses the term 'nettement'.

---

38 Judgment of 10 September 2009 (C−446/07, EU:C:2009:530).

---

39 Judgment of 10 September 2009, Severi(C−446/07, EU:C:2009:530, paragraph 62).

---

40 See, to that effect, Article 49 of the Fourth Geneva Convention. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I.C.J. Reports* 2004, p. 136 (paragraph 78 et seq.).

---

41 See, to that effect, UNSCR No 2334 (2016) of 23 December 2016 (The situation in the Middle East, including the Palestinian question).