



Rebecca Evans
Minister for Finance and Trefnydd
Welsh Government
5th Floor, Ty Hywel, Cardiff Bay CF99 1NA
By email: Correspondence.Rebecca.Evans@gov.wales

**Subject: Legal Implications of Welsh Procurement
Advice Note Under American Law**

Dear Ms. Evans,

The International Legal Forum (ILF) is a non-profit, proactive legal hub, coordinating the efforts of attorneys, professional organizations and activists worldwide in their respective fights to promote justice, peace and equality in Israel and the Middle East. The ILF is ultimately dedicated to facilitating international cooperation in the global battle against antisemitism, the BDS movement and terrorism.

It has come to our attention that the Welsh government has proposed a new Procurement Advice Note (**PAN**) that would exclude tendering companies that conduct business with or have ties to Jewish communities in Judea and Samaria (the West Bank). We express our gravest concern that such a policy is discriminatory. Companies operating in Judea and Samaria do so legally, in full compliance with relevant Israeli, domestic and international law. Indeed, national courts in the UK¹, France², the US³ and Canada⁴ have upheld the legality of economic operations in Judea and Samaria. Furthermore, conducting business in territories considered occupied worldwide is an established international norm⁵. Many of the largest international corporations, among them British companies, operate in occupied territories such as Northern Cyprus, Western Sahara and Nagorno-Karabakh.

The ILF has extensive experience responding to companies and jurisdictions that have been pressured to adopt discriminatory boycott regulations and policies against Israeli and Jewish businesses and individuals. Two prominent examples of such actions are the failed Frances Black Bill in Ireland and Airbnb's now-reversed discriminatory policy. As the Irish government considered criminalizing economic activity by Irish citizens in Judea and Samaria, the ILF brought attention that such a move would, among other, incur heavy

¹ Richardson v. Director of Public Prosecutions, [2014] UKSC 8 (Eng.)

² Cour d'Appel [CA] [regional court of appeal] Versailles, Mar. 22, 2013, No. 11/05331 (Fr.)

³ U.S. District Court (2005): Corrie v. Caterpillar, Inc., 403 F.Supp.2d 1019

⁴ Bil'in (Village Council) v. Green Park International Ltd., 2009 QCCS 4151

⁵ <https://www.whoelseprofits.org/>



American sanctions and would likely force companies that operate in the US to pull out of Ireland or face significant financial losses and legal ramifications. When Airbnb adopted a discriminatory policy against Jewish communities in Judea and Samaria, the company found itself confronted with a barrage of legal claims against them based on a variety of anti-discrimination laws. Moreover, following Airbnb's announcement, the State of Florida adopted sanctions against the company,⁶ Illinois⁷ and Texas⁸ initiated procedures for implementing sanctions, and legal actions were brought in Delaware,⁹ California¹⁰ and Jerusalem. Airbnb eventually settled and abandoned its discriminatory policy.

In other cases, companies that were found to be violating various anti-boycott state laws in the US have faced financial losses that amounted in some cases to several hundred million dollars. Those companies had then made every effort to comply and avoid these detrimental consequences. Our professional experience has shown that biased regulations and policies against Jewish communities, businesses and individual do not hold legal water.

For the Welsh government to exclude law-abiding companies operating in Judea and Samaria while allowing the tendering of companies operating in other occupied territories is unfair and discriminatory. Laws must be universally applied, lest they risk serving as a fig leaf for a politically motivated by a desire to harm a single state. Furthermore, the principles of fairness and constitutionality require a heavy justification before restricting individuals' and corporations' right to free trade and equal opportunity. Given that corporations operating in Judea and Samaria do legally, it is hard to see such a justification in this case.

Therefore, while we have no wish to interfere in internal Welsh affairs, we wish to bring to your attention the legal complications that such a move would present *vis-a-vis* American law. American law prohibits companies from participating in an unauthorized foreign boycott against Israel or Israeli-held territories. Companies that comply with such a boycott, such as those operating under the new PAN, would be exposed to sanctions and liabilities in the United States.

We attach a brief summary of the various American anti-boycott and anti-BDS law that companies complying with the PAN may be in violation of, and as well the possible adverse implications on the Welsh economy.

⁶ <https://www.jns.org/florida-takes-action-against-airbnb-amid-its-boycott-of-west-bank-properties/> (accessed on 19/3/2019)

⁷ <https://www.jpost.com/BDS-THREAT/Illinois-board-finds-Airbnb-in-breach-of-state-law-over-settlements-move-574325> (accessed on 19/3/2019)

⁸ <https://www.calcalistech.com/ctech/articles/0,7340,L-3757543,00.html> (accessed on 19/3/2019)

⁹ <https://www.jpost.com/Arab-Israeli-Conflict/12-Israeli-Americans-sue-Airbnb-in-Delaware-cite-religious-discrimination-573094> (accessed on 19/3/2019)

¹⁰ https://www.jpost.com/Arab-Israeli-Conflict/Airbnb-faces-civil-rights-suit-in-US-over-West-Bank-settlement-boycott-578575?utm_source=newsletter&utm_campaign=21-2-2018&utm_content=airbnb-faces-civil-rights-suit-in-us-over-west-bank-settlement-boycott-578575 (accessed on 19/3/2019)

Anti-BDS State Laws

To date, over 30 American states have passed laws against the Boycott, Sanctions, Divestment ("BDS") movement¹¹. While the laws differ in various jurisdictions, they prohibit companies engaging in the boycott of Israel from contracting with the state government or receiving government funding, as well as public sector pension investments. Compliance with anti-Israel boycotts can result in the loss of tax benefits business, and stock value opportunities. These laws apply not only to companies incorporated in these jurisdictions, but also foreign companies operating in them. Thus far companies that were included or were in the process of examination in the State lists of boycotters have suffered, or stood to suffer, major economic loss, in some cases, the estimated loss amounted to hundreds of millions of dollars.

For example, in 2017, Danske Bank, Denmark's largest bank, published a list of companies that it would not invest in due to conflicts between Danske's CSR program and the activities of the listed companies. Danske acknowledged that its exclusion of Elbit, an Israeli security technology company, stemmed from political calculations, namely opposition to the company's work on Israel's security wall¹². No other company was included in Danske's Exclusion List on the basis of supplying electronic equipment used in border defense, despite the existence of at least 65 national border walls¹³. Danske's exclusion of Elbit followed heavy BDS campaigning against investment in the company¹⁴. In 2017, the State of Colorado Public Employee Retirement Association notified Danske that its policy violated Colorado's anti-boycott laws and it would thus be subject to divestment¹⁵.

Federal Anti-Boycott Laws -

The US Internal Revenue Code ("IRC") allows for criminal and/or civil punishment for willful failures to report participation in or collaboration with a foreign boycott not sanctioned by the US government. If a corporate actor participating in an unsanctioned boycott willfully fails to report such participation to the Internal Revenue Service ("IRS"), that actor will be fined not more than USD 25,000, imprisoned for not more than one year, or both.

¹¹ Jewish Virtual Library, "State Anti-BDS Laws", <https://www.jewishvirtuallibrary.org/anti-bds-legislation> and UK Lawyers for Israel, "USA Anti-BDS Legislation" <http://uklficharity.com/resources/anti-bds-2>, Lawfare Project https://www.dropbox.com/s/um6pn49gvpx0zb8/LP_BDS_Memo_April_2019.pdf?dl=0

¹² Nicolai Raastrup, Danske Bank Cuts Out Controversial Israeli Companies, BERLINGSKE (Jan. 25, 2010), <https://www.business.dk/finans/danske-bank-frasortereromstridte-israelske-selskaber>

¹³ Simon Tomlinson, World of Walls: How 65 Countries Have Erected Fences on Their Borders – Four Times as Many as When the Berlin Wall Was Toppled – as Governments Try to Hold Back the Tide of Migrants, DAILY MAIL, <https://www.daily mail.co.uk/news/article-3205724/How-65-countries-erected-security-wallsborders.html> (last updated Aug. 22, 2015)

¹⁴ al-Shabaka, The "S" in BDS: Lessons of the Elbit Systems Campaign, BDS (Aug. 14, 2016), <https://bdsmovement.net/news/%E2%80%9Cs%E2%80%9D-bdslessons-elbit-systems-campaign>

¹⁵ Jerusalem Post, "Colorado sanctions Danish bank for BDS activity against Israeli companies" <https://www.jpost.com/BDS-THREAT/Colorado-sanctions-Danish-bank-for-BDS-activity-against-Israeli-companies-505996>

Unlike the US Commerce Department's anti-boycott regulations, found in the Export Administration Regulations ("EAR"), the Internal Revenue Code ("IRC") provisions reach the conduct and sales activities of non-US affiliates who are members of a US taxpayer's controlled group under the IRC, even if that conduct is not associated with an activity in US commerce.

Loss of tax benefits

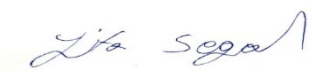
US taxpayers that cooperate with or participate in the boycott are subject to the loss of tax benefits that the US government provides to exporters. These benefits include, among others, the foreign tax credit and the tax deferral available to US shareholders of a Controlled Foreign Corporation.

Under the Ribicoff Amendment to the 1976 Tax Reform Act ("TRA"), the term "boycott participation or cooperation" is defined to include any agreement to refrain from doing business in or with the companies or nationals of a boycotted country. Compliance policies to exclude Israeli communities would necessarily fall within this definition.

Impact on US subsidiaries in Wales

Obviously, should the PAN be published, US parent companies with operations in Wales ought to examine closely every contract relating to Welsh operations in order to prevent a damaging loss of tax benefits. Faced with the dilemma between compliance with a legal requirement to boycott sales of goods partly produced in Israel, or with the US anti-boycott statutes, a likely scenario is major corporate restructuring of US-controlled subsidiaries to avoid US taxes on Wales-sourced income that is not yet distributed, and perhaps the contemplation of repatriating foreign dividends to the United States given the relative advantages of the one-time repatriation tax on profits from overseas subsidiaries created by the Tax Cuts and Jobs Act of 2017 ("TCJA"). It is also foreseeable that US technology companies will choose to move the residences and/or operations of their subsidiaries or divisions from Wales to other countries. **Thus, the impact of the PAN on Welsh companies that are controlled foreign subsidiaries of US shareholders has the potential to harm the Welsh economy.**

We appreciate your consideration of this matter. We are happy to provide assistance with any questions or issues.



Yifa Segal, Esq.
Chair & CEO
International Legal Forum