

## **Advice on the Labelling of goods from the Occupied Palestinian Territories**

### **1. Introduction**

1.1. Four firms of solicitors, Christian Khan, Hickman & Rose, Leigh Day and Public Interest Lawyers, instructed counsel to advise on issues arising from the Israeli Government's occupation of various territorial areas, including the West Bank and Gaza strip. These geographical areas are frequently referred to as the Occupied Palestinian Territory ('OPT'). For the purposes of the advice, it is assumed that the OPT:

- (i) are not recognised under international law as forming part of the state of Israel; and
- (ii) have been settled by persons from outside the OPT in violation of public international law (in particular Article 49 of the Fourth Geneva Convention).

1.2. One aspect of the instructions related to the sale of goods from illegal Israel settlements in the OPT. Those goods include fruit, vegetables, flowers, fresh herbs, wine, cosmetics, plastics and other household goods. The majority of these products, which are produced for export, are labelled for consumers in the United Kingdom as originating either from Israel or the West Bank. A number of supermarkets, including Tesco, Waitrose, Sainsbury's and Somerfield, have started to regularly label products as coming from the West Bank rather than from Israel. The result is that this labelling misleads, or could mislead, consumers to assume that a product labelled 'West Bank' originates from a Palestinian enterprise, when in fact it is much more likely to have come from an illegal Israeli settlement.

1.3. Counsel Kieron Beal of Matrix Chambers advised on the applicable law as follows:

### **2. Relevant Legal Provisions**

## *I. Community law*

2.1. Various measures have been adopted by the Community legislature designed to prevent consumers being misled when purchasing goods, including agricultural produce.

### (a) The common organisation of various markets

2.2. First, there have been specific measures aimed at ensuring that accurate country of origin information is given in respect of specific produce.

2.3. Fresh fruit and vegetables:

a) Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables<sup>1</sup> and its amendments and supplements by Council Regulation (EC) No 1182/2007 of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector, amending Directives 2001/112/EC and 2001/113/EC and Regulations (EEC) No 827/68, (EC) No 2200/96, (EC) No 2201/96, (EC) No 2826/2000, (EC) No 1782/2003 and (EC) No 318/2006 and repealing Regulation (EC) No 2202/96;<sup>2</sup> and

b) Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules of Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector.<sup>3</sup>

2.4. Article 2(1) of Regulation No. 1182/2007 requires fresh fruit and vegetables falling within Article 1(2) of Regulation (EC) No. 2200/96<sup>4</sup> to be marketed only if the country

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<sup>1</sup> OJ L 297, 21.11.1996, p. 1, as last amended by Commission Regulation (EC) No 47/2003 (OJ L 7, 11.1.2003, p. 64).

<sup>2</sup> OJ L 273, 17.10.2007, p. 1–30

<sup>3</sup> OJ L 350, 31.12.2007, p. 1–98.

of origin is indicated. This is supported by an equivalent requirement in Article 6(1)(d) of Commission Regulation (EC) No 1580/2007 for country of origin information to be included on sales packaging.

#### (b) Labelling requirements for foodstuffs

2.5. There have also been other measures of more general application. First, there are Community law provisions concerning the labelling of foodstuffs that are principally contained in 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 (“the 2000 Directive”).<sup>5</sup>

2.6. Recital (6) to the Directive makes clear that the prime consideration should be the need to inform and protect the consumer. Labelling should enable the consumer to make his choice of product in full knowledge of the facts (recital (8)) and should prohibit the use of information that would mislead the purchase (recital (14)). To this end, the material parts of Article 2 of the 2000 Directive provide as follows:

“1. The labelling and methods used must not:  
(a) be such as could mislead the purchaser to a material degree, particularly:  
(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;  
...”

2.7. Furthermore, Article 3 contains a compulsory requirement for foodstuffs to be marketed with “particulars of the place of origin or provenance where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff.”

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<sup>4</sup> As amended.

<sup>5</sup> OJ [2000] L No. 109, 6.5.2000, p. 29, as amended from time to time, principally by Directive 2003/89/EC of the European Parliament and of the Council of 10 November 2003 amending Directive 2000/13/EC as regards indication of the ingredients present in foodstuffs, OJ [2003] L No. 308, 25.11.2003, p. 15, which relates to the risk of common allergens in foodstuffs.

### (c) The General Food Law Regulation

- 2.8. Article 16 of the Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (“the General Food Law Regulation”),<sup>6</sup> states that the “labelling, advertising and presentation of food ... and the information which is made available about them through whatever medium shall not mislead consumers.”
- 2.9. While the thrust of the Regulation is aimed at food safety as such, various recitals make clear that it also encompasses considerations arising from “societal, economic, traditional, ethical and environmental factors” (recital 19); “fair and ethical trading practices” (recital 23); and “developing international standards” (recital 25). Regulation 5 also includes as a general objective of the regime an aim of “fair practices in food trade.” Regulation 8 also states that food law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consumer. It is also aimed at the prevention of “fraudulent or deceptive practices” or “any other practices which may mislead the consumer.”
- 2.10. Article 17 imposes an obligation on food business operators at all stages of production to ensure that the good satisfies the requirements of food law relevant to their activities. The responsibility for enforcement is imposed on Member States under Article 17(2).

### (d) Unfair commercial practices

- 2.11. Finally, Article 5(1) of the Unfair Commercial Practices Directive (‘the UCPD’)<sup>7</sup> prohibits unfair commercial practices. The definition of an unfair commercial practice is given in Article 5(2) as follows:

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<sup>6</sup> OJ [2002] L No. 31, 1.2.2002, p. 1.

<sup>7</sup> 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, OJ [2005] L No. 149, 11.6.2005, p. 22.

“A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,  
and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.”

The definition of professional diligence is given in Article 2(h) as:

“ ‘professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.”

2.12. The definition of ‘distortion of economic behaviour’ is modified in respect of particularly vulnerable groups in Article 5(3) in the following way:

“Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.”

2.13. Article 5(4) provides a non-exhaustive list of examples of unfair commercial practices, as including commercial practices which are misleading as set out in Articles 6 and 7 of the UCPD.

2.14. Article 6 relates to “misleading actions.” Article 7 relates to “misleading omissions.”

2.15. Furthermore, Annex 1 (when read with Article 5(5)) provides a list of those commercial practices which shall in all circumstances be regarded as unfair. These include claiming to be a signatory to a code of conduct when the trader is not.

## *II. Domestic law in the United Kingdom*

2.16. The above provisions of Community law have been transposed into domestic law in a number of measures.

### (a) Measures relating to food safety

2.17. First, the Food Safety Act 1990 provides in section 15(3) that:

“(3) Any person who sells, or offers or exposes for sale, or has in his possession for the purpose of sale, any food the presentation of which is likely to mislead as to the nature or substance or quality of the food shall be guilty of an offence.”

2.18. Pursuant to section 35, a person guilty of an offence under section 15(3) is liable on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both; alternatively on summary conviction, to a fine not exceeding the relevant amount or to imprisonment for a term not exceeding six months or to both.

2.19. The General Food Regulations 2004 (SI 2004 No. 3279) also create domestic offences for contravention of the directly applicable provisions of the Community’s General Food Law Regulation. Regulation 4(c) makes it an offence for a person to fail to comply with the requirements of Article 16 of the General Food Law Regulation. A person guilty of such an offence is liable under Regulation 5 on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both; and on summary conviction, to a fine not exceeding the relevant amount or to imprisonment for a term not exceeding six months or to both.

2.20. Pursuant to Regulation 6, responsibility for enforcing and executing the requirements of Article 16 falls to the food authority designated for any given area.

### (b) Measures relating to food labelling

- 2.21. The correct labelling of food is governed primarily by the Food Labelling Regulations 1996 (“the FLR 1996”). Its provisions apply to most foods, with some exceptions. They apply to food which is ready for delivery to the ultimate consumer or to a catering establishment. They do not apply, however, to the sale of wine,<sup>8</sup> or to fresh fruit and vegetables, in so far as their labelling is regulated by Council Regulation (EC) No 2200/96 on the common organisation of the market in fruit and vegetables.<sup>9</sup> Other exemptions from certain labelling requirements also exist for certain foods which are not pre-packed for sale (Regulations 23 and 27); or which are pre-packed in packages not exceeding 10 square centimetres.
- 2.22. Regulation 5 provides as follows:
- “5. Subject to the following provisions of this Part of these Regulations, all food to which this Part of these Regulations applies shall be marked or labelled with—
- ...
- (f) particulars of the place of origin or provenance of the food if failure to give such particulars might mislead a purchaser to a material degree as to the true origin or provenance of the food . . .”
- 2.23. Regulation 38 also requires that the particulars with which a food is required to be marked or labelled by these Regulations “shall be easy to understand, clearly legible and indelible and, when a food is sold to the ultimate consumer, the said particulars shall be marked in a conspicuous place in such a way as to be easily visible.”
- 2.24. Failure to comply with these Regulations puts a seller of the goods at risk of criminal prosecution, punishable under Regulation 44 on summary conviction with a fine not exceeding level 5 on the standard scale.
- 2.25. There is no statutory definition of “place of origin or provenance” in the FLR 1996 or in the 2000 Directive. Helpful guidance on the relevant provisions governing country of

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<sup>8</sup> Regulation 4(2)(h) FLR 1996.

<sup>9</sup> Regulation 4(2)(1) of the FLR 1996.

origin labelling has been provided by the Food Standards Agency on 31 October 2008. That guidance indicates that:

a) The rules laid down by the World Trade Organisation deem the country of origin to be the place of last substantial change.<sup>10</sup>

b) This is consistent with Section 36 of the Trade Descriptions Act 1968, which states as follows:

“(1) For the purposes of this Act goods shall be deemed to have been manufactured or produced in the country in which they last underwent a treatment or process resulting in a substantial change.”

2.26. Part 2 of the Food Standards Agency’s Guidance covers “avoiding misleading origin labelling.” Paragraph 13 states:

“Where the label carries other information that may **imply** origin, the actual country of origin declaration should be sufficiently **prominent, precise and compelling** to correct any potentially misleading impression.”

### (c) Unfair commercial practices

2.27. The Unfair Commercial Practices Directive, UCPD, has been implemented in the United Kingdom with effect from 26 May 2008 by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No 1277) (‘the CPUTR 2008’) and the Business Protection from Misleading Marketing Regulations, 2008 (‘the BPMMR 2008’).

2.28. The CPUTR 2008 broadly follow the approach set out in the UCPD in prohibiting unfair commercial practices under Regulation 3(1). A commercial practice may be unfair for any of the following reasons if, *inter alia*:

a) It contravenes the requirements of professional diligence (Regulation 3(3)(a));

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<sup>10</sup> Final Act of the 1986 —1994 Uruguay Round, Article 3(b) of the Agreement on Rules of Origin available at: [http://www.wto.org/english/docs\\_e/legal\\_e/22-roo.pdf](http://www.wto.org/english/docs_e/legal_e/22-roo.pdf)

- b) It materially distorts or is likely materially to distort the economic behaviour of the average consumer with regard to the product (Regulation 3(3)(b));
- c) It is a misleading action (Regulations 3(4)(a) and 5);
- d) It is a misleading omission (Regulations 3(4)(b) and 6); or
- e) It is listed in Schedule 1 to the Regulations.

2.29. The terms ‘average consumer’, ‘commercial practice’, ‘materially distort the economic behaviour’, ‘professional diligence’ and ‘transactional decision’ are each defined in Regulation 2. A commercial practice constitutes a misleading action if the following conditions in either Regulation 5(2) or 5(3) are met.

2.30. Regulation 5(4) refers to matters such as the main characteristics of the product, as defined in Regulation 5(5). Under Regulation 5(5)(p), this includes the geographical or commercial origin of the product.

2.31. Pursuant to Regulation 6(1), a misleading omission consists in the following:

“(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

- (a) the commercial practice omits material information,
- (b) the commercial practice hides material information,
- (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
- (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context, and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.”

2.32. The matters referred to in Regulation 6(2) are:

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
- (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.”

- 2.33. Regulation 6(3) defines material information to include the information which the average consumer needs, according to the context, to take an informed transactional decision. If the commercial practice is an invitation to purchase (as defined in Regulation 2), then material information will also include “the geographical address of the trader” and the geographical address of any other trader on whose behalf he is acting, where this is not apparent from the other material information provided.
- 2.34. Schedule 1 contains a list of commercial practices deemed in all circumstances to be unfair. These include (under paragraph 1) claiming to be a signatory to a Code of Conduct where the trader is not.
- 2.35. Pursuant to Regulation 9, a trader is guilty of an offence if he engages in a commercial practice which is a misleading action (with one, non-relevant exception). Furthermore, under Regulation 10, a trader is guilty of an offence if he engages in a misleading omission under Regulation 6. A trader is also guilty of an offence if he engages in a commercial practice identified in certain paragraphs of Schedule 1, including paragraph 1. A person found guilty of any of these offences is liable on summary conviction, to a fine not exceeding the statutory maximum; or on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both. Regulation 15 provides for criminal liability on the part of culpable officers of a body corporate.
- 2.36. Regulation 19 imposes a duty on every enforcement authority to enforce these Regulations. The enforcement authorities include the local weights and measures authority for an area and the Office of Fair Trading (under Regulation 2). Regulation 29 provides that an agreement is not void or unenforceable by reason of an infringement of the provisions.
- 2.37. Regulation 3 of the BPMMR 2008 prohibits misleading advertising. These also contain a prohibition on advertising that is misleading as to the geographical or commercial origin of the product. The Regulations make infringement of that Regulation an offence. “Advertising” for these purposes means any form of representation which is made in

connection with a trade, business, craft or profession in order to promote the supply or transfer of a product. The definition is arguably wide enough to cover misleading statements of origin on the packaging of a product although the misleading advertising in the BPMMR 2008 must be aimed at “traders” rather than consumers.

- 2.38. Under Regulation 13 there is a duty on all enforcement authorities in England and Wales to enforce the Regulations and under Regulation 15, an injunction may be sought where an enforcement authority believes that there has been or it is likely that there will be a breach of the Regulations. The OFT must be notified if such an action is going to be taken. Under Regulation 16, undertakings may be accepted in lieu of injunctive relief.

### **3. Conclusion**

- 3.1. It is clear from the above provisions that where goods have come from the OPT they should *not* be labelled as having their place of origin as Israel. To do so would represent a clear breach of a number of the Community law provisions identified above and would be punishable by a number of criminal offences under domestic UK law. It might also constitute an inaccurate statement of origin for the purposes of the Community Customs Tariff.
- 3.2. Where the goods are labelled as having their place of origin as the West Bank, while this is a more accurate statement of the geographical origin of the products concerned, the declaration of the country of origin as “West Bank” is positively misleading if the produce in question has not been imported into the EU under the Interim Euro-Mediterranean Agreement with the Palestinian Authority, but instead brought into the EU via an Israeli trader or exporter, even if proper customs duties have been paid. The denomination “West Bank” does not indicate whether or not the imported goods are derived from Palestinian traders, importing the produce directly to the EU; or from Israeli traders taking advantage of the illegal occupation of settlements in the OPT. This is an

issue which could clearly influence a reasonable consumer in the context of his or her transactional decisions.

- 3.3. Depending on the specific products in question, retailers are at present at risk of prosecution under the Food Labelling Regulations 1996 and/or the General Food Regulations 2004 as a result of untruthful declarations of origin of produce coming from the OPT (where they are wrongly declared to be produce of Israel); or as a result of misleading statements of origin (where they are ambiguously and confusingly referred to as produce of the West Bank). If the product in question is subject to Regulation 5(f), then retailers run the risk of criminal prosecution if the country of origin designation is either wrong or sufficiently ambiguous that it might mislead a purchaser to a material degree as to the true origin or provenance of the food.
- 3.4. There is no reason why “true origin or provenance of the food” should be construed narrowly to refer to geographical origin alone, to the exclusion of other issues such as commercial origin and identity of the nationality of the exporting producer where this does not reasonably appear from the information provided. In the event of ambiguity, it is for the retailer to make clear what the true position is. The FLR 1996 must be construed as far as is possible consistently with the underlying rationale of the 2000 Directive, namely to give the consumer as full a picture as possible.
- 3.5. The use of the expression “West Bank” will almost always fail to give the consumer the full picture. A fully informed consumer could quite rationally wish to know whether the produce came from either a Palestinian settlement or a settlement condemned as illegal under public international law by the United Nations, and confirmed as such by an advisory opinion of the World Court. Even more so to the extent that purchasing products derived from Israeli settlements in the OPT might be considered by some to be tacit support for an illegal act.
- 3.6. It follows that retailers who currently fail to take sufficient steps to clear up this ambiguity put themselves at risk of prosecution. While a due diligence defence *may* be

available to retailers if the criteria set out in section 21 of the Food Safety Act 1990 are met, the prospects of success of such a defence would depend heavily on the facts.

- 3.7. Retailers who are aware of genuine confusion and concern on the part of consumers arising from the use of the label “West Bank”, may find themselves unable to successfully raise a defence of due diligence.
- 3.8. In any event, no due diligence is available for a contravention of Regulation 4(c) of the General Food Regulations 2004, which make it a criminal offence to fail to comply with the provisions of Article 16 of the General Food Law Regulation. Article 16 of that Regulation contains a general prohibition on the labelling or presentation of food misleading customers.
- 3.9. Certain retailers appear to be in breach of Regulations 5 and 6 of the CPUTR 2008. The CPUTR 2008 should be construed in the light of the UCPD on which it is based. Article 6 of that Directive targets a commercial practice which contains false information and which is therefore untruthful. That seems apt to cover a declaration of country of origin which is manifestly incorrect. It also covers commercial practices which through their overall presentation are likely to deceive the average consumer, even if the information provided is factually correct. That appears to be apt to cover the situation in which produce is labelled as originating in the West Bank without further clarification being given. Furthermore, the “geographical or commercial origin” of the product is one of the factors that must be conveyed in a truthful and non-misleading way. The complementary provision to Article 6 is Article 7, which deals with the omission of material particulars.
- 3.10. It follows that if:
  - a) the presentation of material is accurate in itself;
  - b) but is otherwise misleading either in context or through omission of particulars of clarification;
  - c) an average consumer would be likely to be deceived or misled;

- d) that average consumer would, as a result, have likely entered into a transaction which he otherwise would not have done, had he known the full facts; then
- e) there will probably be an infringement of either Articles 6 or 7 of the UCPD.

3.11. On the basis of the material already available, a good case can be made for saying that the declaration of the country of origin as West Bank, without more, amounts to an infringement of Articles 6 and/or 7 of the UCPD. The UK authorities ought to give effect to this through the CPUTR 2008, which is in broadly the same terms. Regulations 5 and 6 of the CPUTR 2008 prohibit misleading actions and misleading omissions in the context of the presentation or marketing of products to consumers. The misleading information must be such as would have been likely to cause the average consumer to enter into a transaction which he would not otherwise have taken.

3.12. Reliance can also be placed on the misleading approach of the marketing of the products in question based on:

- a) The main characteristics of the product, as defined in paragraphs (4)(b) and (5) of Regulation 5. In particular, an argument can be made for saying that country of origin defined as “West Bank” without more fails to give full information as to:
  - (i) the method of manufacture of the product;
  - (ii) the specification of the product (if broadly construed);
  - (iii) The extent of the trader’s commitments as defined (paragraph (4)(c) of Regulation 5);
  - (iv) The motives for the commercial practice (paragraph (4)(d));
  - (v) The nature of the sales process (paragraph (4)(e));
  - (vi) The nature and attributes of the trader as defined in paragraphs (4)(j) and (6) of Regulation 5. In particular:
    - The identity of the trader, which is defined not simply by reference to the retailer but anyone on whose behalf the retailer acts. While it would be

outside a formal agency scenario, a strong purposive construction of these provisions would require a retailer to make clear the source of its produce;

- The status of the trader; and
- The affiliations or connections of the trader.

3.13. The identification of the source of supply becomes important in the context of this case because of the ambiguous reference to West Bank provided on the product's labelling.

3.14. Even if the specific criteria in Regulations 5 and 6 are not met, the cumulative effect of the marketing of West Bank produce from illegal settlements in the OPT is such that such marketing could well constitute a commercial practice that is likely materially to distort the economic behaviour of the average consumer with regard to the product. Regulation 3(3)(b) cannot be read alone. In order to constitute an unfair commercial practice under Regulation 3, the practice in question must contravene the requirements of professional diligence. This will include a retailer who has failed to meet the standard of special skill and care reasonably expected of it in its actions towards consumers, commensurate either with:

- a) Honest market practice in the retailer's field of activity; or
- b) The general principle of good faith in the trader's field of activity.

3.15. Where retailers are aware that consumers are being misled by their marketing and labelling practices, a breach of Regulation 3 of the CPUTR 2008 could already be in existence.

3.16. On the basis of the information available, retailers are therefore potentially vulnerable to prosecution under Regulations 9 and/or 10 of the CPUTR 2008. Their risk of successful prosecution increases if and when there is evidence that a detailed and substantiated case has been put to them of consumers being misled by the origin descriptions given on their products.

- 3.17. A good argument can be made for suggesting that the marketing of certain settlement produce marked “Israeli produce” or “made in Israel” is unlawful under Article 2(1) of Regulation No. 1182/2007. This requires the country of origin to be stipulated. But the country of origin is falsely stated to be Israel for certain products. Pursuant to Chapter II of Commission Regulation (EC) No 1580/2007, each Member State is obliged to designate an enforcement body responsible for monitoring compliance with marketing standards. Under Article 146, national sanctions must also be established for non-compliance.
- 3.18. It also seems that there is a serious risk that there has been widespread abuse of the preferential origin system by Israeli exporters, possibly coming close in some cases to outright fraud.

16 May 2009

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