IN THE MATTER OF THE CONTROL OF ECONOMIC ACTIVITY (OCCUPIED TERRITORIES) BILL 2018

OPINION

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1. I have been asked to provide an opinion on the compatibility of the Control of Economic Activity (Occupied Territories) Bill 2018 initiated in the Irish Senate ('the Bill') with European Union ('EU') law. My view has been sought, in particular, on whether the criminal offences introduced by the Bill can be justified by the public policy exception provided for in Article 36 of the Treaty on the Functioning of the European Union ('TFEU') and Article 24 of Regulation (EU) 2015/478 on common rules for imports ('the Import Regulation').[1]

2. I will first provide an overview of the Bill. I will then provide my assessment.

The Bill

3. The Bill seeks essentially to prohibit certain economic activities connected with illegalities committed in territories which are occupied for the purposes of international law. Its full title is as follows:

   'An Act to give effect to the State's obligations arising under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and under customary international humanitarian law; and for that purpose to make it an offence for a person to import or sell goods or services originating in an occupied territory or to extract resources from an occupied territory in certain circumstances; and to provide for related matters.'

4. The Bill makes the importation or sale of goods produced in settlements illegally established in an occupied territory, the provision of certain services, and the extraction of resources from an occupied territory a criminal offence.

5. Specifically, the offences created by the Bill are as follows.

6. Section 6(1) makes it an offence for a person to import or attempt to import settlement goods. Section 6(2) makes it an offence for a person to assist another person to import or attempt to import settlement goods. Section 6(3) states that, for the purpose of the Customs Act 2015, the import of settlement goods is hereby prohibited.

[1] Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (codification), OJ 2015 L 83/16.

7. Section 7(1) states that is shall be an offence for a person to sell or attempt to sell settlement goods. Under section 7(2), it shall be an offence for a person to assist another person to sell or attempt to sell settlement goods.

8. Section 8(1) makes it offence for a person to provide or attempt to provide a settlement service, and section 8(2) makes it an offence for a person to assist another person to provide or attempt to provide a settlement service.

9. Section 9(1) makes it an offence for a person to engage or attempt to engage in the extraction of resources from a relevant occupied territory or its associated territorial waters. Section 9(2) states that it is an offence for a person to assist another person to engage in the extraction of resources from a relevant occupied territory or its associated territorial waters.

10. Under section 5(1), the Bill applies to the following categories:

    a. a person who is an Irish citizen or ordinarily resident in the State,

    b. a company incorporated under the Companies Act 2014, and

    c. an unincorporated body whose centre of control is exercised in Ireland.

11. A person or entity that belongs to the above categories who commits an offence under the Bill, whether through an act or omission outside the State, is guilty of an offence and liable upon conviction to the penalty attached to the offence as if committed in Ireland (section 5(2)).

12. Section 10 provides for the penalties applicable and section 11 lays down a number of defences.

13. Pursuant to section 2, 'settlement goods' means goods produced in whole or in part within a relevant occupied territory by an illegal settler. 'Settlement service' means a service provided in whole or in part within a relevant occupied territory by an illegal settler. 'Resources' means natural resources which include but are not limited to oil, gas, mineral, rock, energy, timber, marine life, and agricultural produce.

14. Section 3 states that 'relevant occupied territory' means a territory which is occupied within the meaning of the Fourth Geneva Convention, and which has been (a) confirmed as such in a decision or advisory opinion of the International Court of Justice, (b) confirmed as such in a decision of the International Criminal Court, (c) confirmed as such in a decision of an international tribunal, or (d) designated as such for the purposes of this Act in a regulation made by the Minister pursuant to section 4.

15. The term 'illegal settler' means a member of the civilian population of an occupying power who was or is present within the relevant occupied territory and whose presence is being, or has been, facilitated directly or indirectly, by the occupying power.[2]

Assessment

16. I will examine in turn the compatibility with EU law of the prohibition on the importation and sale of goods, the provision of services, and the extraction of resources. I will then discuss briefly the relevance of the EU – Israel Association Agreement[3] and the EU interim association agreement with the Palestine Liberation Organisation for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip.[4]

Prohibitions in relation to goods

17. The prohibitions on the importation and sale of settlement goods provided by sections 6 and 7 apply both to products directly imported or sold from an occupied territory (or another third country) and those imported or sold from another Member State. I will examine each of them in turn.

Importation from another Member State

18. Trade in goods between EU Member States is governed by Title II of Part Three of the TFEU (Articles 28 to 37). Article 34 states that quantitative restrictions on imports and all measures having equivalent effect must be prohibited between Member States.

19. The prohibition of Article 34 applies to all products which are in free circulation within the EU whether or not they originate from a EU Member State. Article 29 TFEU states, in particular, that products coming from a third country are in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

20. Article 36 TFEU provides a derogation from the principle laid down in Article 34. It states that the prohibition of quantitative restrictions and measures having equivalent effect shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified, inter alia, on grounds of public policy. It states further

[2] See section 2 of the Bill.
[3] Euro-Mediterranean Agreement, establishing an association between the European communities and their member states and Israel, 21 June 2000 (OJ 2000 L 147/32 to L 147/156.
[4] 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 187/3).

that such prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Importation from third countries

21. The importation of products from third countries is governed principally by the Import Regulation.[5] That regulation is based on Article 207(2) TFEU which empowers the European Parliament and the Council to adopt measures defining the framework for implementing the common commercial policy.

22. The Import Regulation governs the importation of all goods save for products originating from certain countries listed in Council Regulation (EC) No 625/2009[6] and textile products.[7] Textiles are subject to specific import rules laid down in Regulation 2015/936.[8]

23. The Import Regulation provides that, without prejudice to the safeguard measures which may be taken by the EU under Chapter V, the importation of products from third countries is free, namely, it must not be subject to any quantitative restrictions (Article 1(2)).

24. The principle of free importation is subject to the derogation clause of Article 24 which states as follows:

'1.This Regulation shall not preclude the fulfilment of obligations arising from special rules contained in agreements concluded between the Union and third countries.

2.Without prejudice to other Union provisions, this Regulation shall not preclude the adoption or application by Member States of:

(a) prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property;

(b) special formalities concerning foreign exchange;

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[5] See above, note 1.

[6] Council Regulation (EC) No 625/2009 of 7 July 2009 on common rules for imports from certain third countries (OJ L 185, 17.7.2009, p. 1). This regulation applies to products imported from the following countries: Armenia, Azerbaijan, Belarus, Kazakhstan, North Korea, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam.

[7] See Import Regulation, Article 1(1).

[8] Council Regulation (EU) 2015/936 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Union import rules, OJ 2015 L 160/1.

(c) formalities introduced pursuant to international agreements in accordance with the Treaty on the Functioning of the European Union.

The Member States shall inform the Commission of the measures or formalities they intend to introduce or amend in accordance with the first subparagraph.

In the event of extreme urgency, the national measures or formalities in question shall be communicated to the Commission immediately upon their adoption.'

Assessment of the public policy derogation

25. The prohibition on the importation of goods provided by section 6 of the Bill is a quantitative restriction under both Article 34 TFEU and Article 1(2) of the Import Regulation, since it prohibits the importation of any quantity of goods whatsoever on pain of criminal penalties. The prohibition on sales provided by section 7 also amounts to a prohibition on imports since it would make little economic sense to import a settlement good given that it cannot be the subject of a legal market transaction.[9]

26. The question therefore arises whether those prohibitions are justified by the public policy exception provided respectively in Article 36 TFEU and Article 24(2) of the Import Regulation.

27. I take the view that, for present purposes, the meaning of public policy under Article 36 TFEU and Article 24(2) of the Import Regulation is the same. If a Member State may justify on grounds of public policy a restriction on the direct importation of a product from a third country, it can also justify its indirect importation from another Member State and vice versa. Otherwise, the restriction could be easily circumvented and would be meaningless.

28. I will now proceed to examine the concept of public policy.

The concept of public policy

29. As a derogation from the free movement of goods, which is a fundamental EU freedom, the exceptions provided for in Article 36 TFEU must be interpreted restrictively.[10] According to the case law, the purpose of Article 36 is not to reserve certain matters to the exclusive jurisdiction of Member States but to allow national legislation to derogate from the free movement of goods to the extent that it is justified to achieve the objectives provided for in that Article.[11] A measure

[9] C-120/78 *Rewe-Zentral (Cassis de Dijon)* ECLI:EU:C:1979:42 ; C-407/85 *3 Glocken* ECLI:EU:C:1988:401 par 11 ; C-90/86 *Zoni* ECLI:EU:C:1988:403 par 11.
[10] Case 124/81 *Commission v United Kingdom* [1983] ECR 203, para 13.
[11] Case 153/78 *Commission v Germany* [1979] ECR 2555, para 5; Case 72/83 *Campus Oil Limited v Minister for Industry and Energy* [1984] ECR 2727, para 32; Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, para 19.

adopted on the basis of Article 36 is subject to the principle of proportionality and can be justified only if it does not restrict intra-EU trade more than it is necessary.[12] The burden of proving that a measure is justified under Article 36 TFEU lies with the Member State.[13]

30. Member States, however, enjoy discretion. The enquiry of proportionality is facts-based and a lot will depend on the circumstances of the case, including the objectives of the restriction, the interests at stake, and the extent of the restriction.

31. As a ground of derogation, public policy has very rarely been relied upon and there is scarce case law. The leading case is *R v Thompson*[14] which concerned a prohibition on the export from the United Kingdom of silver coins minted before 1947. The European Court of Justice ('ECJ' or 'the Court') found that the prohibition was justified on grounds of public policy as it was based on 'the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the State'.[15] Since it was for each Member State to mint their own coinage and protect it from destruction, and given that the UK made it a criminal offence to destroy coins of the realm within the national territory, the prohibition on export was justified with a view to preventing those coins from being melted down or destroyed in another Member State.

32. In some cases, the exception of public policy has been pleaded in conjunction with other exceptions. Thus, in *Ahokainen*, it was invoked together with public health to justify Finnish measures to control the consumption of alcohol.[16] In general, where an alternative ground of derogation listed in Article 36 TFEU could apply, the Court tends to use that alternative or use public policy in conjunction with other possible justifications.[17]

33. Public policy has also been relied, together with public security, in the contest of public protest and civil unrest. In *Cullet v Leclerc*[18] the French Government sought to justify the imposition of minimum prices for the retail sale of petrol on grounds of public policy and public security. It argued that an unrestricted price war for the sale of fuel would result in social unrest, even violence, by disaffected retailers. This submission was rejected by the Court on the ground that the French Government had failed to show that it would be unable to deal with any public

[12] *Campus Oil, op. cit.*, para 37; *Richardt, op. cit.*, para 20. See also Case 12/78 *Eggers* [1978] ECR 1935; Case 42/82 *Commission v France* [1983] ECR 1013.
[13] Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369. But when a Member State provides convincing justifications it is then for the Commission to show that the measures taken are not appropriate in that particular Case C-55/99 *Commission* v *France* [2000] ECR I-11499.
[14] Case 7/78 *R v Thompson*, [1978] ECR 2247.
[15] Op. cit., para 34.
[16] Case C-434/04 *Akohainen and Leppik* ECLI:EU:C:2006:609 but note that in that case the Court referred to 'public order' rather than 'public policy'.
[17] European Commission, 'Free movement of goods. Guide to the application of Treaty provisions governing the free movement of goods.' 2010, 26.
[18] Case 231/83 *Cullet v Leclerc* [1985] ECR 305.

disorder using the powers at its disposal. The judgment in *Cullet v Leclerc* appears to leave the door open for public policy to justify restrictions in cases where the risk of civil unrest is clearly proven.[19]

34. Public policy, however, cannot be used to include consideration of consumer protection[20] or the achievement of economic ends.[21]

35. Public policy provides a derogation not only from the free movement of goods but also the right of establishment (Article 52 TFEU), the freedom to provide services (Article 62), and the free movement of workers and EU citizens (Article 45(3) TFEU).[22] In relation to the free movement of workers and citizens, extensive case law has developed. Essentially, according to the formula used by the case law, a Member State may restrict the free movement of persons where there is a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[23]

36. The interpretation of public policy in relation to the free movement of workers and citizens may not necessarily be the same as its interpretation in relation to the free movement of goods and services.[24] However, I am prepared to accept that, also in relation to goods, the concept allows a restriction only where there is a serious threat to one of the fundamental interests of society.

37. Subject to that, Member States enjoy discretion to determine what constitutes public policy in the light of their national needs. The case law, as systematised in the Opinion of Advocate General Stix-Hackl in *Omega*,[25] a case which pertained to the free movement of services, makes it clear that Member States are in principle 'free to determine the requirements of public policy and public security in the light of their national needs',[26] because EU law 'does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy'.[27] Member States enjoy discretion 'in particular, in areas that are especially sensitive ideologically'.[28]

38. As the Court held in *Omega,*

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[19] See P. Oliver on Movement of Goods in the European Union, Hart, 2010, 5th ed., at 253.
[20] Case C-177/83 Kohl v Ringelhan [1984] ECR- 3651, para 19.
[21] Case C-224/97 *Ciola* [1999] ECR I-2517, para 16.
[22] See also in relation to citizens, the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L 158/77 (the 'Citizenship Directive'), specifically Article 1(c), and Articles 27 through to 33. In relation to the free movement of capital, see Article 65(1)(b) TFEU.
[23] Case 30/77 *R v Bouchereau* [1977] ECR-1999 para 35, and Article 27(2) Citizenship Directive.
[24] Oliver, op.cit., 251 n 221 and see further references there.
[25] Case C-36/02 *Omega* ECLI:EU:C:2004:162 Opinion of Stix-Hackl AG, paras 96-99.
[26] Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, para 17.
[27] Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, para 8.
[28] *Omega*, op.cit., Opinion of Stix-Hackl AG, para 102.

'the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty'.[29]

39. I have no doubt that promotion of respect for international law is part of public policy.

40. There is also no doubt that the protection of fundamental rights is part of public policy. The case law makes it clear that the free movement of goods and services may be restricted to comply with fundamental rights: see *Schmidberger*[30] and *Omega.*[31]

41. In *Schmidberger*, the Court held that,

'since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.'[32]

42. In the present case, it appears to me that the prohibitions laid down in sections 6 and 7 of the Bill are justified by the derogation of public policy for the following reasons. First, the Bill seeks to comply with international law, in particular, the Fourth Geneva Convention, Secondly, it seeks to protect human rights, namely the right to self determination. Thirdly, it is fully in alignment with the avowed objectives of EU law and the Union's political stance on matters of occupied territories.

International law

43. The avowed objective of the Bill is to comply with Ireland's obligations under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War ('the Convention')[33] and under customary international humanitarian law: see above para 3.

44. It will be remembered that the Bill prohibits a person from (a) importing or selling settlement goods, (b) attempting to import or sell settlement goods and (c) assisting another person to do (a) or (b). A 'settlement good' is a good produced

[29] C-36/02 *Omega* EU:C:2004:614, para 31.
[30] C-112/00 *Schmidberger* [2003] ECR I-5659.
[31] Op.cit., above.
[32] *Schmidberger*, op.cit., para 74.
[33] Convention relative to the Protection of Civilian Persons in Time of War (*United Nations Treaty Series*, Volume 75, p. 287).

in whole or in part within a relevant occupied territory by an illegal settler. 'Illegal settler' means a member of the civilian population of an occupying power who was or is present within the relevant occupied territory and whose presence is being, or has been, facilitated directly or indirectly, by the occupying power.[34]

45. These prohibitions appear to me to be fully in alignment with, and promote, the objectives of the Convention. They also give effect to the obligations undertaken by the Contracting Parties under the Convention, Article 49(6) of which specifically states that

    'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'

46. The terms 'occupied territory' are defined by Article 42 of the 1907 Hague Regulations[35] which reflects customary international law[36] and states that:

    'a territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

47. It is not submitted here that the Convention or the Hague Regulations require the prohibition of trade in settlement goods and services as defined by the Bill. For the purposes of the present opinion, it is not necessary to determine the precise scope of obligations imposed by the Convention or the Hague Regulations.

48. In my view, the prohibitions on trade in goods imposed by the Bill are justified because they (a) unequivocally promote and give effect to the obligations imposed by the Convention and (b) Member States have some discretion to determine the measures they consider appropriate to give effect to obligations imposed by fundamental instruments of international law such as the Geneva Convention.

49. In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[37] the International Court of Justice ('ICJ') stated as follows (para 120):

    '[Article 49(6)] prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures

[34] See section 2 of the Bill.
[35] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Article 42.
[36] See *Democratic Republic of Congo v. Uganda*, International Court of Justice, Judgment of 19 December 2005, para. 172; and Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, paras. 78, 89
[37] Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136.

taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.'

50. Goods produced by illegal settlers, as defined in the Bill, are the fruit of the poisonous tree: they result directly from an activity which is in violation of the Convention. By prohibiting the importation and sale of such goods, Ireland wishes to discourage the settlement of civilians by an occupying power. It also wishes to discourage the consequent changes in the demographic composition of the population, the exploitation of the occupied land and, the *de facto* annexation of occupied territories which is furthered and assisted by the production and commercial exploitation of settlement goods.

51. In short, Ireland seeks to give effect to the obligations imposed by the Convention and guarantee its effectiveness. This is well within the discretion allowed to a Member State by the concept of public policy. Contracting Parties to the Convention have an obligation to 'respect and to ensure respect for the present Convention in all circumstances': See Common Article 1 to the Four Geneva Conventions. The obligation to take the necessary measures to guarantee the effectiveness of the Convention is also part of the obligation of good faith stated in Article 26 of the of the Vienna Convention on the Law of Treaties.[38]

52. Finally, I note that although the European Union is not in itself a party to the Convention, it is bound by it in two respects. First, it is bound by the Convention insofar as it reflects customary international law: see *Racke*.[39] Secondly, since all Member States are parties to the four Geneva Conventions and the additional protocols accompanying them, EU legislation must be interpreted as far as possible in manner which is consistent with it.[40]

53. In *Intertanko*[41] the ECJ held there that the fact that an international agreement binds all Member States but not the EU 'is liable to have consequences for the interpretation … of the provisions of secondary law' even if the agreement does not codify customary rules of international law. It is incumbent upon the Union institutions to interpret provisions of secondary law 'taking into account' the agreement in question.[42] The Court justified that approach by 'the customary principle of good faith' and the principle of sincere cooperation in what is now Article 4(3) TEU. The objective is to avoid, so far as possible, interpreting EU law in a manner that makes it impossible for the Member States to fulfill their international law commitments.[43]

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[38] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[39] Case C-162/96 *Racke* [1998] ECR I-03655, para 46.
[40] See specifically in relation to the Fourth Geneva Convention, Case C-158/14 *A (Tamil Tigers)* ECLI:EU:C:2017:202, para 88.
[41] Case C-308/06 *The International Association of Independent Tanker Owners and Others* EU:C:2008:312, para 52.
[42] Ibid, para 52
[43] Ibid, para 52

54. There is therefore no doubt that the prohibitions included in the Bill seek to promote the objectives of, and give effect to, fundamental rules of international law which also bind the EU. The concept of public policy within the meaning of Article 36 TFEU and Article 24(2)(a) of the Import Regulation must be interpreted taking into account the objectives of the Geneva Convention and customary international law and, thus, as allowing Member States some discretion in deciding the steps they consider appropriate to take in order to fulfil the obligations arising therefrom.

Right to self-determination

55. The prohibitions contained in sections 6 and 7 of the Bill are also justified by the need to uphold fundamental rights, in particular, the right to self-determination. As stated above, the protection of fundamental rights may justify restrictions on free movement: see above, paras 40 *et seq*.

56. Fundamental rights include the right to self-determination. This is enshrined in Article 1(2) of the Charter of the United Nations and also Article 1 of the International Covenant on Civil and Political Rights[44] and Article 1 of the International Covenant on Social Economic and Cultural Rights.[45]

57. Several UN resolutions stress the need to respect the human right to self-determination. For example, Resolution 2625 (XXV) adopted on 24 October 1970, entitled 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' states that 'every State has the duty to promote [the right to self-determination of peoples] in accordance with the provisions of the Charter'.

58. Both the ICJ and the ECJ have held that self determination is a legally enforceable right *erga omnes* and one of the essential principles of international law.[46]

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[44] International Covenant on Civil and Political Rights, 16 December 1966 (*United Nations Treaty Series* vol. 999, p. 171). Article 1 states as follows:
1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[45] International Covenant on Economic Social and Cultural Rights, 16 December 1966 (*United Nations, Treaty Series* vol. 993, p. 3). Article 1 of that Covenant is identical to Article 1 of the International Covenant on Civil and Political Rights, cited in the above footnote.

[46] Case C-104/16 P *Council v Front Polisario* ECLI:EU:C:2016:973, para 88; ICJ, *Advisory Opinion on Western Sahara* paras 54-56; East Timor (*Portugal* v *Australia*) judgment, *ICJ Reports 1995*, p. 90, para 29.

59. Sections 6 and 7 of the Bill seek to promote, and are justified by, the right to self determination. Illegal settlements entail the exploitation of the land, wealth, and resources of the occupied territories by the occupying power. The production or sale of settlement goods, as defined by the Bill, and the infrastructure that is required to make it possible, inevitably entails the exploitation of resources, such as land or water, of the occupied territories. Furthermore, as stated in paragraph 50, the production of such goods contributes to the *de facto* annexation of occupied territories and changes on the demographic composition of its population. It thus interferes with the right to self-determination of the occupied population.

60. The prohibitions contained in the Bill are intended to provide effective protection to the right to self-determination and by no means exceed what is necessary for this purpose. For the avoidance of doubt, it is not submitted here that the protection of the right to self-determination necessarily requires the introduction of the prohibitions stated in the Bill as a matter of international law. However, it justifies the imposition of those prohibitions by a Member State under the exception of public policy since it seeks to promote respect of that right and provides for its effective protection.

61. This view is further supported by the judgments of the General Court of the EU ('GC') and the ECJ in *Front Polisario*.[47] The representatives of the territories of Western Sahara, which are administered (albeit not occupied) by Morocco sought the annulment of the EU-Morocco Association Agreement in so far as it extended to Western Sahara.[48] In upholding their application, the GC found that, by means of that agreement, the EU would contribute to the human rights violations by 'encouraging and profiting' from the exploitation of the Western Sahara.[49] It held that, before concluding an association agreement with Morocco, the EU 'should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights.'[50]

62. On appeal, the ECJ held that the GC had erred in law by taking the view that the Association Agreement with Morocco extended to Western Sahara: interpreting the Association Agreement in that way would imply a violation of the right to self determination.[51]

63. The view that the prohibitions included in the Bill are justified by public policy under EU law is also supported by the Opinion of Advocate General Wathelet in

[47] Case T-512/12 *Front Polisario* ECLI:EU:T:2015:953
[48] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2000 L 70, p. 2).
[49] Case T-512/12 *Front Polisario*, para 231.
[50] Ibid, para 241.
[51] Case C-104/16 *Front Polisario* ECLI:EU:C:2016:973, paras 88 and subsequent.

Rosneft.[52] In that case, an oil company challenged before English courts national acts implementing economic sanctions imposed by EU law against Russian undertakings following the Ukrainian crisis.

64. One of the arguments submitted by the applicants was that the economic sanctions in question ran counter to the EU – Russia Partnership Agreement.[53] Article 10(1) of that Agreement states that the Parties shall accord to one another the general most-favoured-nation treatment described in Article I, paragraph 1 of the GATT. Article 19 states that the Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified, inter alia, on grounds of public policy.

65. Advocate General Wathelet opined that the sanctions did not fall within the scope of application of the Partnership Agreement. Notably, he added that, in any event, even if the Court should find that the sanctions were a restriction covered by the Partnership Agreement,

    'such a restriction would, as the Commission states, be justified on grounds of public policy and public security, in accordance with Article 19 of the Partnership Agreement.[54]

66. It is important that both the Advocate General and the Commission considered that the concept of public policy could justify the imposition of restrictions on imports of products from a third country on grounds of its occupation of a territory of another country.[55] The same reasoning appears to me to apply in the present case.

    EU objectives

67. Sections 6 and 7 are fully in conformity with, and pursue, the values of the Union and the objectives of the Union's external action.

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[52] *The Queen, on the application of PJSC Rosneft Oil Company v Her Majesty's Treasury*, C-72/15, ECLI:EU:C:2017:236.

[53] Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, signed in Corfu on 24 June 1994, OJ 1997 L 327/3.

[54] See para 132 of the Opinion.

[55] The ECJ did not pronounce on the issue of public policy. It held, instead, that even if the restrictive measures at issue were not compatible with certain provisions of the EU – Russia Partnership Agreement, Article 99 of that agreement permits their adoption. Under Article 99(1)(d), nothing in that agreement is to prevent a party from taking measures that it considers necessary for the protection of its essential security interests, particularly in time of war or serious international tension constituting a threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security (see paras 110-111).

68. The right to self-determination is part of customary international law which binds the EU. It also forms part of the Union values stated in Article 2 TEU which include respect for human rights and the rule of law.

69. Article 3(5) TEU states that, in its relations with the wider world, the Union must contribute to the protection of human rights as well as the strict observance and the development of international law, including respect for the principles of the United Nations Charter. Article 21(2) TEU lists among the objectives of the external action of the EU to 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (Article 21(2)(b)).

70. The prohibitions of sections 6 and 7 of the Bill fall within the objective of Article 3(5) and 21(2)(b) TEU because they seek to give effect to international law – in particular the Fourth Geneva Convention – and consolidate and support the human right of the people of an occupied state to self determination.

71. I also note that, even though EU law has not introduced prohibitions similar to those provided in the Bill, the European Union has consistently condemned Israeli settlements. The European Council Conclusion of 18 January 2016 stated[56]

'Recalling that settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two state solution impossible, the EU reiterates its strong opposition to Israel's settlement policy and actions taken in this context'.

72. The 2017 'European Joint Strategy in Support of Palestine' expressed a strong condemnation of 'the regular and persistent violations of human rights and international humanitarian law' perpetrated in a territory 'under 50 years of occupation'.[57] More recently, in the summer 2018, a spokesperson of the European External Action Service has stated that 'as reflected in successive Foreign Affairs Council conclusions, the EU is strongly opposed to Israel's settlement policy which is illegal under international law and an obstacle to peace.'[58]

73. Therefore, insofar as it applies to the territories occupied by Israel, the Bill is compatible with and promotes the EU's avowed policy.

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[56] Outcome of the 3443rd Council Meeting on Foreign Affairs, Brussels, 18 January 2016, 5304/16, section on Middle East Process, para 7, available at https://www.consilium.europa.eu/media/22873/st05304en16.pdf

[57] https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/european_joint_strategy_in_support_of_palestine_2017-2020.pdf page 1.

[58] Statement by the Spokesperson on the latest settlements' announcements by the Israeli authorities, 23 August 2018, 180823_4, available at https://eeas.europa.eu/headquarters/headquarters-homepage/49656/statement-spokesperson-latest-settlements'-announcements-israeli-authorities_en .

74. In addition, the International Court of Justice,[59] and, on several occasions,[60] the UN Security Council has expressed the view that the Israeli settlements are in violation of international law. The ECJ would have regard to those views in assessing the compatibility of the Bill with the exception of public policy under EU law insofar as the Bill might apply to settlements established by Israel in the Occupied Palestinian Territory.

The principle of proportionality

75. Sections 6 and 7 satisfy the principle of proportionality. The definitions provided in section 2 are drafted in general terms and are based on objective criteria. They are in full conformity with international law and also in full conformity with EU objectives. They do not go beyond what is necessary to achieve the objectives pursued. I also take the view that the imposition of criminal penalties are necessary to ensure the effectiveness of the prohibition.

76. The penalties provided for in section 10 are not excessive. Under section 10(1), a person who is guilty of an offence under section 6, 7, 8 or 9 is liable (a) on summary conviction to a class A fine or to imprisonment for a term not exceeding 12 months or to both, and (b) on conviction on indictment to a fine not exceeding €250,000 or imprisonment for a term not exceeding 5 years or to both. Sections 10(2) and 10(3) refer to the liability of managers and members of bodies corporate. I also note that a number of defences are provided by section 11.

77. Further, I note that the Bill is consistent with Ireland's outlook towards occupied territories. I note, in particular, that the International Criminal Court Act 2006 and the Geneva Conventions Acts 1962 and 1998 give domestic effect to the crime of transfer of civilian population onto an occupied territory and provide for full universal jurisdiction in relation to that crime. The Bill is fully in alignment and promotes compliance with those Acts and therefore forms part of a consistent and coherent national policy.

78. The Bill is promoted in the Senate and provides an illustration of a case where the legislature of a Member State takes a different view from that of the Government in relation to the best way of giving effect to international obligations.

79. This however by no means affects my analysis above. As stated above, a Member State enjoys some discretion to limit imports on grounds of public policy. Just as that concept may differ, within limits, from time to time and from State to State, it may also differ between different political actors within the same Member State. The fact that a Government may consider it preferable as a matter of policy not to propose a specific measure does not mean that that measure is in breach of the public policy exception which must be defined by reference to objective criteria.

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[59] See above ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall*, n 37.
[60] United Nations Security Council Resolutions 298 (1971), 446 (1979), 452 (1979), 465 (1980), 471 (1980), 476 (1980), 2334 (2016).

80. There is nothing in EU law to suggest that the views of the executive should take preference over the views of the legislature in defining the meaning of public policy. Indeed, it would be beyond the competence of the EU to provide for such a preference.

Conclusion on the prohibitions on goods

81. For the reasons explained above, I take the view that the prohibitions of sections 6 and 7 of the Bill may be justified by the exception of public policy under 36 TFEU and Article 24(2) of the Import Regulation.

82. For reasons of completeness, I state that my above conclusion is not affected by Regulation 2015/936 on textiles.[61] As stated above, the importation to the EU of textile products is governed by Regulation 2015/936 and not by the Import Regulation. However, the above analysis also applies in relation to settlement goods which might fall within Regulation 2015/936 since that regulation also provides for a public policy exception: see Article 33(2)(b).

Prohibitions in relation to the provision of services

83. As stated above, Section 8(1) of the Bill makes it an offence for a person to provide or attempt to provide a settlement service, and section 8(2) makes it an offence for a person to assist another person to provide or attempt to provide a settlement service. 'Settlement service' is defined as 'a service provided in whole or in part within a relevant occupied territory by an illegal settler' (section 2).

84. For the purposes of the present opinion, it is not necessary to examine in detail whether the above prohibitions fall within the scope of EU law. I accept that they may impose restrictions both on the provision of services to and from a third country and the provision of services within the EU. Section 8(2) may, for example, prohibit a person resident in Ireland from offering travel services to persons based in other Member States in a relevant occupied territory.

85. For the reasons explained above in relation to the prohibitions on settlement goods, I take the view that the prohibitions on settlement services, to the extent that they fall within the scope of EU law, are also justified by reasons of public policy. I see no objective reasons why services may here be differentiated from goods.

86. In terms of drafting, I add the following points.

87. I understand that the prohibition of section 8(1) applies only to persons covered by section 5(1) who are illegal settlers within the meaning of the Bill since, under

[61] See above, n 8.

service 2, a settlement service is a service provided by an illegal settler (whether it is provided in whole or in part in a relevant occupied territory).

88. Section 8(2) states that 'it shall be an offence for a person to assist another person to provide or attempt to provide a settlement service'. Section 8(2) only prohibits a person covered by section 5(1) to assist another person to provide or attempt to provide a settlement service. It is unclear, however, whether 'another person' means only a person covered by section 5(1) or any person who is an illegal settler whether or not covered by that paragraph.

89. In my view, the last interpretation is more in line with the objectives of the Bill as I understand them. If I am correct, section 8(2) would prohibit, for example, a person ordinarily resident in Ireland or a corporation governed by the Companies Act 2014 from advertising services provided by an illegal settler in a relevant occupied territory. By contrast, if the first interpretation suggested above were to prevail, a person ordinarily resident in Ireland or a corporation governed by the Companies Act 2014 would not be so prohibited unless it was itself an illegal settler.

90. It might be better to make the above clear by stating in Article 8(2) that 'it shall be an offence for a person to assist another person, *whether or not a person covered by Article 5(1),* to provide or attempt to provide a settlement service'.

Prohibitions in relation to the extraction of resources

91. Section 9(1) makes it an offence for a person to engage or attempt to engage in the extraction of resources from a relevant occupied territory or its associated territorial waters. Section 9(2) states that it is an offence for a person to assist another person to engage in the extraction of resources from a relevant occupied territory or its associated territorial waters.

92. For the reasons stated above in relation to goods, I take the view that, to the extent that the conduct prohibited by the above sections might be said to fall within the scope of EU law, it is justified by the need to comply with the international law and the protection of the right to self-determination.

The EU- Israel Association Agreement and the Interim PLO Agreement

93. Insofar as the Bill may affect trade between Ireland and the territories occupied by Israel, it is pertinent to examine the Association Agreement between the EU and Israel.

94. The EU has concluded an association agreement with Israel ('the Agreement').[62] The Agreement is part of a series of trade and cooperation agreements concluded

[62] Euro-Mediterranean Agreement, establishing an association between the European communities and their member states and Israel, 21 June 2000 (OJ 2000 L 147/32 to L 147/156.

between the EU and third countries in pursuance of the EU's European Neighbourhood Policy. It is a so-called 'mixed' agreement. This means that it has been concluded both by the Union and the Member States acting as contracting parties vis-à-vis Israel.

95. The EU has also concluded an association agreement with the Palestine Liberation Organisation for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip.[63] That agreement provides for duty-free access to EU markets for Palestinian industrial goods, and a phase-out of tariffs on EU exports to Palestine over five years. An Agreement for further liberalisation of agricultural products, processed agricultural products and fish and fishery products entered into force on 1 January 2012.[64]

96. The Agreement provides, among others, for the establishment of a free trade area between the EU and Israel and, among others, prohibits, subject to certain exceptions, customs duties, discriminatory taxation, and quantitative restrictions on trade (Articles 6-28). It also contains provisions which deal with the right of establishment and the supply of services (Articles 29-30).

97. The prohibitions imposed by the Bill do not run counter to the Agreement. That Agreement cannot be interpreted to apply to settlement goods or settlement services within the meaning of the Bill for the following reasons.

98. First, the conclusion that the Agreement does not apply to settlement goods and services is supported by the judgment in *Brita*,[65] where the ECJ expressly held that products originating in the West Bank do not fall within the territorial scope of the Agreement.

99. Secondly, to the extent that trade with territories occupied by Israel is governed by the EU PLO Agreement, the EU-Israel Agreement cannot impose obligations on the PLO as a third party.

100. Thirdly, the Agreement must be interpreted in the light of the right to self-determination which is a fundamental right under EU and international law and in the light of the Fourth Geneva Convention. Seen in that light, it cannot be said to preclude a Member State from imposing the restrictions provided in the Bill.

101. This is supported by the Human Rights clause which is provided in Article 2 of the Agreement. That clause states that 'Relations between the Parties, as well as all the provisions of the Agreement itself shall be based on respect for human

[63] 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 187/3).
[64] http://ec.europa.eu/trade/policy/countries-and-regions/countries/palestine/index_en.htm
[65] Case C-386/08 *Brita* ECLI:EU:C:2010:91.

rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement'.

102. It is also supported by the fact that the Agreement contains a public policy exception. Under Article 27, nothing in the Agreement is to preclude prohibitions or restrictions on imports, exports or goods in transit justified, inter alia, on grounds of public policy. In this respect, I refer to my analysis on public policy laid out above.

103. I note that the Bill defines as settlement goods those which are produced 'in whole or in part' within a relevant occupied territory by an illegal settler: see section 2. In my view, the above analysis also applies to goods which are produced partly in Israel and partly in a relevant occupied territory as defined in section 3 of the Bill. This is for two reasons.

104. First, the reasons which I have outlined above, namely, compliance with international law and fundamental rights, apply equally to goods which are only partly produced in an occupied territory by illegal settlers. It would make little sense to prohibit the export and sale of goods which are wholly produced within such a territory but allow those which are partly produced there. Partial production also offends the right to self-determination and the interests that the Geneva Convention seeks to protect.

105. Secondly, if it were otherwise, it would be easy to circumvent the prohibition and its enforcement would be very difficult to achieve.

106. Therefore, the prohibitions imposed by the Bill do not run counter to the EU-Israel Association Agreement.

Conclusion

107. For the reasons stated above, I take the view that the criminal offences provided in sections 6, 7, 8 and 9 of the Control of Economic Activity (Occupied Territories) Bill 2018 do not run counter to European Union law.

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