

An Assessment of the Legality under EU Law of the Control of Economic Activity (Occupied Territories) Bill 2018

Jonathan Turner¹

This paper discusses whether the Control of Economic Activity (Occupied Territories) Bill 2018² contravenes EU law³ and the liabilities that may arise if it does. This Bill, originally introduced by Senator Frances Black in the last Oireachtas, would make it a serious criminal offence⁴ to supply goods produced or services provided wholly or partly by Israelis in East Jerusalem, Judea or Samaria (the West Bank). Contravention of EU law would be a fundamental objection to the Bill in itself and the exposure of the Irish State to damages and legal costs would also provide a strong additional ground for the Taoiseach to refuse a “Money Message” under Art. 17.2 of the Irish Constitution.⁵

The Bill passed several stages in the last Oireachtas prior to its dissolution on 14 January 2020 and has recently been restored at the Dáil Committee stage in the present Oireachtas. The previous Government opposed the Bill, in particular on the basis of advice from the then Attorney-General that it is unlawful.⁶ It was reported that EU Commission officials warned that the EU Commission or third parties may bring proceedings for infringement of EU law against the Irish State.⁷ A response of the EU Commission to a written question by a member of the EU Parliament appeared to confirm this position by emphasising the exclusive competence of the EU for the common commercial policy.⁸ The present Taoiseach appears to have adopted this view, stating in the Dáil in answer to an oral question regarding the Bill: “*it is not legally possible*”.⁹ It has also been suggested that

¹ Member of the Bar of England and Wales

² <https://www.oireachtas.ie/en/bills/bill/2018/6/> (accessed 16/2/2019)

³ Potential applications of US Federal and State counter-boycott laws and of the GATT also deserve consideration, but are beyond the scope of this paper.

⁴ Punishable by up to 5 years imprisonment and/or a fine up to € 250,000: see §10(1) of the Bill

⁵ This provides: “*Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach*”. As to the applicable procedures, see https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-06-15-l-rs-note-private-members-bills-pmbs-admissibility-government-messages-and-detailed-scrutiny_en.pdf (accessed 16/2/2019) and [http://opac.oireachtas.ie/AWData/Library3/Report of the sub-Committee on Dil Reform re MOU as agreed on 5 December 2018 095149.pdf](http://opac.oireachtas.ie/AWData/Library3/Report%20of%20the%20sub-committee%20on%20Dil%20Reform%20re%20MOU%20as%20agreed%20on%205%20December%202018%20095149.pdf) (accessed 9/5/2019).

⁶ See the statements in the Irish Parliament by the Tanaiste, Simon Coveney TD (Deputy Prime Minister and Minister for Foreign Affairs and Trade) at <https://www.oireachtas.ie/en/debates/debate/seanad/2018-07-11/13/>; <https://www.oireachtas.ie/en/debates/debate/seanad/2018-07-11/17/> and <https://www.oireachtas.ie/en/debates/debate/dail/2019-01-23/25/>; and of Helen McEntee TD (Minister of State for European Affairs) at <https://www.oireachtas.ie/en/debates/debate/seanad/2018-12-05/27/> (all accessed on 16/2/2019)

⁷ <https://www.irishtimes.com/news/politics/state-in-firing-line-if-ban-on-israeli-settlement-imports-passes-1.3629726> (accessed 16/2/2019)

⁸ http://www.europarl.europa.eu/doceo/document/P-8-2019-000081-ASW_EN.html

⁹ <https://www.oireachtas.ie/en/debates/question/2020-07-21/section/7/> (accessed 4/1/21)

compliance with the Bill would expose companies to sanctions under US laws.¹⁰ However supporters of the Bill have relied on opinions that are said to show that the Bill is lawful.¹¹

In order to address the legality of the Bill under EU law, it is necessary first to examine its provisions.

The Provisions of the Bill

The Bill defines “*relevant occupied territory*” in its §3(1) as

“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,¹² or

(d) designated as such for the purposes of this Act in a regulation made by the Minister ...”.

This definition appears to have been crafted so as to apply, as matters stand, to the West Bank, but no other territory, unless the Irish government extends it to other territories.¹³ The definition incorporates non-binding advisory opinions of the International Court of Justice (ICJ). Although it has been disputed that East Jerusalem, Judea and Samaria are occupied within the meaning of the Fourth Geneva Convention,¹⁴ the ICJ expressed the

¹⁰ <https://thehill.com/opinion/international/371302-irish-bill-to-boycott-israeli-settlements-runs-afoul-of-us-laws>; <http://fortune.com/2018/07/09/occupied-territories-bill-apple-ireland-israel/> (both accessed 16/2/2019)

¹¹ “*New legal advice finds Occupied Territories Bill is ‘fully compliant with EU trade rules’*”, TheJournal.ie, <https://www.thejournal.ie/occupied-territories-bill-4354083-Nov2018/> (accessed 16/2/2019); speech of Senator Black in the Seanad on 5/12/2018 <https://www.oireachtas.ie/en/debates/debate/seanad/2018-12-05/27/> (accessed 16/2/2019). Senator Black has circulated opinions by Prof James Crawford (dated 24/1/2012 and published as a “Draft for Consultation” at <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 16/2/19), Michael Lynn SC (dated 19/9/2012) and Prof Takis Tridimas (dated 21/11/2018). A further opinion by Tom Moerenhout and John Reynolds (electronically dated 30/6/2018) has been published at https://www.academia.edu/36954348/Legal_Opinion_re_Control_of_Economic_Activity_Occupied_Territories_Bill_2018?ends_sutd_reg_path=true (accessed 16/2/2019). These opinions are discussed further below.

¹² “International tribunal” is defined in §2 by reference to the International War Crimes Tribunals Act 1998 so that it covers other international criminal courts, but not (for example) the European Court of Human Rights or the EU Court of Justice

¹³ Proponents of the Bill have made it clear that their target is Israeli settlements in the West Bank, although Senators Niall Ó Donnghaile and Alice-Mary Higgins suggested in the Seanad that it should be applied to Western Sahara: <https://www.oireachtas.ie/en/debates/debate/seanad/2018-12-05/27/> (accessed 16/2/2019)

¹⁴ Israel regards the whole of Jerusalem as its sovereign territory in accordance with its Basic Law:

view in its advisory opinion in the “*Wall*” case¹⁵ that they are. By contrast, other territories commonly regarded as occupied, such as Western Sahara, Northern Cyprus, Crimea, Abkhazia, South Ossetia and Nagorno Karabakh have not been the subject of specific conclusions under the Fourth Geneva Convention by any of the tribunals specified in the Bill.¹⁶

These tribunals do not include the European Court of Human Rights (ECHR) and the EU Court of Justice (CJEU), which have confirmed or might be more likely to confirm the occupied status of some of these other territories.¹⁷ The omission of the ECHR and CJEU appears consistent with a deliberate intention to target specifically Israeli settlements in the West Bank. On the other hand, if the Bill is passed, other areas could become “*relevant occupied territories*” covered by it as a result of decisions of the International Criminal Court (ICC) or other specified international tribunals outside Ireland’s control.¹⁸

The Bill defines “*illegal settler*” in its §2 as

Jerusalem Capital of Israel, 1980, as amended in 2000. For the argument that Judea and Samaria outside Jerusalem are not “occupied”, see (for example) the Report of the Levy Commission on the Legal Status of Building in Judea and Samaria, copy of original posted at <https://www.scribd.com/doc/101019993/Levy-Report-in-Hebrew> (accessed 16/2/2019), mainly unofficial English translation available at <https://israelipalestinian.procon.org/sourcefiles/The-Levy-Commission-Report-on-the-Legal-Status-of-Building-in-Judea-and-Samaria.pdf> (accessed 16/2/2019), discussed by Profs Iain Scobbie, Eugene Kontorovich and others at <https://www.ejiltalk.org/justice-levys-legal-tinsel-the-recent-israeli-report-on-the-status-of-the-west-bank-and-legality-of-the-settlements/> (accessed 16/2/2019)

¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136

¹⁶ Pre-Trial Chamber I of the International Criminal Court (ICC) held in its decision of 27/1/2016 on the Situation in Georgia (https://www.icc-cpi.int/courtrecords/cr2016_00608.pdf, accessed 16/2/2019) that Russia had occupied Georgian territory, but it appears that this referred to territory beyond South Ossetia from which Russia subsequently withdrew. The ICJ held in its Advisory Opinion on *Western Sahara* [1975] ICJ Rep 12 that neither Morocco nor Mauritania had sovereignty or legal ties in respect of this territory such as might affect the principle of self-determination of its people. However, this does not appear to be to confirm that the territory is now occupied by Morocco within the meaning of the 4th Geneva Convention.

¹⁷ The ECHR regarded Northern Cyprus as occupied by Turkey in (inter alia) *Loizidou v Turkey* (15318/89, 18/12/1996) and *Cyprus v Turkey* (25781/94, 10/5/2001). The ECHR also appears to have regarded parts of Nagorno-Karabakh as occupied by Armenia in *Sargsyan v Azerbaijan* (40167/06, 16/6/2015) and held that Russia had effective control over Transnistria in *Mozer v Moldova and Russia* (11138/10, 23/2/2016), *Catan v Moldova and Russia* (43370/04, 19/10/2012), *Ivantoc v Moldova and Russia* (23687/05, 15/11/2011) and *Ilascu v Moldova and Russia* (48787/99, 8/7/2004). The CJEU held that Western Sahara is not part of the territory of Morocco under international law and therefore not covered by the concept of “territory of Morocco” in the EU-Morocco Association Agreement in Cases C-104/16P *Council of the EU v Front Polisario* §§87-108 (ECLI:EU:C:2016:973) and C-266/16 *Western Sahara Campaign UK v HMRC* §§62-73 (ECLI:EU:C:2018:118). The Opinion of Adv-Gen Wathelet in the latter case (ECLI:EU:C:2018:1) affirmed that Morocco’s presence in Western Sahara is an occupation within the meaning of Art. 42 of the 1907 Hague Regulations.

¹⁸ These include South Ossetia (currently under investigation by the ICC Prosecutor), Crimea and Eastern Ukraine (currently under preliminary examination by the ICC Prosecutor).

“a member of the civilian population of any 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”.

This definition differs notably and, no doubt, deliberately from Arts. 49(6) of the 4th Geneva Convention and 8(2)(b)(viii) of the Rome Statute of the International Criminal Court, which refer to “*transfer*” by the occupying power of its civilian population into the occupied territory.

While it is not clear what is meant by “*facilitated directly or indirectly*” (which is itself a reproach for legislation that imposes serious criminal penalties), the definition appears to cover any Israeli present in East Jerusalem, Judea and Samaria, in so far as his presence there is facilitated by Israeli control of the territory, by roads constructed or maintained by the Israeli administration, and/or by security provided by the Israeli Defence Forces and security services. This would include Israelis who have not settled beyond the 1949 armistice line in the sense that they live there, but who travel to that area merely to work there or in the course of their work.

“*Settlement goods*” are then defined in §2 as

“goods produced in whole or in part within a relevant occupied territory by an illegal settler”.

In view of the Bill’s definition of “illegal settler” discussed above, this would appear to cover any goods produced in a factory in the West Bank if any Israelis work there (whether they live in the West Bank or not).

“*Settlement service*” is somewhat similarly defined in §2 as

“a service provided in whole or in part within a relevant occupied territory by an illegal settler”.

However, there is a difference in that “*settlement goods*” (as defined) can travel to and be supplied in Ireland whereas a “*settlement service*” (as defined) must be provided in whole or in part within a “*relevant occupied territory*”. It would nevertheless appear to cover any service provided by an Israeli in the West Bank, whether he lives there or not.

§§6-9 of the Bill would make it a criminal offence to import or sell “*settlement goods*” or provide a “*settlement service*” or extract resources from a “*relevant occupied territory*” or its associated territorial waters, or to attempt any of these acts, or to assist any other person to carry out or attempt any of these acts.

§5 of the Bill would extend these criminal prohibitions to acts committed outside Ireland by Irish individuals or bodies.

§11(a) of the Bill contains an obscure provision that it shall be a defence for a person charged with an offence under §§6-9 to show that

“the act or omission which is the subject of the alleged offence was carried out with the consent of an entity or form of authority which is recognised by the State [of Ireland] as being the legitimate authority over that relevant occupied territory”.

Ireland officially supports the Oslo II Agreement, under which Israel retains authority over East Jerusalem and Area C of the West Bank, including in particular Israeli settlements, pending a resolution of the “*final status*” issues.¹⁹ Israel consents to the supply of goods produced, services provided and resources extracted by Israelis in these areas, subject to compliance with Israeli law in Jerusalem and the laws administered by Israel in Area C of the West Bank. It could therefore be argued that §11(a) of the Bill would provide a complete defence in respect of these acts. However, even if this is correct, the Bill would have the practical effect of restricting the import and supply of these goods and services in Ireland, particularly given the severity of the penalties, the burden of proof and the obscurity of this potential defence.

Having examined the provisions of the Bill, it is now possible to address whether they are compatible with EU law, in particular on the common commercial policy, the common foreign policy and the internal market.

The EU’s Common Commercial Policy

The EU has exclusive competence for the common commercial policy – i.e. its external trade policy. Art. 3(1)(e) of the Treaty on the Functioning of the EU (TFEU) provides:

“The Union shall have exclusive competence in the following areas: ... (e) common commercial policy.”

Since the EU has exclusive competence for the common commercial policy, Art. 2(1) of the TFEU applies:

“When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”

This provision codifies case-law of the CJEU which established that “*national measures of commercial policy are therefore permissible only if they are specifically authorised by the Community*”.²⁰

¹⁹ See particularly Art. XVII of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington D.C., 28/9/1995.

²⁰ C-83/94 *Leifer* [1995] ECR 3231 §12 (ECLI:EU:C:1995:329); 41/76 *Donckerwolcke* [1976] ECR 1921 §32 (ECLI:EU:C:1976:182); 174/84 *Bulk Oil v Sun International* [1986] ECR 559 §31 (ECLI:EU:C:1986:60).

Furthermore, Art. 207(1) of the TFEU provides: *“The common commercial policy shall be based on uniform principles”*

Accordingly, EU member states are not permitted to adopt unilateral measures within the scope of the common commercial policy. This is very clear and well-established in EU law. As Advocate-General Sharpston observed:

“The Court clarified the European Union’s exclusive competence over the common commercial policy long before the entry into force of Article 3(1)(e) TFEU, which now expressly confirms the European Union’s exclusive competence over that policy. Thus, in its very first Opinion delivered on the basis of (what is now) Article 218(11) TFEU, the Court held that exclusive competence over the common commercial policy was justified because permitting the Member States to exercise concurrent powers in that area ‘would amount to recognising that, in relations with third countries, Member States may adopt positions which differ from those which the [European Union] intends to adopt, and would thereby distort the institutional framework, call into question mutual trust within the [European Union] and prevent the latter from fulfilling its task in the defence of the common interest’. That reasoning is consistent with the construction of the customs union set up by the Treaty of Rome. Internally, that union consists of an absolute prohibition on customs duties on imports and exports and charges having equivalent effect between the Member States. At the same time, the Treaties entrust the European Union and its institutions with the task of defending the European Union’s commercial interests externally. Enabling the Member States to conduct their own commercial policies with the outside world (and indeed to pursue their own interests in that context) in parallel with the actions of the European Union would clearly risk jeopardising that essential function.”²¹

The importance of maintaining a common EU policy on external trade is highlighted in this case by the existence of extensive US Federal and States’ laws which prohibit or sanction compliance with boycotts of businesses in territories governed by Israel and which require US trade negotiators to address this issue in international trade negotiations.²²

The EU Court of Justice (CJEU) has repeatedly held that an act falls within the common commercial policy *“if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on*

²¹ Opinion 2/15 *Free Trade Agreement with Singapore* §96 (ECLI:EU:C:2016:992).

²² For summaries of US States’ legislation, see <https://palestinelegal.org/righttoboycott/>. Existing US Federal legislation includes the Export Administration Act 1979, Tax Reform Act 1976 (Ribicoff amendment), Trade Promotion Authority Act 2015, and Trade Facilitation and Trade Enforcement Act 2015. For an example of the application of some of this legislation, see the discussion of the Airbnb case at the end of this paper.

trade”.²³ It covers international trade in services (except in the field of transport) as well as goods.²⁴

The Bill clearly comes within this definition, since the prohibitions in its §§6-9 are intended to govern trade with occupied territories and (if enacted) would have direct and immediate effects on trade with the West Bank and potentially other territories. Furthermore EU trade sanctions for alleged violations of international law have in the past been based on its competence to conduct the common commercial policy.²⁵

The Bill is therefore incompatible with EU law unless EU member states have been empowered by the EU to adopt such legislation. In this regard, it is necessary to consider the EU Regulations providing for common rules on imports.

The EU's Common Rules on Imports

EU Regulation 2015/478 on common rules for imports applies to imports of products, other than certain textiles, originating in most third countries around the world, including Israel and territories under Israel's control.²⁶ The excluded textiles are covered by Regulation 2015/936, which contains similar provisions to Regulation 2015/478 so far as relevant to this subject.²⁷ The excluded countries²⁸ are covered by Regulation 2015/755, which also contains similar provisions, so far as relevant.²⁹ The points made in the following discussion apply to all of these Regulations.

Recital 2 of Regulation 2015/478 reaffirms that “*The common commercial policy should be based on uniform principles.*” Art. 1(2) of Regulation 2015/478 provides that

“Imports into the Union of the products referred to in paragraph 1 shall take place freely and accordingly shall not be subject to any quantitative restrictions, without prejudice to the safeguard measures which may be taken in Chapter V”.

²³ Cases C-137/12 *Commission v Council (conditional access / illicit devices to receive broadcasts)* §57 (ECLI:EU:C:2013:675); C-389/15 *Commission v Council (revised Lisbon Agreement on Appellations of Origin)* §49 (ECLI:EU:C:2017:798); Opinion 2/15 *Free trade agreement with Singapore* §§36, 112 (EU:C:2017:376); C-414/11 *Daiichi Sankyo v DEMO* §51 (ECLI:EU:C:2013:520)

²⁴ TFEU Art. 207(1); Opinion 2/15 *(free trade agreement with Singapore)* §§50-55 (ECLI:EU:C:2017:376)

²⁵ e.g. EU Regulations 877/82 (Argentina), 2340/90 and 3150/90 (Iraq), 945/92 (Libya), 1432/92 and 990/93 (Serbia). Art. 215 of the TFEU now provides a specific legal basis for economic and financial sanctions.

²⁶ Regulation 2015/478, Art. 1(1).

²⁷ Regulation 2015/936 replaced Regulation 517/94 referenced in Art. 1(1) of Regulation 2015/478. The provisions of Regulation 2015/936 corresponding to the cited provisions of Regulation 2015/478 are: Recital 2, Art. 2 (which excludes some products from Belarus and North Korea that remain subject to quantitative restrictions) and Art. 33(2).

²⁸ Azerbaijan, Belarus, Kazakhstan, North Korea, Turkmenistan, Uzbekistan: Regulation 2015/755, Annex I.

²⁹ Recital 2, Art. 1(2) and Art. 17(2).

According to the case-law of the CJEU, this provision applies to restrictions on the importing of goods, but not to restrictions on their subsequent marketing.³⁰ Nor does it apply to the provision of services or the extraction of resources. Thus it applies to the prohibition of imports in §6 of the Bill³¹ but not to the prohibitions on the sale of goods, provision of services or extraction of resources in its §§7-9.

Art. 24(2) of Regulation 2015/478 provides that

“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 interpretation of this provision is not necessarily the same as that of similar exceptions to free movement within the EU’s internal market.³² However, as observed by Advocate-General Sharpston in the passage cited above, there is a close connection between the common commercial policy and the free movement of goods in the internal market. Both are fundamental principles of the EU; together they constitute the customs union; and exceptions to both are interpreted strictly.³³ Moreover, the test adopted in *Bouchereau* and subsequent cases³⁴ for the “public policy” exception to free movement within the EU’s internal market, discussed further below, has been applied when interpreting “public policy” exceptions to free trade under association agreements between the EU and other countries.³⁵ The CJEU has also observed that the corresponding provision of a predecessor of this Regulation allows derogations comparable to Art. 36 of the TFEU.³⁶

It seems therefore that “public policy” in this exception should be interpreted in line with Art. 36 of the TFEU and related exceptions to free circulation in the internal market.³⁷ However, there is a further consideration: just as the exceptions in Art. 36 of TFEU are directed to eventualities of a non-economic kind,³⁸ those in Art. 24(2) must contemplate

³⁰ C-296/00 *Expo Casa Manta* §§28-35 (ECLI:EU:C:2002:316); C-154/04 *Alliance for Natural Health* §95 ECLI:EU:C:2004:848; C-525/14 *Commission v Czech Republic* §§38-39 (ECLI:EU:C:2016:714)

³¹ A provision in similar terms relating to exports was interpreted as covering measures of equivalent effect to quantitative restrictions on imports in C-83/94 *Leifer* [1995] ECR 3231 §§17-22 (ECLI:EU:C:1995:329)

³² 270/80 *Polydor v Harlequin* [1982] ECR 329 §§18-22 (ECLI:EU:C:1982:43); C-351/08 *Grimme* §29 (ECLI:EU:C:2009:697); C-221/11 *Demirkan* §44 (ECLI:EU:C:2013:583)

³³ 29/75 *Kaufhof v Commission* [1976] ECR 431 §5 (ECLI:EU:C:1976:55)

³⁴ See notes 49 and 50 below

³⁵ C-340/97 *Nazli* [2000] ECR I-957 §§56-61; C-268/99 *Jany* [2001] ECR I-8615 §59 (ECLI:EU:C:2001:616); C-349/06 *Polat* §§29-39 (ECLI:EU:C:2007:581)

³⁶ C-296/00 *Expo Casa Manta* §34 (ECLI:EU:C:2002:316)

³⁷ Prof Tridimas also takes this view in §27 of his opinion. Michael Lynn SC does not (§33 of his opinion) but his view is not substantiated by any consideration of the relevant case-law. As to these opinions see note 11 above and the further discussion below.

³⁸ 7/61 *Commission v Italy* [1961] ECR 317 at C(d) (ECLI:EU:C:1961:31); 95/81 *Commission v Italy* [1982] ECR 2187 §27 (ECLI:EU:C:1982:216); 288/83 *Commission v Ireland* [1985] ECR 1761 §28 (ECLI:EU:C:1985:251); C-324/93 *Evans Medical* [1995] ECR I-563 §36 (ECLI:EU:C:1995:84)

measures that are not in the nature of a national commercial policy, since permitting measures of national commercial policy under this proviso would directly contradict the allocation of exclusive competence over commercial policy to the EU.

As discussed below, it is highly implausible that the Bill's prohibition of imports of "*settlement goods*" (as defined in it) could satisfy the *Bouchereau* test. Furthermore, the Bill plainly pursues a national commercial policy with the stated aim of influencing the actions of a foreign state. It is not a measure pursuing some other purpose that only incidentally affects commercial policy. Art. 24(2) of Regulation 2015/478 cannot have been intended to permit such a measure directly contradicting the exclusive competence of the EU.

In addition, even if (contrary to the points made above) §6 of the Bill could be regarded as a "measure on grounds of public policy" within the meaning of Art. 24(2) of Regulation 2015/478, this provision merely states that this Regulation does not preclude the adoption or application of that measure, without prejudice to other provisions of EU law. Other provisions of EU law include Arts. 2(1), 3(1)(e) and 207(1) of the TFEU, which specify that the EU has exclusive competence for the common commercial policy and that EU member states may adopt national measures in this field only if so empowered by the EU or for the implementation of EU acts. Art. 24(2) of the Regulation does not appear to constitute the "specific authorisation" required by the case-law codified in Art. 2(1) of the TFEU to permit a national measure of commercial policy derogating from the EU's exclusive competence.³⁹

Moreover, as noted above, the Regulation only applies to rules on imports of goods, so Art. 24(2), which refers only to the Regulation and not to activities outside its scope, could not permit the prohibitions in §§7-9 of the Bill on the sale of "*settlement goods*" or the supply of "*settlement services*" or the extraction of resources, which also infringe the EU's exclusive competence in respect of the common commercial policy.

For all these reasons, Art. 24(2) of Regulation 2015/478 and the corresponding provisions of Regulations 2015/735 and 2015/966 do not appear to exempt the Bill from the EU's exclusive competence in respect of the common commercial policy and the illegality of national measures of commercial policy under EU law.

Furthermore, Art. 24(2) of the Regulation does not exempt the Bill from other provisions of EU law, including those relating to the EU's common foreign policy.

The EU's Common Foreign Policy

TFEU Art. 215 empowers the EU Council to adopt trade sanctions pursuant to a decision of the EU Council under Title V Chapter 2 of the Treaty on European Union (TEU). Unilateral trade sanctions by an EU member state in an area where the EU is already

³⁹ Cf. 174/84 *Bulk Oil v Sun International* [1986] ECR 559 §§29-33 (ECLI:EU:C:1986:60) where the relevant provision stated that the principle of freedom of export from the Community would not apply to specific products

active would undermine the EU's policy. Indeed, Art. 24(3) of the TEU explicitly provides that

“The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles.”

Separate trade sanctions by Ireland against Israel and potentially other countries would appear to impair the EU's effectiveness as a cohesive force in international relations contrary to this provision.

Moreover, the EU Commission has adopted an *Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967*.⁴⁰ This presupposes that such goods are permitted to be sold in the EU provided they are appropriately labelled. Unilateral action by an EU member state would contradict this policy.

The EU's Internal Market

One of the fundamental principles of the EU is an internal market comprising

*“an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”*⁴¹.

Pursuant to this principle, Art. 34 of the TFEU provides:

“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

This provision applies to products coming from third countries which are in free circulation in EU member states, as well as products originating in EU member states.⁴²

“Settlement goods” as defined in the Bill freely circulate in other member states of the EU and, as noted above, the Bill would plainly have the practical effect of restricting the

⁴⁰ 2015/C 375/05 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015XC1112%2801%29>

⁴¹ TFEU, Art. 26(2). The Treaties are the TFEU and the Treaty on European Union (TEU): TFEU Art. 1(2)

⁴² TFEU Arts. 28(2) and 29

importation of these goods into the Irish Republic. It would therefore contravene Art. 34 of the TFEU unless an exception applies.⁴³

The Bill would similarly restrict the supply of cross-border services within the EU's internal market, in that it would prevent persons established in another EU member state assisting the supply of "*settlement services*" to persons in Ireland. This would contravene Art. 56 of the TFEU, which prohibits restrictions on the provision of cross-border services within the internal market.

The Bill would also restrict the free movement of Irish citizens from other EU states to Ireland, since they would be liable to prosecution in Ireland if they have supplied or assisted the supply of "*settlement goods*" or "*settlement services*". This would be contrary to Art. 45 of the TFEU which prohibits restrictions on the free movement of workers in the internal market. In so far as the Bill would apply to those holding joint citizenship of Ireland and another EU state, it would also contravene the prohibition of discrimination in Art. 18 of the TFEU and their rights as EU citizens to move and reside freely within the EU under its Arts. 20(2) and 21, as well as the prohibition of restrictions on freedom of establishment in another EU member state in its Art. 49.

The currently proposed "Brexit agreement" on the withdrawal of the UK from the EU would further require free circulation of goods to be maintained between the UK and the EU at least until the end of 2020,⁴⁴ and thereafter between Ireland and Northern Ireland under the "backstop" provisions, unless and until these provisions are superseded in this regard by a subsequent agreement, or the EU and the UK jointly decide that they are no longer necessary,⁴⁵ or they are suspended unilaterally for persistent failure to comply with a ruling of arbitration panel.⁴⁶ The Bill would therefore breach the proposed Brexit agreement if it comes into force.

The Public Policy Exceptions

All of these provisions have exceptions for measures justified on grounds of public policy.⁴⁷ However, these exceptions are interpreted strictly, since they derogate from a fundamental principle of the TFEU.⁴⁸ In particular, the CJEU has repeatedly held in

⁴³ See, for example, the Judgment of the CJEU in Case 41/76 *Donckerwolcke* [1976] ECR 1921 (ECLI:EU:C:1976:182), where it was held that a disproportionate penalty for an inaccurate customs declaration would constitute an obstacle to the free movement of goods.

⁴⁴ *Agreement on the withdrawal of the UK from the EU* and the EAEC, COM (2018) 833 final, Arts. 41, 126

⁴⁵ *Ib.*, Protocol on Ireland / Northern Ireland, Arts. 1(4), 2(2), 6(2), 20

⁴⁶ *Instrument relating to the Agreement on the Withdrawal of the UK from the EU and the EAEC*, 11 March 2019

⁴⁷ TFEU Arts. 36, 45(3), 52(1), 62; EU Directive 2004/38 Art. 27 (which is particularly stringent).

⁴⁸ See e.g. 46/76 *Bauhuis* [1977] ECR 5 §12 (ECLI:EU:C:1977:6); 95/81 *Commission v Italy* [1982] ECR 2187 §27 (ECLI:EU:C:1982:216); C-348/96 *Calfa* [1991] ECR I-11 §23 (ECLI:EU:C:1999:6); C-355/98 *Commission v Belgium* [2000] ECR I-1221 §28 (ECLI:EU:C:2000:113); C-465/05 *Commission v Italy* [2007] ECR I-11091 §49 (ECLI:EU:C:2007:781); C-319/06 *Commission v Luxembourg* [2008] ECR I-4323 §50 (ECLI:EU:C:2008:350); C-161/07 *Commission v Austria* [2008] ECR I-10671 §35 (ECLI:EU:C:2008:759); C-347/09 *Dickinger* [2011] ECR I-8185 §82 (ECLI:EU:C:2011:582)

Bouchereau and subsequent cases that restrictions on the free movement of persons⁴⁹ or services⁵⁰ within the EU can only be justified on the ground of public policy where there is a “*genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society*” (“the *Bouchereau* test”).

The mere fact that a criminal offence has been committed is not enough to justify a restriction of free movement on this ground.⁵¹ A restriction protecting human rights can be justified on this ground, but only if the *Bouchereau* test is satisfied and the restriction is necessary, and no more restrictive than necessary, to protect the right in question.⁵² Decisions to date have considered whether there was a threat to a fundamental interest of society in the state imposing the restriction; it is not clear whether a restriction can be justified on the ground of public policy based on a threat to a fundamental interest of a society in another country.

The CJEU’s case-law on public policy in relation to free movement of goods is less extensive, but the same basic principles apply and reference has likewise been made in this context to the “*fundamental interests of the state*”.⁵³ It seems likely that a similar test would be applied.⁵⁴

It is highly implausible that the prohibition of the import or supply of “*settlement goods*” or the provision of “*settlement services*” as defined in the Bill could be justified in accordance with the *Bouchereau* test and hence permitted to derogate from the free movement of goods, services and persons within the EU required by EU law.

In the first place, these acts do not in themselves threaten any fundamental interest of society and are several steps removed from any actions that might be alleged to be harmful.

Secondly, the legal objection to Israeli settlements in Jerusalem, Judea and Samaria is based on Art. 49(6) of the 4th Geneva Convention, which prohibits States from

⁴⁹ 30/77 *Bouchereau* [1977] ECR 2000 §35 (ECLI:EU:C:1977:172); 115-116/81 *Adoui* [1982] ECR 1665 §8 (ECLI:EU:C:1982:183); C-348/96 *Calfa* §21 [1991] ECR I-11 (ECLI:EU:C:1999:6); C-161/07 *Commission v Austria* [2008] ECR I-10671 §35 (ECLI:EU:C:2008:759); C-304/14 *Secretary of State for the Home Department v CS* §38 (ECLI:EU:C:2016:674); C-193/16 *E v Subdelegación del Gobierno en Álava* §23 (ECLI:EU:C:2017:542).

⁵⁰ C-348/96 *Calfa* §21 [1991] ECR I-11 (ECLI:EU:C:1999:6); C-355/98 *Commission v Belgium* [2000] ECR I-1221 §28 (ECLI:EU:C:2000:113); C-465/05 *Commission v Italy* [2007] ECR I-11091 §49 (ECLI:EU:C:2007:781); C-319/06 *Commission v Luxembourg* [2008] ECR I-4323 §50 (ECLI:EU:C:2008:350); C-347/09 *Dickinger* [2011] ECR I-8185 §82 (ECLI:EU:C:2011:582).

⁵¹ 30/77 *Bouchereau* (1977) ECR 2000 (ECLI:EU:C:1977:172); C-348/96 *Calfa* [1991] ECR I-11 §24 (ECLI:EU:C:1999:6); C-33/07 *Jipa* [2008] ECR I-5157 §23 (ECLI:EU:C:2008:396)

⁵² C-36/02 *Omega* [2004] ECR I-9609 §30-36 (ECLI:EU:C:2004:614)

⁵³ 7/78 *R v Thompson* [1978] ECR 2247 §34 (ECLI:EU:C:1978:209)

⁵⁴ The *Bouchereau* formulation has also been applied to public policy exceptions to the free circulation of capital in the EU (C-54/99 *Association Eglise de Scientologie de Paris* §17 (ECLI:EU:C:2000:124) and to free movement of persons and services under association agreements between the EU and other countries as noted below. Prof Takis Tridimas, in his opinion prepared for supporters of the Bill, was “*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*” (§36)

transferring part of their population into occupied territories.⁵⁵ This provision does not prohibit the operation of businesses in occupied territories. Even if it applies to acts by the State of Israel encouraging the voluntary settlement of Israelis in the West Bank (which is itself disputed⁵⁶), Art. 49(6) does not make it illegal to operate businesses employing Israelis in this area, as the UK Supreme Court observed in *Richardson v DPP*,⁵⁷ or for Israelis to provide transport services there, as the Court of Appeal of Versailles held in *AFPS and OLP v Alstom and Veolia*.⁵⁸

Thirdly, as noted above, “*settlement goods*” and “*settlement services*” as defined in the Bill would appear to cover any goods produced or services provided in East Jerusalem, Judea or Samaria if an Israeli participated in their production or provision. “*Settlement goods*” would cover products of factories in the West Bank in which Israelis are employed alongside Palestinians, whether those Israelis are Jews or Arabs, and whether they have settled in the West Bank or not, and whether the business is owned by a State entity or not (usually not). “*Settlement services*” would include medical services in East Jerusalem hospitals if they are provided wholly or partly by Israeli staff; transport and other public services provided by Israelis in East Jerusalem, Judea or Samaria; and guided tours by Israelis of the old city of Jerusalem. Moreover, these terms would apply regardless of any actual impacts of the production of the goods or provision of the services on Palestinians. Many Palestinians in fact benefit from relatively well-paid jobs in Israeli businesses in the West Bank.⁵⁹

Fourthly, any claim that the import into Ireland of “*settlement goods*” or the supply in Ireland of “*settlement services*” as defined in the Bill constitutes a genuine and serious threat to a fundamental interest of society is undermined by the drafting of the Bill so that it does not currently cover goods or services produced by settlers in occupied territories such as Western Sahara, Northern Cyprus and Nagorno Karabakh. If the import and supply of such goods and services really constitutes a genuine and serious threat to a fundamental interest of society, one would expect the Irish legislators to address it comprehensively.⁶⁰

⁵⁵ Art. 8(2)(b)(viii) of the Rome Statute of the ICC is based on this provision. Note 44 to the “Elements of Crimes” (which are to assist the Court in interpreting the Statute in accordance with its Art. 9) indicates that the term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law

⁵⁶ See, for example, note 14 above and Eugene Rostow, 84 AJIL (1990) 717

⁵⁷ [2014] UKSC 8 at §17.

⁵⁸ 11/05331, 22 March 2013

⁵⁹ See *Defeating Denormalization – Shared Palestinian and Israeli Perspectives on a New Path to Peace*, JCPA January 2018 (http://jcpa.org/pdf/Defeating_Denormalization_Final_22_january.pdf accessed 10/5/2019)

⁶⁰ See 115-116/81 *Adoui* [1982] ECR 1665 §8 (ECLI:EU:C:1982:183) and C-268/99 *Jany* [2001] ECR I-8615 §60 (ECLI:EU:C:2001:616) where the lack of restrictions on the state’s own nationals showed that the conduct restricted was not a genuine and serious threat to a fundamental interest of society.

For these reasons, the restrictions in the Bill do not appear to be exempted from, and therefore conflict with, the fundamental requirements of free movement of goods, services and persons in the EU's internal market.

The EU-Israel Association Agreement

The above analysis is not affected by the EU-Israel Association Agreement. The CJEU has held that this Agreement does not extend to the West Bank,⁶¹ but this limitation does not affect the infringements discussed above of the EU's exclusive competence for the common commercial policy and of free movement in the EU's internal market.

Art. 2 of the Association Agreement provides that relations between the parties “*shall be based on respect for human rights*”. However, this does not entitle Ireland to take unilateral measures of commercial policy to address a supposed lack of respect for human rights on the part of Israel.

In the first place, if any measure is to be taken pursuant to Art. 2 of the Association Agreement within the scope of the EU's common commercial policy, it must be taken in accordance with that policy, i.e. by the EU exercising its exclusive competence, not by an individual EU member state.

Secondly, the Bill would prohibit the supply of products and services whose production or provision does not involve any invasion of human rights and so could not bring Art. 2 of the Association Agreement into play.

Thirdly, even if a member state is concerned that Israel has had insufficient respect for human rights in accordance with Art. 2, the Agreement provides that the concern should be raised by the procedure in its Art. 79(2). That procedure has not been invoked and passage of the Bill does not comply with it.

Fourthly, Art. 2 of the Association Agreement merely states that relations between the parties shall be based on respect for human rights. It does specify any particular action that must or must not be carried out by the parties.

Fifthly, identical provisions to Art. 2 of the EU-Israel Association Agreement are contained in the EU-Morocco Association Agreement and the EU-Armenia Association Agreement. Morocco and Armenia have promoted settlement of their nationals in the occupied territories of Western Sahara and Nagorno-Karabakh respectively. Criminalising the supply of goods and services produced by Israelis in East Jerusalem, Judea and Samaria on the basis of this provision, without similarly criminalising the supply of goods and services produced by Moroccans in Western Sahara or Armenians in Nagorno-Karabakh, would constitute discrimination on the basis of ethnicity, religion and/or nationality contrary to Art. 21 of the Charter of Fundamental Rights of the EU and thus amount to a further breach of EU law by Ireland.

⁶¹ C-386/08 *Brita* [2010] ECR 1289 (ECLI:EU:C:2010:91)

Opinions cited in support of the Bill

Advocates for the Bill have claimed that opinions of Prof. James Crawford, Michael Lynn SC and Prof. Takis Tridimas⁶² show that the Bill complies with EU law.

The opinions of Prof. Crawford and Mr Lynn were written in 2012 and thus did not address the terms of this Bill.⁶³ More seriously, the opinion of Prof. Crawford overlooked the relevant case-law of the CJEU on the concept of public policy as an exception to the free movement of goods, services and persons in the EU's internal market, while that of Mr Lynn treated it as irrelevant on the basis that he was only considering direct imports into Ireland. Both ignored the exclusive competence of the EU for the common commercial policy. Neither is of any value on the compatibility of the Bill with the provisions of the TFEU on the common commercial policy or free movement in the internal market.

By contrast, the opinion of Prof. Tridimas was written recently for supporters of the Bill and refers to its terms. He addresses relevant case-law and appears to accept the applicability of the *Bouchereau* test in relation to free movement in the internal market.⁶⁴ However, his application of this test is based on a fundamentally erroneous understanding of the terms of the Bill and of how most goods and services are produced by Israelis in the West Bank. He supposes that

*“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 [Art. 49(6) of] the [4th Geneva] Convention.”*⁶⁵

Contrary to this assumption, “*goods produced by illegal settlers*” as defined in the Bill include any goods produced in the West Bank by Israelis, whether they have settled there or not, and whether the business is run by a state entity or not. Such goods do not “*result directly*” from any activity of the Israeli state of organising or encouraging Israelis to live in the West Bank, even if such activity is in violation of Art. 49(6) of the 4th Geneva Convention. Prof. Tridimas's cursory consideration of services prohibited by the Bill⁶⁶ appears to be similarly flawed.

Furthermore, even if Prof. Tridimas's characterisation of “*settlement goods*” and “*settlement services*” as defined in the Bill were accurate, it would still be extraordinary to suppose that their supply in Ireland represents a “*serious threat to the requirements of public policy affecting a fundamental interest of society*”.

⁶² See note 11 above

⁶³ HE Judge Crawford's office informed the writer: “*Judge Crawford has asked me to state that he provided no such opinion [that the Bill is legally permissible under EU and WTO Rules], nor could he have done, consistently with the Court's Statute*” (email of 21/8/2018)

⁶⁴ §36

⁶⁵ §50

⁶⁶ §§83-85

In addition, Prof. Tridimas wrongly assumes that the *Bouchereau* test is the only criterion to be addressed under the common commercial policy. As explained above, this assumption ignores the fact that a measure of national commercial policy directly violates the allocation of exclusive competition over commercial policy to the EU and misinterprets Art. 24(2) of EU Regulation 2015/478 and corresponding provisions.

Prof. Tridimas claims that his view is supported by observations in two cases relating to the operation of the EU's common commercial policy. However, firstly, a member state derogating unilaterally from the EU's exclusive competence in respect of the common commercial policy or from the fundamental principle of free movement in the internal market does not have the same latitude under EU law as the EU when implementing the EU's common policy.

Secondly, on examination, the cited cases do not support his argument. From *Front Polisario v Council*, he cites part of a sentence⁶⁷ taken out of its context in a judgment of the EU General Court (GCEU) which held that the EU Council has a wide discretion to conclude a trade agreement extending to an occupied territory, especially as “*the rules and principles of the international law applicable in the area are complex and imprecise*”.⁶⁸ From *Rosneft*, he cites an observation of Advocate-General Wathelet⁶⁹ that was implicitly rejected by the CJEU, which relied instead on a different justification (security) for the sanctions in issue.⁷⁰

A further opinion by Tom Moerenhout and John Reynolds⁷¹ is similarly based on an erroneous assumption that “*settlement goods*” and “*settlement services*” as defined in the Bill are traded by settlements.

Sanctions and Liabilities for Violation of EU Law

If the Bill is enacted, the EU Commission could pursue enforcement proceedings against Ireland in the CJEU under TFEU Arts. 258-261, which may result in the imposition of fines if Ireland does not comply with the CJEU's ruling. In addition private parties affected by the Bill could bring claims for judicial review in the Irish High Court to declare the Bill invalid and to obtain injunctions prohibiting its enforcement.⁷²

Private parties damaged by the Bill could also claim compensation from the Irish state. The EU Court of Justice held in *Francovich* and subsequent cases⁷³ that an EU member state is liable to compensate private parties for damage suffered as a result of a breach of

⁶⁷ T-512/12 §241 (ECLI:EU:T:2015:953).

⁶⁸ See particularly §§215, 220-224, 247. The GCEU's decision was reversed by the CJEU on the ground that the agreement did not extend to Western Sahara: C-104/16P (ECLI:EU:C:2016:973)

⁶⁹ C-72/15 §132 (ECLI:EU:C:2016:381)

⁷⁰ §§110-116 (ECLI:EU:C:2017:236)

⁷¹ See note 11 above

⁷² As in C-213/89 *R v Secretary of State for Transport ex parte Factortame* [1990] ECR I-2433 (ECLI:EU:C:1990:257) which confirmed that such relief cannot be barred by rules of national law

⁷³ C-6/90 *Francovich v Italy* [1991] ECR I-5357 (ECLI:EU:C:1991:428); C-46/93 *Brasserie du Pecheur* [1996] ECR I-1029 (ECLI:EU:C:1996:79), C-244/13 *Ogieriakhi* (ECLI:EU:C:2014:2068)

EU law by that member state, if the rule of EU law that was infringed conferred rights on private parties, the breach was sufficiently serious in that the state manifestly and gravely disregarded the limits on its discretion, and there was a direct causal link between the breach and the damage.

The prohibitions of restrictions on cross-border trade in the internal market of the EU⁷⁴ and of quantitative restrictions on imports of goods into the EU⁷⁵ confer rights on private parties. On the basis of the points discussed above, and the fact that the Irish Attorney-General has advised that the Bill would contravene EU law, the breach would appear to constitute a manifest and grave violation of these rules. Furthermore, situations can readily be envisaged in which private parties would suffer damage as a direct result of the breach.

The exposure of private parties is exacerbated by the fact that compliance with the Bill (if enacted) may contravene extensive legislation in the US,⁷⁶ as has been strikingly illustrated by the Airbnb case. When Airbnb announced the withdrawal of its service for properties in Israeli settlements in the West Bank, Florida adopted sanctions against the company,⁷⁷ Illinois⁷⁸ and Texas⁷⁹ initiated procedures for implementing sanctions, and legal actions were brought in Delaware,⁸⁰ California⁸¹ and Jerusalem.⁸² The litigation in Delaware was settled on the basis that Airbnb would resume service to these properties.⁸³ Compliance with this settlement by Airbnb's EMEA headquarters in Dublin would appear to contravene the Bill, if enacted, and expose its staff to imprisonment.

Jonathan Turner
4 January 2021

⁷⁴ 26/62 *Van Gend en Loos* [1963] ECR 3 (ECLI:EU:C:1963:1); 74/76 *Iannelli v Meroni* [1977] ECR 557 (ECLI:EU:C:1977:51); 33/74 *Van Binsbergen* [1974] ECR 1299 (ECLI:EU:C:1974:131); 41/74 *Van Duyn* [1974] ECR 1337 (ECLI:EU:C:1974:133)

⁷⁵ TFEU Art. 288 para 2; C-83/94 *Leifer* [1995] ECR 3231 §§43-47 (ECLI:EU:C:1995:329)

⁷⁶ See note 22 above

⁷⁷ <https://www.jns.org/florida-takes-action-against-airbnb-amid-its-boycott-of-west-bank-properties/> (accessed on 19/3/2019)

⁷⁸ <https://www.jpost.com/BDS-THREAT/Illinois-board-finds-Airbnb-in-breach-of-state-law-over-settlements-move-574325> (accessed on 19/3/2019)

⁷⁹ <https://www.calcalistech.com/ctech/articles/0,7340,L-3757543,00.html> (accessed on 19/3/2019)

⁸⁰ <https://www.jpost.com/Arab-Israeli-Conflict/12-Israeli-Americans-sue-Airbnb-in-Delaware-cite-religious-discrimination-573094> (accessed on 19/3/2019)

⁸¹ 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)

⁸² <https://www.usnews.com/news/business/articles/2018-11-22/israeli-sues-airbnb-over-west-bank-settlement-listing-ban> (accessed on 19/3/2019)

⁸³ <https://www.bbc.co.uk/news/world-middle-east-47881163> (accessed on 26/4/2019)