Differentiation Tracker

EUROPEAN COUNCIL ON FOREIGN RELATIONS ecfr.eu

ECFR's Differentiation Tracker provides a snapshot of third state relations with Israel – and the extent to which these contain a clearly defined territorial definition that explicitly excludes Israeli settlements constructed on occupied territory in line with UNSCR 2334.

Findings

In December 2013, the EU vowed to include a differentiation clause in all new agreements and memorandum of understanding (MoU) with Israel, stating that, "in accordance with EU policy, this agreement shall not apply to the geographic areas that came under the administration of the State of Israel after 5th June 1967."

In addition to the publication of guidelines on the correct labelling of settlement products (November 2015) and financial guidelines excluding Israeli settlement-linked entities from EU funding (July 2013), the EU has initiated corrective processes to address some of the regulatory deficiencies in pre-existing aspects of its relationship with Israel. These relate to matters such as organic and veterinary certification.

However, in some important areas – including trade with settlements, cross-border data transfers, police cooperation, and marketing standards for fruit and vegetables – the EU has not enforced differentiation requirements properly, or even at all in some domains. In 2020, the European Commission also signed an MoU with Israel relating to the export of natural gas. The document lacked a territorial clause, which is in contravention of existing EU positions, legal requirements, and member state demands.

In addition, the European Commission and EU member states continue to oppose calls to bar Israeli settlement products and financial services.

The picture is even patchier at the level of EU member state relations with Israel. ECFR research indicates that a majority of European bilateral agreements with Israel potentially benefit its settlements, their companies, and residents – including with regard to social security, taxation provisions, and burgeoning cooperation in research and development areas.

Of the more than 260 agreements reviewed by ECFR, few contain a definition of their territorial scope. Those that do often have vague or ambiguous clauses, including definitions of Israeli territory according to 'the laws of the State of Israel' or 'the territory where it levies taxation.' This ambiguity has undoubtedly benefited Israeli settlements and their residents, and has created confusion among European authorities tasked with monitoring and implementing these agreements.

Uneven progress

Since the publication of ECFR's Differentiation Tracker in 2018, there have been some positive developments. France and Belgium have announced that all future agreements with

Israel will include clear differentiation clauses, and have stressed the non-applicability of existing agreements to occupied territory. The Belgian government has gone further, by including support for differentiation within its 2020 coalition agreement. This has led to the formation of an 'inter-cabinet group' to support national compliance with differentiation requirements, and to work with like-minded states to advance similar efforts at the EU level.

Elsewhere, Denmark and Germany have both confirmed that their research and development cooperation with Israel can only take place within Israel's internationally recognised territory from before 1967. In 2016 the Netherlands restricted payments to Dutch pensioners residing in Israeli settlements. France, Ireland, and Switzerland [add link to Switzerland Tracker section] have also confirmed that individuals and companies that reside in Israel's settlements cannot benefit from the provisions of bilateral treaties with Israel, including with regards to the avoidance of double taxation. In addition, Norway has ended tax deductions for charities acting in contravention of UN Security Council resolutions, including those supporting Israeli settlements.

Judging by interviews with European officials, some negotiations over new agreements (including those on social security provisions) have stalled over EU member states' insistence on the inclusion of a differentiation clause, with Israel refusing to accept such provisions. In 2017 the Israeli government backed out of the EU's Creative Europe programme over its exclusion of Israeli settlements.

Nevertheless, Israel has occasionally put ideology aside by signing up to EU differentiation requirements when doing so is in its interests. In December 2021, the government of Prime Minister Naftali Bennett, a former head of the YESHA settlement council, agreed to EU conditions that excluded Israeli settlement entities and activities. This enabled Israel to join Horizon Europe, the EU's new flagship research and development programme (and the successor to Horizon 2020). Previous Israeli governments agreed to exclude occupied territory from Israel's 2019 post-Brexit Trade and Partnership Agreement with the United Kingdom. In 2017 Israel also signed a labour agreement with China without the settlements, in deference to Beijing's demands on the issue.

But there have been setbacks. The Trump administration reversed US labelling requirements for products originating in occupied territory. As a result, all products originating in Area C of the West Bank (in which Israeli settlements are located) must be marked as Israeli. This also applies to Palestinian products. This decision has yet to be reversed by President Biden. The Canadian government has also fought to maintain the labelling of settlement wine as "made in Israel".

Arab normalisation of Israeli settlements

Perhaps the biggest potential challenge to UNSCR 2334 could come from Arab states which have normalised their relations with Israel as part of the US-orchestrated Abraham Accords. The United Arab Emirates, Bahrain, and Morocco have all signed agreements with Israel relating to trade and investment, scientific research and development, and tourism. So far, none of these agreements include differentiation clauses. And, indeed, the UAE's agreements with Israel on the double taxation and investment protection contain territorial clauses extending their provisions to the settlements, in contravention of UNSCR 2334. This comes to the backdrop of meetings between Emirati businessmen and settler representatives and reports that Israeli settlement products are on sale in the UAE. These include the sale of Israeli settler wine from the occupied Syrian Golan Heights at Dubai airport duty free.

Business and human rights

European businesses and financial organisations remain deeply implicated in Israel's settlement activities. The extent of these linkages has been revealed through extensive research by European civil society organisations, as well as the UN Human Rights Council's report on business enterprises involved in the settlements.

To date, governments have adopted a light touch when it comes to private business dealings with Israeli settlements. Fifteen EU member states have issued business advisories warning of the legal, financial, and reputational consequences of dealing with Israeli settlement entities. But they continue to avoid an outright ban on such activities of the kind they have applied to Russian-occupied Crimea.

However, parliaments in countries such as Denmark, Finland, France, and Norway are exploring other potentially important measures. These have passed legislation requiring domiciled companies to undertake mandatory due diligence and reporting, to ensure respect for human rights in their business activities and supply chains. The European Parliament is set to debate similar legislation. Such moves could provide some crucial oversight of business dealings in occupied territories.

At times, though, the private sector has found itself ahead. Pension funds have often led the way, with several of them having now divested from companies connected to Israel's settlements. Several companies have also ended their business ties with the settlements, most notably Ben and Jerry's – owned by British conglomerate Unilever.