



Ritva Sotamaa
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Unilever PLC
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Dear Ms Sotamaa

Ben & Jerry's Homemade, Inc.

UK Lawyers for Israel is a voluntary association of lawyers who support Israel and seek the proper application of laws in matters relating to Israel.

The Decision and the purpose of this letter

We are aware of the statements by Unilever PLC and its subsidiary, Ben & Jerry's Homemade, Inc. ("BJH"), of 19 July 2021 regarding the latter's intention not to renew its Israeli franchisee's license agreement at the end of next year ("the Decision"). These statements make it clear that the Decision was taken to prevent sales of the franchised products in East Jerusalem and the West Bank (Judea and Samaria).

We have also seen a copy of the letter of Arizona's State Treasurer, Kimberly Yee, to Richard Williams of Unilever PLC of 2 September 2021. This letter indicates that Unilever PLC told Arizona's investment management team that "*the acquisition [by Unilever PLC] of Ben & Jerry's in 2000 allowed them to retain its independent board and ability to make decisions in direct opposition to Unilever*". Despite this, the Arizona State Treasurer concluded that her office had no choice but to divest the State's holdings of shares in Unilever PLC in order to comply with Arizona law. Similar divestments are expected in other US States and Unilever PLC is exposed to additional civil and criminal liabilities and sanctions under various laws in the US and Israel, as described further below.

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We gather from the statements mentioned above that Unilever PLC finds itself in a difficult position as a result of its reading of the terms of the merger agreement by which BJH became a subsidiary of Unilever PLC (“the Merger Agreement”).

The purpose of this letter is to provide our thoughts on this issue and how it might be resolved. We believe our observations are consistent with the law, the relevant contractual framework, the corporate policies of the Unilever group and the best interests of the shareholders of Unilever PLC.

The approach detailed in this letter identifies the scope for Unilever PLC to right the perceived weakness in corporate governance highlighted by the Decision, within the framework of the Merger Agreement. The acquisition of BJH pre-dated the Myners report and the arrangements that were then instituted are not consistent with current expectations of corporate governance, as the Decision has shown. Nevertheless, we suggest a way in which this inconsistency can be mitigated.

Conversely, a failure by Unilever PLC to demonstrate utilisation of available mechanisms to assert effective group governance could seriously undermine investor confidence in the group.¹ It could even amount to non-compliance with the UK Corporate Governance Code² which premium-listed companies on the London Stock Exchange are required to observe.

Investors in Unilever include institutional investors that have ESG and/or stewardship policies and will have to examine these corporate governance issues in that light. Furthermore, these investors include hedge funds that invest via swaps or other derivative products rather than directly holding shares in a UK stock. Such investors do not have standing to engage with Unilever PLC as shareholders and so may have no way of addressing governance concerns except by divesting.

In order to explain the proposed approach it is helpful first to review the application of some US and Israeli laws.

Non-compliance with requirements of US and Israeli laws

The Decision does not comply with various US and Israeli laws, and thereby exposes Unilever plc to a variety of sanctions and liabilities. We summarise some of these laws

¹ See Daniel Harris, “The rock, paper, scissors of ESG: when social missions clash with corporate governance”, *City AM*, 24 August 2021 <https://www.cityam.com/esg-social-mission-clash-corporate-governance-ben-jerrys-unilever/>

² <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF>

below. This outline is not exhaustive, but is sufficient to show non-compliance with multiple laws. It is unlikely that Unilever PLC's auditors will be able to dismiss these legal issues out of hand when preparing its financial statements.

US State counter-boycott laws

35 of the 50 US States have adopted counter-boycott laws. As in the case of Arizona, mentioned above, some of these laws provide for divestment of public funds from a company or group of companies that engages in a boycott of Israel or of territory administered by Israel. Other US States imposing this sanction include Florida, Illinois, New York, Texas, Arkansas, Colorado, Indiana, Iowa, Nevada, New Jersey and North Carolina. Divestment under these laws may also result in the removal of Unilever PLC from index-linked funds.

Alternatively or additionally, some US State counter-boycott laws ban or restrict public procurement from a company or group of companies that engages in a boycott directed against Israel. Such provisions have been adopted in Florida, Texas, Ohio, Pennsylvania, Alabama, Arizona, Arkansas, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nevada, North Carolina, Rhode Island, South Carolina and Wisconsin.

US Federal counter-boycott legislation

US Federal legislation (namely the Export Administration Act 1979 (EAA), as continued by Executive Orders and implemented by Part 760 of the Export Administration Regulations (EAR), and the Anti-Boycott Act 2018) imposes criminal and administrative penalties on companies that do certain acts with intent to comply with, further or support a boycott fostered by a foreign country against a country which is friendly to the US. The specified acts including refusing to do business with or in a boycotted country or with any business concern organised under the laws of a boycotted country pursuant to a request from or on behalf of a boycotting country.

The criminal penalties include a fine of up to \$1 million and imprisonment for up to 20 years. Administrative penalties include a fine of up to \$300,000 or twice the value of the underlying transaction, revocation of export licences and prohibition of exports.

The term "country" in this legislation is not limited to recognised States and should be interpreted as extending to nations or peoples.³ The Decision was evidently made pursuant to the request by the "BDS Movement" to boycott Israel.⁴ This movement is

³ See the careful analysis by Greendorfer, Marc A. (2017) "The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal", *Roger Williams University Law Review*: Vol 22: Iss 1, Article 2, pp 60-97 https://docs.rwu.edu/cgi/viewcontent.cgi?article=1617&context=rwu_LR

⁴ <https://www.bdsmovement.net/call>

led by the Palestinian Boycott National Committee,⁵ purports to be a national movement, and continues the boycott instituted by the Arab League which was the primary target of the US Federal legislation.⁶ In our view, there is a strong argument that the EAA/EAR and the 2018 Act apply to it.

Israeli competition law

As you are no doubt aware, the Israeli Competition Commissioner imposed significant conditions on his approval of Unilever's acquisition of BJH by a decision dated 16 December 2001.⁷

Clause 1 of that decision required that as of 31 December 2001, all Ben & Jerry's products in Israel must be distributed by a franchisee who is not directly or indirectly connected with Unilever and/or Strauss Icecream. Clause 2 states that BJH and Unilever as its controlling shareholder will not reduce the scope of the franchise and will not impair its terms.

Clause 4 specifies that a complete administrative separation will be maintained between Unilever's business in Israel, including its business relating to Strauss ice cream, and the franchisee's business. Without derogating from the generality of the foregoing, Unilever and/or BJH will have no right to determine the franchisee's marketing terms and will have no influence on the terms of its contracts with retailers, or their scope or duration, or on the scope of opening retail stores, or their locations, or the prices at which Ben & Jerry's products are sold in these stores

Clause 5 further provides that BJH, Unilever and Strauss Ice Cream will not take any action that may interfere with the franchisee's activity in the distribution and marketing of Ben & Jerry's products. Clause 6 states that any transfer of the franchise to another person, appointment of another person as a franchisee, or change in control of the franchisee will be subject to prior approval of the Commissioner. Clause 7 reserved the determination of any doubts regarding the conditions, their applicability or their interpretation to the Competition Commissioner.

It seems clear that implementation of the Decision will contravene these conditions. Indeed the announcement of the Decision has probably already contravened clause 5 by seriously interfering with the Israeli franchisee's ability to market Ben & Jerry's products to Israelis.

⁵ <https://www.bdsmovement.net/bnc>

⁶ See Greendorfer, op cit note 3

⁷ <https://www.gov.il/he/Departments/legalInfo/unilever>

Breach of these conditions gives rise to both criminal and civil liability under Israeli law. It has been reported that the Israeli franchisee has filed a complaint with the Competition Authority.⁸

Israeli law prohibiting discrimination

Article 3(A1) of Israel's Law Prohibiting the Discrimination in Products, Services, and Entry to Places of Entertainment and Public Places 2000, as amended in 2017, provides that "A person whose business is the provision of goods or public services or running a public place, may not discriminate in the provision of goods or public services in the place of the business, in permitting entry to the public place or provision of services in the public place, due to place of residence."

The Decision would appear to breach this prohibition by discriminating against residents of East Jerusalem, Judea and Samaria. Breach of Article 3 of the Act gives rise to both civil and criminal liability.

International law

Finally, it should be noted that the BJH Decision was based on a fundamental legal error. According to BJH's statement of 19 July 2021, the eastern part of Jerusalem and the West Bank (Judea and Samaria) are "an internationally recognised illegal occupation". However, on the contrary, the prevailing view is that Israel's control of these areas is in itself lawful pending resolution of their final status by negotiation in accordance with the Oslo Accords. On any view, international law does not prohibit the sale of ice-cream in these areas and does not provide any defence to claims or sanctions under the national legislation outlined above.

Obligation of the BJH Board to Comply with Unilever's Code of Conduct

The Merger Agreement

We have reviewed the merger agreement pursuant to which BJH became a wholly-owned subsidiary of Conopco, Inc., itself a subsidiary of Unilever PLC. We note that it is governed by New York law and makes provision for jurisdiction of the New York courts (sections 9.08 and 9.10).

The merger agreement establishes an independent Board of BJH which "shall be the custodians of the Ben & Jerry's-brand image and shall have primary responsibility for safeguarding the integrity of the essential elements of the Ben & Jerry's brand-name" (section 6.14(f)).

⁸ <https://www.jewishpress.com/news/israel/boycott/ben-jerrys-israel-to-israels-competition-authority-global-ben-jerrys-demand-for-boycott-illegal/2021/09/02/>

Nevertheless, the merger agreement also provides in section 6.14(j) that *“Each member of the Company Board after the Effective Time and all employees of the Surviving Corporation shall agree to abide by the Unilever Code of Business Conduct, and all employees of the Surviving Corporation shall agree to abide by Unilever’s financial, accounting and legal procedures”*.

This lays down an important limitation on the conduct of the BJH Board. Without this provision, Unilever would not be able to exercise governance in accordance with its own code of business conduct over important aspects of BJH’s business.

We assume that BJH’s directors and employees have agreed to abide by the Unilever Code of Business Conduct in accordance with section 6.14(j). If not, this provision should be enforced forthwith by Conopco, Inc. requiring BJH to instruct its directors and employees to confirm their agreement to abide by the Code.

We also note that this provision was mentioned expressly in the book *“Ice Cream Social: The Struggle for the Soul of Ben & Jerry’s”* by Brad Edmonson (2014).⁹ The current Chair of BJH’s Board, Anuradha Mittal, contributed a “reflection” on reading the book and was presumably reminded of this provision as she read it.

In view of its nature, we consider that this provision should be interpreted as referring to the current Unilever Code of Business Conduct as updated from time to time; it would not make much sense to require compliance with an out-of-date code. In any case, we expect that the most relevant provisions have not changed.

Unilever’s Code of Business Conduct

Unilever’s current Code of Business Conduct is called “Code of Business Principles and Code Policies.”¹⁰ It states on page 6 that *“Unilever companies and employees are required to comply with the laws and regulations of the countries in which we operate”* and on page 10 that *“Employees must at all times comply with laws and regulations that apply to the countries in which Unilever operates. Ignorance of the law is no excuse. Timely legal consultation is essential to ensure that Unilever’s legitimate business interests and opportunities are protected.”*

Statements on pages 7 and 8 of the document confirm that the term “employees” covers directors and “Unilever” covers Unilever subsidiaries, and this is also reiterated in the glossary on page 44.

⁹ Location 2423 in the Kindle edition

¹⁰ https://www.unilever.com/Images/code-of-business-principles-and-code-policies_tcm244-409220_en.pdf

In view of the obvious purpose of these requirements, in our view references to complying with laws and regulations includes complying with conditions such as those whose breach is sanctioned under US State laws by divestment or restrictions on procurement, as well those whose breach gives rise to tortious or criminal liability. In any event, page 12 of the Code discusses the requirement of responsible risk management, which would include the risk of such sanctions.

It appears to us that the directors of BJH have manifestly failed to abide by Unilever's Code of Business Conduct by taking a Decision which does not comply with laws and regulations in the US and Israel, as explained above.

Since the agreement to abide by Unilever's Code of Business Conduct is for the benefit of Unilever PLC, it should be enforceable by Unilever PLC in accordance with New York and other laws. Unilever PLC should now insist on full compliance by BJH with this Code by BJH withdrawing the Decision since it is unlawful in the US and Israel.

Consequences of enforcing or not enforcing the Code of Business Conduct

We note that Unilever's report "The Governance of Unilever" of 29 November 2020 emphasises in "Part A: The Fundamentals":

"The Code of Business Principles represents the standard of conduct which all Unilever employees are expected to meet in their business endeavours. It forms the benchmark against which the outside world is invited to judge Unilever's activities. The Code of Business Principles must be adhered to strictly and any amendment thereto must be approved by the Board.

Code Policies that support the Code of Business Principles have been developed to provide a set of mandatory rules designed to ensure consistency in key areas within our worldwide operations. Code Policies are characterised by being universally applicable within Unilever and mandatory in effect. They govern the principles and practices of how we run our business.

Compliance with the Code of Business Principles and Code Policies is an essential element in our business success. The Board is responsible for ensuring that these standards of conduct are applied throughout Unilever. The Chief Executive Officer is responsible for implementing these standards of conduct and is supported in this by the Global Code and Policy Committee, which is chaired by the Chief Legal Officer."

Similar points are made at page 44 of Unilever's 2020 Annual Report.

If Unilever PLC enforces compliance with its Code of Business Conduct, this will go some way to repairing the reputational damage done to the group. Conversely, if Unilever PLC does not take this step, this will be a serious hole in the group governance arrangements that need not exist. The deprivation of effective corporate governance will undoubtedly be of considerable concern to investors and disclosable to Unilever PLC's auditors.

Indeed such a loss of governance would appear to conflict with the requirement of the UK Corporate Governance Code that *“For parent companies with a premium listing, the board should ensure that there is adequate co-operation within the group to enable it to discharge its governance responsibilities under the Code effectively.”*¹¹ It would also be inconsistent with the claim in Unilever PLC's 2020 Annual Report that *“The Board has overall accountability for the management of risk”* (page 44).

Conclusion

We hope that the observations in this letter may assist you and the Board of Unilever PLC to restore adequate governance and avoid the serious difficulties which will otherwise ensue. If we can assist you further, please do not hesitate to contact us.

Yours sincerely



Jonathan D. C. Turner
Chief Executive

¹¹ <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF>, p3