

EBS / EGGED LEGAL MEMO

Introduction

1. This legal memo is meant to evaluate the lawfulness of the participation of **Egged Bus Systems (EBS)**, a fully owned subsidiary of Egged Israeli Transport Cooperative Society Ltd (**Egged**), in the ongoing public tender for bus transport concession in the Dutch municipalities of Zaanstreek and Waterland.
2. It will be argued that **Vervoerregio Amsterdam** - the competent public authority - **should exclude EBS from the tender procedure as Egged Group is liable of maintaining and facilitating the illegal Israeli settlement policy in the Occupied Palestinian Territory (OPT)**¹.
3. To support this argument, this memo will expose that: **1)** EBS is part of the single commercial entity "**Egged Group**", which is directly involved in supporting the illegal Israeli settlement policy in the OPT through its bus services to, from and between the settlements; **2)** Egged Group's business activities in the illegal Israeli settlements violate International Law and amount to "**grave professional misconduct**", a ground of exclusion from a public tender according to the EU Directive 2014/24 on Public Procurement (**EU Directive 2014/24**) and the Dutch Public Procurement Act 2012 (**Aw 2012**).

1

¹ It is not the purpose of this memo to analyse and expose in detail the international legal framework applicable to the Israeli occupation of the OPT. Anyway, it is widely accepted by the UN, the EU and a vast majority of States (including The Netherlands) that the situation in the OPT is one of military occupation, as defined and regulated by **International Humanitarian Law (IHL)**. As Occupying Power, Israel is bound by specific IHL provisions, including **Article 49 of the Fourth Geneva Convention (IVGC)** that prohibits the Occupying Power from transferring parts of its own civilian population into the occupied territory. The UN Security Council – whose decisions are binding on all UN Member States – firmly considers the Israeli settlement policy in the OPT as in contravention of this and other rules of international law. **SC Resolution 2334 (2016)**, for example, states that "**Israel's settlement activity has no legal validity and constitutes a flagrant violation under international law**" and demands that "**Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard**".

Moreover, the ICJ Advisory Opinion on the Israeli Wall (2004) confirmed that Israel as Occupying Power is also bound to comply with its obligation to respect **International Human Rights Law (IHRL)**; competent UN bodies have firmly condemned the impact of the illegal settlements on the fundamental rights of Palestinians living in the OPT. Among others, a Report of the UN High Commissioner for Human Rights (A/HRC/37/39) states that: "**The violations of human rights associated with the settlements are pervasive and devastating, reaching every facet of Palestinian life. Owing to settlement development and infrastructure, Palestinians suffer from restrictions on freedom of religion, movement and education; their rights to land and water; access to livelihoods and their right to an adequate standard of living; their rights to family life; and many other fundamental human rights**".

1. Background information and facts: Egged Group and its role in the illegal Israeli settlement policy in the OPT

1.1 Brief Company overview

4. Egged is the largest transportation company in Israel, operating 35% of the public transport service lines in the country and with an annual revenue turnover of nearly US\$ 1.13 billion². It recently agreed with the Israeli government³ to change the long-established cooperative structure into a regular business company: *“Egged’s title was formally changed from cooperative to company, to be able to introduce a substantial investor into the company, to expand its activities throughout its channels”*⁴.
5. Egged is the parent company of various subsidiaries that together form the **Egged Group**: Egged Ta’avura, Egged He’seim & Tours, Egged Holding, Egged Europe, Tevel Metro Ltd, the Polish company Mobilis and the Dutch company EBS⁵.
6. As of 2007 Egged operates in Europe through **Egged Europe**, which the Egged official website describes as *“a wholly owned subsidiary of the Egged Group, operating public transit services in The Netherlands and Poland”*⁶. In 2011 Egged Europe entered the Dutch market under the brand name of the “Egged Bus Systems (EBS)”, after it had won the bid to provide public transport services to the Waterland region in the Amsterdam Metropolitan Area⁷.
7. It is worth stressing that EBS, despite its management autonomy, is part of the single commercial group headed by Egged and that **entering into economic relations with EBS means therefore doing business with Egged itself**. In this regard, the Court of Justice of the European Union (CJEU) has adopted a wide approach to parent liability for subsidiary conduct where the subsidiary is wholly owned by the parent company, encouraging to focus on substance rather than the legal form of companies and to view “control” as the core issue when examining the status of economic entities⁸.
8. In the field of public procurement procedures, therefore, **EU law permits public bodies to treat a group of companies under common control as the tenderer, even where just a single subsidiary directly participates in the public procurement**. Egged’s effective control over EBS

² <http://www.egged.co.il/Article-830-Egged-Cooperative.aspx>

³ <https://en.globes.co.il/en/article-egged-seeks-strategic-investor-1001244597>

⁴ <http://www.egged.co.il/Article-830-Egged-Cooperative.aspx>

⁵ <https://www.bdicode.co.il/en/company/egged-israel-transport-cooperative-society-en/>

⁶ <https://www.egged.co.il/Section-19335,1487-About-Egged-Europe.aspx>

⁷ <https://www.egged.co.il/Section-20143,1490-Egged-in-The-Netherlands.aspx>

⁸ Akzo Nobel NV and Others v. Commission of the European Communities, 10 September 2009, Case C-97/08.

was evident in 2014, when the Israeli parent company saved the Dutch subsidiary from a serious financial crisis that had brought it close to bankruptcy. As reported by local press, indeed, *“The Israeli company Egged, parent company of EBS, lost 30 million euros on the Waterland concession”*⁹, and again *“The Israeli parent company has been transferring millions of euros to keep the Dutch subsidiary afloat for over a year now”*¹⁰.

1.2 Egged Group’s involvement with the illegal Israeli settlement enterprise

9. Egged is named in the **United Nations database of business enterprises involved in activities that maintain and facilitate the existence of the illegal Israeli settlements in the OPT**, issued in February 2020 by the UN Human Rights Office (OHCHR)¹¹ in response to the request of the UN Human Rights Council¹².
10. The reference of the UN database is the Report of the Independent International Fact-finding Mission on the Implications of the Israeli Settlements on the Human Rights of the Palestinian people that called on all States *“to take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations”*¹³.
11. The UN database contains a list of a wide range of business activities that result in direct and indirect support of the illegal Israeli settlements; among others, it is worth highlighting *“the provision of services and utilities supporting the maintenance and existence of settlements, including transport”*¹⁴.
12. Even before the publication of the UN database, Egged’s involvement in the settlements business had been documented and condemned by several independent organisations, including the Israeli NGO *“Who Profits”*¹⁵. According to this organization, the fact that Egged contributes with its services to the illegal Israeli settlement policy is proven by: **(a)** connection

⁹ <https://www.ovmagazine.nl/2015/11/israelis-stopten-30-miljoen-in-concessie-waterland-1313/>

¹⁰ <https://downtoearthmagazine.nl/aanbestedingen-bussen-waterland/>

¹¹ Report of the United Nations High Commissioner for Human Rights, A/HRC/43/71, 12 February 2020.

¹² Human Rights Council Resolution 31/36, UN Doc A/HRC/RES/31/36.

¹³ Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem, A/HRC/22/63 (16 January 2013), para 117.

¹⁴ Report of the United Nations High Commissioner for Human Rights (note 11), para 6(e).

¹⁵ <https://whoprofits.org/about-who-profits/>

services for Israeli citizens between Jerusalem and illegal settlements as well as between illegal settlements themselves; **(b)** tours and travel packages to illegal settlements.

The above circumstances are detailed as follows:

- a) Until 2017, Egged operated bus lines to illegal Israeli settlements in the occupied West Bank and Jerusalem. The bus lines were armoured vehicles that according to the company allowed them to pass through “Arab populated areas”. Since then, the operation of bus lines to illegal settlements was transferred to the company’s subsidiary Egged Taavura. Egged Taavura operates bus lines to illegal settlements in the West Bank, in the areas of Gush Etzion, Giva’at Ze’ev, Binyamin, Mount Hebron and Kiryat Arba, including illegal settlements in the Jordan Valley, and the settlements of Shiloh, Otniel and Ma’ale Adumim¹⁶;
- b) The company’s subsidiary, Egged Heseim Tours and Recreation, provides tours and travel packages to the Old City of Jerusalem and the City of David settler complex, located in the Palestinian neighbourhood of Silwan in occupied East Jerusalem. The company also organizes tours to Bethlehem and Jericho in the occupied West Bank and to the occupied Syrian Golan¹⁷.

4

1.3 The public procurement for bus transport concession in Zaanstreek and Waterland

13. In all probability, EBS will compete in the ongoing tender for the new public bus transport concession in the municipalities of Zaanstreek and Waterland.
14. The public procurement is administered by the local authority **Vervoerregio (Transport Region) Amsterdam**, an institution that includes fifteen municipalities¹⁸ and administers the public transport services in the area under its authority¹⁹. More specifically, it is defined in Dutch as an “Overheid” (administration, government), which leaves no doubt about its public nature²⁰. Vervoerregio’s Executive Committee (DB) consists of aldermen from three municipalities (Amsterdam and two others)²¹, and its Council is formed by 51 members from the fifteen Municipal Councils²².

¹⁶ <https://whoprofits.org/company/egged-israel-transport-cooperative-society/>

¹⁷ <https://whoprofits.org/company/egged-israel-transport-cooperative-society/>

¹⁸ <https://vervoerregio.nl/artikel/20170203-overzicht-gemeenten-vervoerregio-amsterdam>

¹⁹ <https://vervoerregio.nl/pagina/20151228-bestuur-organisatie>

²⁰ <https://data.overheid.nl/dataset/w1nvvp7o-cnesg>

²¹ <https://vervoerregio.nl/pagina/20160103-het-dagelijks-bestuur>

²² <https://vervoerregio.nl/pagina/20160103-regioraad>

15. As the public transport concessions in the two municipalities will expire in December 2021, Vervoerregio as local concession grantor decided to merge them into a **new and single Zaanstreek-Waterland concession**. In April 2019 a document outlining the various stages of the procurement process was published²³. The tender period started in November 2019 and will end on 27 March 2020, after which the administration will evaluate the offers received: the final granting is scheduled for the summer of 2020 and the concession will be valid from December 2021²⁴.

2. Applicable Legal Framework

16. EBS, as part of the Egged Group, should be excluded from the ongoing tender for the bus transport concession in the municipalities of Zaanstreek and Waterland according to **Article 2.87(c) of the Dutch Public Procurement Act 2012 (Aw 2012)**. The company, indeed, is liable of “grave professional misconduct” on the grounds of the above described assistance in maintaining and facilitating the illegal Israeli settlement enterprise, which poses serious concern about the company’s integrity.

17. The following section (2.1) will analyse the **essential criteria** for correctly applying the Aw 2012 to the present case, namely: **A)** the international duty of non-recognition and non-assistance of an unlawful situation (**duty of non-recognition**); **B)** the UN Guiding Principles on Business and Human Rights (**UNGPs**); **C)** the EU Directive 2014/24 on Public Procurement (**EU Directive 2014/24**).

5

2.1 A) International duty of non-recognition and non-assistance in maintaining an unlawful situation

18. The International Court of Justice (ICJ) advisory opinion on Israel’s wall in the OPT (2004) confirmed that Israel, with its illegal wall and settlements, is responsible for the violation of peremptory norms of international law, i.e., the prohibition of acquisition of territory by force

²³ Here is the set schedule for the procedure: Preparation phase 2018-Oct to 2019-Mar; Tender strategy / Note of Principles 2019-May; Draft Program of Requirements 2019-May; Participation 2019-June-Sept; Final Program of Requirements 2019-Oct; Specifications 2019-Nov; Tender period 2019-Nov to 2020-Mar; Assessment and award 2020-April to 2020-June; Implementation period 2020-July to 2021-Dec. See <https://vervoerregio.nl/pagina/20181210-aanbesteding-ov-zaanstreek-waterland-2021>

²⁴ <https://vervoerregio.nl/artikel/20191029-aanbesteding-ov-zaanstreek-waterland-gestart>

and the right to self-determination of the Palestinian people, in addition to grave breaches of International Humanitarian Law and International Human Rights Law²⁵.

19. Since peremptory norms are fundamental customary rules that govern the international legal system, serious violations of peremptory norms by any State give rise to the obligation of all other States of the international community to cooperate to end the violations and to give no aid or assistance to the maintenance of the unlawful situation,
20. Third States should abstain from assisting Israel with its illegal settlement policy in accordance with the international duty of non-recognition and non-assistance of unlawful situations under international law. Indeed, **every State has a duty to abstain from entering into economic and other relationships that may be of assistance in maintaining a situation constituting a serious violation of a peremptory rule of international law**²⁶.
21. International Tribunals such as the International Court of Justice (ICJ) in the 1970 Advisory Opinion on the occupation of Namibia²⁷ and the Arbitral Tribunal in the dispute between Bosnia and Serbia²⁸, have stressed the paramount importance of the principle of non-recognition to put an end to cases of unlawful territorial situations.
22. Therefore, the non-recognition and non-assistance to the Israeli settlements policy is not a mere political choice within the discretion of States, but is the object of a legal international duty.
23. Accordingly, in 2004 the ICJ in its Wall Opinion concluded that *“Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. All States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while*

6

²⁵ Advisory Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004, p. 159, 163.

²⁶ This is laid out in Article 41(2) of the International Law Commission *Draft Articles on State Responsibility*, which requires that *“States shall neither recognize as lawful a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining the situation created by the breach”*, UN Doc. A/56/10, at Art. 41.

²⁷ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ, Repts 1971, p. 16.

²⁸ Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area (Republika Srpska v Bosnia and Herzegovina), 14 February 1997, para. 77, available at http://www.ohr.int/?ohr_archive=brcko-arbitral-tribunal-for-dispute-over-the-inter-entity-boundary-in-brcko-area-award.

*respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention*²⁹.

24. It is worth noting that **the obligations mentioned above apply to all local administrations, state authorities and public bodies** with discretionary powers, and not only on the main State organs such as Government and Parliament. In fact, International law recognizes States as integrated systems, which means that the legal norms that apply to a State consequently apply to all its constituent parts within its jurisdiction³⁰.
25. In this regard, paragraph 6 of the ILC Draft Articles commentary clarifies that: *“Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level”*³¹. By analogy, the UN Human Rights Committee has stressed that human rights obligations are binding on every State Party as a whole, explaining that: *“All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party”*³².
26. In light of the above, **there can be no doubt that every Dutch public authority** - in this case Vervoerregio Amsterdam – is bound to orientate its decision in the light of the duty of non-recognition and non-assistance, which requires **to avoid economic relationships that may be of assistance in maintaining the internationally unlawful Israeli settlements in the OPT.**

7

2.1. B) UN Guiding Principles on Business and Human Rights

27. In 2011 the UN has published the **Guiding Principles on Business and Human Rights**³³ (UNGPs), the most authoritative framework on business-related human rights violations, which maintains that:

²⁹ Advisory Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004 at. 159.

³⁰ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), para 8.

³¹ ILC Article 4, paragraph 6.

³² Human Rights Committee (HRC), General Comment No. 31: “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (2004), para 4.

³³ OHCHR, Guiding Principles on Business and Human Rights, UN. Doc. HR/PUB/11/04.

- a) States have the primary duty to protect against human rights abuses by third parties, including businesses, and should adopt appropriate policies and measures “to prevent, investigate, punish and redress such abuses”³⁴.
- b) Business companies have an independent and complementary responsibility to respect internationally recognized human rights, which means that they should act with due diligence to “avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur”³⁵.

28. The Commentary to the UNGPs clarifies, on the one hand, that “failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State’s human rights obligations may entail both reputational and legal consequences for the State itself. (...) States should ensure that they can effectively oversee the enterprises’ activities, including through the provision of adequate independent monitoring and accountability mechanisms”³⁶. On the other hand, the Commentary also explains that “**the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate**”³⁷.

29. Moreover, Principle 7 of the UNGPs specifically addresses the issue of business activities in conflict affected areas, including situations of occupation, encompassing IHL norms as standards that companies should respect when operating in such areas³⁸. Since States in areas of armed conflicts where enterprises operate may be unable to adequately protect human rights due to lack of effective control or involvement in abuses themselves, UNGPs underline the duty of other States to ensure that enterprises domiciled or operating in their territory and/or jurisdiction are not involved in such abuses, including by “denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation”³⁹.

30. As regards the **implications of the UNGPs in the context of Israeli settlements in the OPT**, it is worth noting that the UN Working Group on Business and Human Rights⁴⁰ has issued a specific statement affirming that “business enterprises that have activities in the settlements or have

³⁴ Ibid., Principle 1.

³⁵ Ibid., Principle 13(a).

³⁶ Ibid., pag. 8.

³⁷ Ibid., pag. 13.

³⁸ V. Azarova, *Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel’s Settlements*, 2018, *Business and Human Rights Journal*, Cambridge University Press, vol. 3(2), pag. 192.

³⁹ UNGPs (note 34), Principle 7.

⁴⁰ The ‘Working Group on the Issue of Human Rights and Transnational Corporations and Other Business’ was established by the Human Rights Council Resolution A/HRC/RES/17/4, 6 July 2011.

*business relationships with entities in the settlements should take due note of reports and resolutions of the United Nations human rights system concerning human rights violations related to Israeli settlements in the OPT*⁴¹.

31. In order to promote the effective implementation of the UNGPs worldwide, the mentioned UN Working Group has encouraged States to develop **National Action Plans (NAPs)** on business and human rights, which are official policy statements in which States outline strategies and instruments to comply with their duty to prevent and repress business-related human rights abuses⁴². According to the UN Working Group: *“The fundamental purpose of a national action plan is to prevent and strengthen protection against human rights abuses by business enterprises through an inclusive process of identifying needs and gaps and practical and actionable policy measures and goals”*⁴³.
32. As regards the implementation of the UNGPs in The Netherlands, in December 2013 the **Dutch Ministry of Foreign Affairs published the National Action Plan on Business and Human Rights**⁴⁴, dedicated to *“the implementation of the UN Guiding Principles, which is an important priority for The Netherlands”*⁴⁵. This leaves no doubt about the Dutch Government's position concerning the validity of the UNGPs, which represent *“an integral part of foreign and human rights policy”*⁴⁶.
33. Therefore, the UN Guiding Principles must be considered a primary source within the Dutch legal framework for evaluating the conduct or misconduct of commercial companies. Accordingly, **all Dutch public bodies must: a) ensure that business enterprises participating in public tenders comply with human rights standards of conduct: b) at the very minimum, review relevant information that enables them to effectively scrutinise and ascertain the respect of these standards.**

⁴¹ Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, 6 June 2014, <https://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>

⁴² D. Augenstein, M. Dawson and P. Thielbörger, *The UNGPs in the European Union: The Open Coordination of Business and Human Rights?*, 2018, Business and Human Rights Journal, 3(1), Cambridge University Press, pag. 2.

⁴³ UN Secretary-General, ‘Report of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises’, A/69/263, 6 August 2014, para 2.

⁴⁴ Nationaal Actieplan bedrijfsleven en mensenrechten, 20 December 2013, available at <https://www.rijksoverheid.nl/documenten/brochures/2014/05/28/nationaal-actieplan-bedrijfsleven-en-mensenrechten>.

⁴⁵ Ibid., pag. 6.

⁴⁶ Ibid., pag. 20.

2.1 C) EU Directive 2014/24 on Public Procurement (EU Directive 2014/24)

34. EU Law provides general regulations in relation to public procurement through the **EU Directive 2014/24**⁴⁷, which has been transposed into the domestic legal systems by the Member States: in The Netherlands it has been implemented in 2016, by an amendment of the Dutch Public Procurement Act 2012⁴⁸.

35. Article 57 of the EU Directive 2014/24 contains several **grounds for exclusion** of economic operators from a tender procedure, distinguishing between mandatory and discretionary ones. The one which is relevant for the case discussed here belongs to the second category and is provided by **art. 57, 4(c)**, which states: *“Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator (..) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable”*.

36. In order to correctly interpret the expression “grave professional misconduct” one must firstly consider the Recital 101 of the Directive: *“Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, (..) or other forms of grave professional misconduct”*.

37. The Court of Justice of the European Union (CJEU) has supported this broad approach in the case *Forposta SA*: *“The concept of ‘professional misconduct’ covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs”*⁴⁹. Therefore, contracting authorities have a relatively large margin of appreciation when assessing which type of behaviour amounts to grave professional misconduct and should do it on a case-by-case basis⁵⁰.

38. The wide meaning of the concept makes clear that **“grave professional misconduct” should also be interpreted in the light of international criteria and standards** relevant to evaluate the conduct of economic operators, such as the UNGPs outlined above.

⁴⁷ Directive 2014/24/EU of the European Parliament and of the Council, 26 February 2014.

⁴⁸ See <https://www.pianoo.nl/en/public-procurement-law-netherlands>.

⁴⁹ CJEU Judgment, *Forposta SA and ABC Direct Contact sp. Zoo v. Poczta Polska SA*, 12 December 2012, (Case C-465/11), p. 27.

⁵⁰ *Ibid.*, p. 31: “(..) in order to find whether ‘grave misconduct’ exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out”.

39. Indeed, in 2011 the **European Commission endorsed the UNGPs** and adopted a new strategy for “Corporate Social Responsibility” (CSR), inviting EU Member States “*to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles*”⁵¹. This request was reiterated in the Council of the European Union’s 2012 and 2015 Action Plans on Human Rights and Democracy, with the deadline for member state NAPs being extended to 2017⁵².
40. EU support of the UNGPs was reiterated in June 2016 by the Council of the European Union in its “Conclusions on Business and Human Rights”, where is stated that “*EU Member States have taken the lead internationally on developing and adopting National Action Plans to implement the Guiding Principles or integrating into national Corporate Social Responsibility (CSR) Strategies*”⁵³.
41. Therefore, the **concept of “grave professional misconduct” provided by EU Directive 2014/24 should encompass cases where a business company doesn’t comply with the standards of respect for human rights set by the UNGPs.**
42. An interpretation of the EU Directive 2014/24 in line with UNGPs has been adopted by the Scottish Government: in 2014 the Scottish Procurement Office issued a note to public bodies in Scotland, strongly discouraging investment and trade with the illegal Israeli settlements and advising that companies involved in such business activities may be excluded from public procurements: “*Exploitation of assets in illegal settlements is likely to be regarded as constituting “grave professional misconduct” for the purposes of procurement law*”⁵⁴.
43. It is important to note that the Scottish government has not proposed a general boycott and stated that decisions should be taken on a case by case basis; this position is in line with the framework provided by the UNGPs and fulfil the obligation to respect and promote international law provided by both Articles 3(5) and 21 of the Treaty on the European Union⁵⁵. Other EU Member States have also adopted similar positions: the European Council on Foreign

⁵¹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011–14 for Corporate Social Responsibility’, COM (2011) 681 final (25 October 2011).

⁵² Council of the EU, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, 11855/12 (25 June 2012); Council of the EU, ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015–2019’, 10897/15, 20 July 2015.

⁵³ Council of the EU, ‘Council Conclusions on Business and Human Rights’, 3477th meeting of the Foreign Affairs Council, 10254/16, 20 June 201, para 6.

⁵⁴<https://www.webarchive.org.uk/wayback/archive/20160111010720mp/http://www.gov.scot/Resource/0045/00458485.pdf>

⁵⁵ EU, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, available at: <https://www.refworld.org/docid/4b179f222.html>.

Relations (ECFR) reported that 15 states have issued advisories warning business of possible legal consequences of being involved in economic relations with the illegal Israeli settlements⁵⁶.

44. Moreover, in November 2019 the Court of Justice of the European Union (CJEU) reaffirmed the obligation of the EU and its Members to respect and promote international law and in particular it held that: *“the settlements established in some of the territories occupied by the State of Israel are characterised by the fact that they give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of general international humanitarian law, as codified in the sixth paragraph of Article 49 (GCIV) (...). Moreover, that policy has been repeatedly condemned by the United Nations Security Council, (...) and by the European Union itself. In that context, it should be underlined that, in accordance with Article 3(5) TEU, the European Union is to contribute to the strict observance of international law, including the principles of the United Nations Charter”*⁵⁷.
45. In sum, either direct or indirect involvement in maintaining and facilitating the illegal Israeli settlement enterprise must be regarded as “grave professional misconduct” for the purpose of art. 57,4 (c) of the EU Directive 2014/24 and **Eged Group should therefore be excluded from public procurements in EU Member States.**

12

2.2 Dutch Domestic Law directly applicable: Public Procurement Act 2012 (Aw 2012)

46. In light of the International and EU legal frameworks outlined above, it is now possible to give a correct interpretation of the law directly applicable to the present case, the **Dutch Public Procurement Act 2012 (Aw 2012)** ⁵⁸, as amended in 2016 in order to implement the EU public procurement Directive 2014/24.
47. The Aw 2012 provides the same grounds of exclusion from public procurements as in EU Law: the mandatory exclusion grounds are stated in Article 2.86 and the discretionary ones in Article 2.87. In particular, **Article 2.87(c)** states: *“The contracting authority can exclude a tenderer or candidate from participation in a procurement procedure on the following grounds: (...) when the contracting authority may establish that the tenderer or candidate has been guilty of grave professional misconduct which may call his integrity into question”*.

⁵⁶ See https://www.ecfr.eu/article/eu_member_state_business_advisories_on_israel_settlements.

⁵⁷ Organisation juive européenne, Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances, 12 November 2019, Case C-363/18, p. 48.

⁵⁸ <https://wetten.overheid.nl/BWBR0032203/2016-07-01>

48. In order to help the contracting authorities in the application of the new law, the Dutch Government published a “**Proportionality Guide**”⁵⁹ that offers criteria for correctly interpreting the new regulation. As regards the ground of exclusion for grave professional misconduct, the Proportionality Guide states that: “*The optional exclusion ground of commission of a serious error in the exercising of the profession (Article 2.87, first paragraph, under c) is an open standard which is open for various interpretations and is consequently difficult to apply. This includes cases in which the economic operator’s integrity must be doubted. Taking this into account, this exclusion ground must be applied very restrictively. In any event, many matters which fall under this ground, are already covered in the Declaration of Conduct for Tenderers (Gedragsverklaring Aanbesteden), for which provision is made in the law*”⁶⁰.
49. Although the Proportionality Guide states that the exclusion of a tenderer due to grave professional misconduct must be applied restrictively, such a **restrictive interpretation cannot in any case violate the international human rights standards** as defined by a) the duty of non-recognition and non-assistance arising from violation of peremptory norms, which is binding on all public authorities; b) the standards of conduct for business companies set out in the UNGPs; c) the wide meaning of the identical ground of exclusion provided by EU Directive 2014/24.
50. The Dutch Constitution recognizes the general principles of international law in Article 90, stating that: “*The Government shall promote the development of the international legal order*”. Accordingly, article 94 provides that: “*Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons*”.
51. Moreover, in 2013 the **UNGPs found concrete implementation in The Netherlands** through the adoption of the **National Action Plan on Business and Human Rights**⁶¹, which clarifies that Dutch

⁵⁹ <https://www.pianoo.nl/sites/default/files/media/documents/proportinality-guide-Engels-1st-revision-april2016.pdf>

⁶⁰ The *Declaration of Conduct for Tenderers* is a self-declaration confirmed by the Minister of Justice and Security through which an entrepreneur can demonstrate to a contracting authority that some specific grounds of exclusion do not apply to him (art. 1.20 Aw 2012). As concerns the article 2.87 (c), ‘grave professional misconduct’, **the Minister only checks whether a company has been convicted on certain specific grounds**, as is clear from article 2.89 (2) Aw: “A candidate or tenderer can by means of a declaration of conduct [...] proof that the grounds for exclusion referred to in Articles 2.86 and 2.87, first paragraph, parts c and d, insofar as it concerns an irrevocable conviction or an irrevocable decision for infringement of competition rules, do not apply to him”. Article 4.7 of the Aw 2012 details the type of convictions in question, and underlines that the screening is very specific and limited: **the Minister does not check whether the operator is involved in human rights violations and, therefore, this responsibility remains completely with the contracting authorities.**

⁶¹ Nationaal Actieplan bedrijfsleven en mensenrechten, 20 December 2013, available at <https://www.rijksoverheid.nl/documenten/brochures/2014/05/28/nationaal-actieplan-bedrijfsleven-en-mensenrechten>.

public authorities should consider that the lack of compliance with international standards by business companies does amount to “grave professional misconduct” under Dutch Law.

52. This National Action Plan takes public procurements into consideration dedicating a specific section to the “sustainable procurement policy”, where it is stated that *“The government requires companies supplying them to respect human rights. (..). Companies that supply the government should carry out a risk analysis and show that they respect human rights in accordance with the UN Guiding Principles”*⁶².
53. The Dutch Government's concern about the respect of human rights by commercial enterprises also emerges from the specific **Action Plan for Socially Responsible Procurement 2015-2020**⁶³: one of the explicit goals of this policy is to prevent human rights violations by companies that have economic relations with public institutions⁶⁴.
54. The Dutch central Government clearly affirmed that it strictly observes this policy: *“The national government makes socially responsible purchases. The government meets its obligations and wants to set a good example”*⁶⁵, declaring moreover that by the end of 2020 **the socially responsible procurement policy must be the norm for all local authorities**: *“This concerns the entire purchasing chain: administrators, policymakers (often also the needs assessors), project managers, sustainability consultants and buyers”*⁶⁶.
55. Thus, there can be no doubt that on the basis of the National Action Plan on Business and Human Rights and the Action Plan for Socially Responsible Procurement 2015-2020, Dutch public authorities have the duty to avoid dealing with business enterprises involved in human rights violations.
56. For this set of reasons, **the Aw 2012 must be interpreted as meaning that the ground of exclusion for “grave professional misconduct” applies to cases where business companies collaborate through their services in maintaining and facilitating the illegal Israeli settlement enterprise in the OPT.**

14

⁶² Ibid., pag 17,18.

⁶³ Plan van aanpak maatschappelijk verantwoord inkopen 2015-2020, 11 September 2015, <https://www.rijksoverheid.nl/documenten/kamerstukken/2015/09/11/plan-van-aanpak-maatschappelijk-verantwoord-inkopen-2015-2020>

⁶⁴ Ibid., pag. 16.

⁶⁵ <https://www.rijksoverheid.nl/onderwerpen/zakendoen-met-het-rijk/maatschappelijk-verantwoord-inkopen>

⁶⁶ <https://www.rvo.nl/onderwerpen/duurzaam-ondernemen/groene-economie/maatschappelijk-verantwoord-inkopen>

3 Conclusions

57. In light of the above, it is clear that Egged Group facilitates the existence and the expansion of the Israeli settlements in the OPT through its transportation services, thereby playing an essential role in maintaining the situation of international unlawfulness marked by serious breaches of IHL and IHRL by the State of Israel.
58. Egged Group's business activities are in contrast with the UN Guiding Principles on Business and Human Rights, which have been transposed into both EU and Dutch legal frameworks and provide essential standards of expected conduct for business enterprises.
59. Accordingly, there are sufficient grounds for questioning Egged Group's professional integrity and all members of the group, including EBS, must thus be considered liable of "grave professional misconduct" for the purpose of the Aw 2012.
60. Therefore, **we conclude that Vervoerregio Amsterdam should exclude EBS from the public procurement for the public bus transport concession in the municipalities of Zaanstreek and Waterland, in compliance with art. Article 2.87 (c) of Aw 2012.**

Amsterdam (The Netherlands), 25-03-2020

Giovanni Fassina, *ELSC Coordinator*

Carlo Mazzoleni, *ELSC Legal Researcher*