

Mr. Mihai Pera
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By email: mihai.pera@ec.europa.eu

Brussels, 12 November 2024,

**Re: Ghent University Attempt to Force a Consortium Change
WHEATWATCHER**

Dear Project Officer,
Dear Mr. Mihai Pera,

We act as external legal counsel to Tel Aviv University and the Weizmann Institute of Science.

As you know, both universities have been entrusted with crucial roles in the ongoing Wheatwatcher project under Ghent University coordination. We understand that you have received a letter from Ghent University on 8 November 2024, which was sent unilaterally and without consultation with our clients or the consortium.

Ghent University is essentially seeking to either (i) convince the Commission to exclude our clients from the project or (ii) request the Commission to state, *ex ante*, whether a collective boycott, in the form of our client's exclusion as a beneficiary, decided by the consortium, would constitute a "proper" or "improper" beneficiary termination.

Executive Summary

This letter outlines the position of Tel Aviv University and the Weizmann Institute of Science regarding Ghent University's unacceptable and unlawful attempt to exclude them from the ongoing consortium. It also sets out the position of our clients with respect to the disruption caused by a potential withdrawal of Ghent University from EU projects as part of its campaign.

1. Ghent University's communication to you should be assessed in light of their stated policy of disruption of several ongoing EU projects, and considering a more general pattern of attempts by certain institutions to isolate Israeli academic institutions through misuse of ethical review procedures (Section 1).

2. Our clients' request (Section 2) is consistent with the unambiguous policy and statements of the Commission, at all levels, regarding similar initiatives.

In light of the gravity of the situation, the potential for a significant disruption of EU projects and the skewing of the level playing field between Horizon partners, our clients also respectfully submits that the Commission takes active steps to protect the integrity of research, academic freedom and the financial interests of the European Union.

In the instant case, this means ensuring that Ghent University should be solely responsible in the event they elect to withdraw from the project. However, and more generally, Ghent University must be prevented to further applying these behaviors elsewhere, including in consortium building if they maintain their position of excluding Horizon partners.

3. A more detailed analysis of Ghent University claims is included (Section 3), as Ghent University is:

- (i) Misusing ethical reviews:

- There are no grounds to exclude Israeli research institutions on the basis of the ethics of the specific action being funded or their overall respect for human rights principles (Section 3.1.1)
- Ghent University mischaracterizes Israeli partners as proxies of Israel's government or military to justify its discriminatory policy (Section 3.1.2)
- Ghent University's "determinations" cannot be trusted (Section 3.1.3)

- (ii) Violating applicable laws and regulations, including by:

- Restricting academic freedom (Section 3.2.1)
- Violating the principles of non-discrimination and equal treatment (Section 3.2.2)
- Contributing to violations of transparency and neutrality rules (Section 3.2.3)
- Violating rules governing the use of the EU budget (Section 3.2.4)
- Engaging in an anticompetitive and unlawful concerted practice (Section 3.2.5)

For all of these reasons, we trust that the Commission will act decisively to oppose the politicization of research and will warn any beneficiary of EU funds that similar actions would make them ineligible for any EU funding.

1. Context

This request is part of a deliberate and concerted policy, along with other institutions and organizations, particularly from Belgium, to engage in the academic boycott of Israeli universities, which has already been repeatedly rejected by the European Commission through press statements, formal letters by Commissioner Ilana Ivanova, and most recently by EU project officers targeted by similar initiatives.

Since 2001, and more prominently since 2004, the so-called Boycott, Divestment and Sanctions Movement, co-funded by Omar Barghouti (who ironically went on to be a doctoral student at Tel Aviv University), has unsuccessfully sought to isolate Israeli research institutions.

More recently, because of activists-led protests in many universities around the world in relation to the war in the Middle East, and even though there was no change in the unwavering commitment of Israeli universities for democracy, freedom of speech, liberal values, and human rights, including for Palestinians, who study and teach in Israeli universities, there was a renewed push for the academic boycott of Israeli research institutions.

Since then, the Commission has repeatedly expressed that “the EU is not considering suspending or revising the participation of Israeli entities in Horizon Europe, while ensuring strict adherence to international law and ethical standards.” The Commission also has warned of the potential contractual liability to which European universities would be exposed if they took unilateral actions to terminate existing relationships.

Despite such clear positions expressed in the press, and, again, no change in the policies of Israeli universities, Flemish universities in Belgium, among them Ghent, sought to question whether Israeli institutions complied with “ethical standards” considering their perception of the geopolitical landscape.¹

Commissioner Ivanova rightfully and unambiguously rejected this initiative based on “ethical standards”, stating, in separate letters addressed to Israeli universities and to Flemish universities that:

- “Israeli entities are eligible to participate in Horizon Europe grants under terms and conditions equivalent to those applicable to legal entities established in the European Union”,
- “The Commission will assess on a case-by-case basis if [the exclusion of a beneficiary] is based on valid reasons and its impact on the project. On the basis of this assessment, the granting authority will decide on the possible legal and financial consequences of the termination”, and
- “Termination solely on the basis of nationality would be improper and would amount to discrimination prohibited under the Association Agreement”

¹ VLIR letter to Commissioner Ivanova, 30 November 2024, available [here](#).

Despite this official response, certain boycotting universities nevertheless are now trying to reach out directly to project officers and coordinators to achieve the exclusion of Israeli partners, bypassing their own researchers involved in the relevant projects, infringing on their academic freedom, harming crucial scientific projects that were already approved or pose no ethical issue whatsoever, and indeed, harm and derail the progression of science itself.

This now becomes an alarming trend. In addition to Ghent's current move, Ghent is pursuing the exclusion of its Israeli partners in all joint projects. In addition, in the last few weeks, in two separate projects involving the University of Hasselt, project coordinators received copy-pasted correspondence aiming at the exclusion of Tel Aviv University. In those cases, as well, no human rights violations had been found in the context of the collaborations, but the intention was to misuse ethical review procedures to achieve the political goal of excluding the Israeli partner.

In both cases, and in other recent cases, EU project officers reiterated the clear position of Commissioner Ivanova, and the consortium rejected the call to boycott Israeli partners.

The case at hand should be assessed against that background.

2. Request

We have no doubt that your services will act consistently and reiterate the well-established position of the European Commission, confirming that:

- (i) The Commission is not considering suspending or revising the participation of Israeli entities in Horizon Europe;
- (ii) The Commission would assess any exclusion of the Israeli partner or withdrawal of Ghent University on a case-by-case basis as to whether it is based on valid reasons.

To the extent the Commission would agree to provide an *ex ante* assessment of whether the exclusion of the Israeli partner or withdrawal of Ghent University would constitute a “proper” or “improper” termination, we also trust that the Commission would find it “improper” based on the analysis below. Otherwise, whenever a coordinator or beneficiary would want to exclude a partner of an EU-funded project, or get out of such project for political reasons, it could claim, after the fact, having a unilateral and unfounded moral objection to working with the partner. This would have – as we see now – detrimental effect on science: projects that were envisioned, designed, and implemented with hard effort, time, and resources would get derailed and forfeited, discrimination based on nationality and politics will abound, academic freedom would be curtailed, and the various parties to the consortium would be coerced to pause their work due to the boycotting institution. This is no way to do science.

Thus, in light of the gravity of the situation, the repeated attempts to undermine ongoing projects, and the potential detrimental impact to the financial interests of the EU, we respectfully ask that you remind Ghent University of Article 138(e) of the EU Financial Regulation.

It should be made clear that Ghent University shall be excluded from participating in award procedures governed by the EU if it “has shown significant deficiencies in complying with

main obligations in the implementation of a legal commitment financed by the budget which has (i) led to the early termination of a legal commitment; (ii) led to the application of liquidated damages or other contractual penalties; or (iii) been discovered by an authorising officer, OLAF, the Court of Auditors, or the EPPO following checks, audits or investigations.”

Our clients further fully intend to pursue any available remedies, systematically, for any and all consequences suffered by my clients or any of their researchers.

3. Reasons and Evidence

3.1. Misuse of Ethical Reviews

3.1.1. There are no grounds to exclude Israeli research institutions on the basis of the ethics of the specific action being funded or their overall respect for human rights principles

Whether assessed under Article 14 of the Grant Agreement or under the own policy of Ghent University, there are no grounds to exclude Israeli research institutions concerning the ethics of the action being funded.

The Ethics clause of the Agreement, as explained in the official guidance, concerns the ethics of the specific action being funded. It is an expression of the principles laid down in Articles 18 and 19 of the Horizon Europe Regulation. It cannot justify a wholesale ban on Israeli universities and researchers based on geopolitical considerations.

As regards this particular project, Ghent University confirmed themselves, stating: “Ghent University assessed the WHEATWATCHER project in light of its Human Rights Policy. On the basis of this assessment, Ghent University concluded that no human rights risk being violated during the project and that there is no risk that the research results will be misused for human rights violations in a later stage.”²

This consideration, together with the clear position expressed by the Commission with respect to the equal standing of Israeli research institutions in Horizon projects should settle the matter.

In any event, there is absolutely no ground to position Israeli universities as unethical, let alone our clients. On the contrary: they are independent academic institutions by law, that serve as beacons of ethics, humanism, and democracy, and adhere to the highest academic standards, including ethical standards.

All Israeli universities are actively and extensively engaged in projects aiming to promote equality between Jews and Arab-Palestinians. 18% of Israeli universities’ students are Muslim and Christian Palestinians, a figure that closely reflects their percentage in Israel’s population.

Many of the Arab-Palestinian students study in their most competitive programs including medicine, computer science, engineering, and law. This reality is the result of extensive efforts and demonstrates the commitment of each one of the Israeli universities to equality and

² Letter from Ghent University to M. Pera, 8 November 2024, page 4.

diversity and to promoting social mobility. These efforts include providing extensive program of financial aid and fellowships for Arab-Palestinian students in all degree levels, including programs specifically encouraging and supporting promising candidates in advanced degree and post-doctoral programs.

The universities work hard to nurture multi-cultural campuses, taking seriously their responsibility to do so given that the period of study at the university is sometimes the first opportunity for meaningful positive interaction between Jews and Arab-Palestinians. This requires not only recruiting diverse faculty members and students, but also creating a welcoming atmosphere and fostering meaningful learning opportunities across campus.

For decades, all of Israel's universities have spearheaded hundreds of projects and initiatives aimed at promoting peaceful relations in the region.

Scholars in engineering, environmental studies, medicine, life science, and more collaborate regularly with counterparts in neighboring countries on projects designed to drive innovation on regional challenges in climate change, agriculture, sustainable development, public health, neuroscience, and other areas (including collaborations with students in Gaza on water research). Other scholars work on promoting equity and social justice for Arab-Palestinian communities within Israel, including through Israeli universities' law clinics, educational initiatives, and community work. Israeli universities' affiliated hospitals have regularly treated patients from Gaza and have also provided care for refugees from the Civil War in Syria. The space here is insufficient to even begin to enumerate all such projects.

3.1.2. Ghent University mischaracterizes Israeli partners as proxies of Israel's government or military to justify its discriminatory policy

The framework under which this project takes place is clear: it is conducted under EU laws and regulations, the grant agreement and ad hoc arrangements. The unfounded beliefs of a single university have no relevance to the project and cannot legally interfere with it.

However, even if the policy of Ghent University was relevant at all, it is obviously unfounded.

Ghent University has decided to "refrain from institutional collaborations with Israeli academic institutions in case there was a high degree of interdependence between the academic institution, the Israeli government, and the Israeli security services."

To be clear, and as is well-known to the Commission, Israeli academia is independent of the government and military, and it operates autonomously in all academic matters. According to the 2024 Academic Freedom Index, which measures the state of academic freedom worldwide, Israeli universities are on par with universities in Norway, Canada, and Switzerland in upholding academic freedoms; moreover, they are ahead of countries such as the United Kingdom, the Netherlands, and the United States.

The clearest voices against the attempted judicial overhaul in Israel, which many feared would have weakened democracy and minority rights, emerged from Israeli universities' campuses. Their leadership, faculty, and students took a leading role in opposing measures and legislation that could have compromised the basic foundations of Israeli democracy.

Since it could obviously not establish a “high degree of interdependence with the Israeli government or the Israeli security services”, Ghent University relied on an unproven assertion that Israeli “academic institutions develop technology for the security services that is later *misused* for human rights violations, and provide training to soldiers and security services, who later *misuse* this knowledge for human rights violations.” [our emphasis]³

In other words, according to this policy, any knowledge generated within specific programs is inherently complicit in human rights abuses according to an unproven presumption that such undefined knowledge might be “misused” in unrelated security or military contexts.

This theory, in turn, would form the basis for a blanket ban on cooperation with an otherwise equal Horizon partner on any project.

This is a prime example of the harmful politicization of academic collaboration and is wholly inconsistent with well-established principles of ethical reviews.

There must be a clear distinction between academic research on dual-use or military items, which indeed falls under rigorous international legal frameworks and normal ethical reviews, and politically charged positioning against entire institutions that ultimately harms research and scientific progress.

While there are researchers at Israeli universities, including in our clients, who, in accordance with their academic freedom and rights, do research on subjects related to Israel’s security, there are academics in just about every other country who conduct research related to national security. Such projects and programs, of course, represent only a small percentage of the research conducted and certainly do not turn Israeli universities into military agencies.

Furthermore, by applying this logic selectively to Israeli universities, Ghent University is effectively holding them to a different standard than academic institutions elsewhere. No other university is subject to the same logic. No review has been conducted according to the same flawed logic about any other university having any other programs attended by students who may or may not serve in any military forces in any context.

3.1.3. Ghent University’s determinations cannot be trusted

It has come to our attention that, most recently, Ghent University acknowledged that an earlier decision, made five years ago to cut ties with the Hebrew University of Jerusalem (also without any attempt to enter into dialogue with that institution, and no notification of the boycott was ever made to that institution), was based on an incorrect factual basis.

Specifically, Ghent University wrongly assumed that the Hebrew University is located on occupied land. Only when the Hebrew University incidentally learnt about the decision and brought the accurate information to the attention of Ghent University’s relevant Committee, did Ghent University admit, just last week, that its decision was in fact baseless.

³ Advice on current collaborations between Ghent University and Israeli entities, 8 November 2024, attached as **Annex 1**.

Strikingly, Ghent University did not offer apologies and change its policy following such a gross failure of due process and decision-making, which led to employing a baseless and unjustified boycott against another university, which reduced opportunities for an otherwise fully equal Horizon partner – for five whole years.

On the contrary, Ghent University insisted on upholding a decision that it now admits was baseless, while repeating the pattern of failing to enter into a dialogue with the Hebrew University and failing to gather evidence before making a new “determination.” This time, Ghent University switched the reasoning of its boycott decision to the mere existence of specific academic programs at the Hebrew University where prospective soldiers study to regular degree programs. This, argued Ghent, was proof of a “high degree of interdependence with the Israeli government or the Israeli security services.”

This substitution of motives is highly problematic. It suggests that Ghent University is willing to adopt any rationale — no matter how tenuous — to continue enforcing a discriminatory policy, even after its original decision was proved faulty and baseless. Such an approach indicates a troubling lack of consistency and raises questions about the true motivations behind these actions.

Incidentally, Ghent University does not even abide by the minimal procedural standards set forth at the Human Rights Charter of the Flemish Inter-University Council (VLIR), which it also claims to apply.

Ghent University has breached the standard set in the Charter, namely “to enter into dialogue with the [relevant] partner.” This norm is a standard aspect of natural justice. This is not merely a formal aspect. According to the Charter, ties with another university should be cut only if the partner “is guilty of serious and/or systematic human rights violations.”

The fact that Ghent University has found it justified to make such a harsh verdict regarding a partner university without respecting even the most minimal procedural standards, reflects its fundamentally biased approach to the matter.

3.2. Violations of Applicable Laws and Regulations

Since there is no valid or even reliable ground for Ghent University to try to exclude its partners from the project or to withdraw from the project on ethical grounds, its stated objectives violate applicable laws and regulations.

Our client will obviously pursue all available remedies against Ghent University if it does not cease its baseless campaign, including contractual and non-contractual liability claims.

This section, however, focuses on the grave violations of applicable laws and regulations that Ghent University’s behavior entails and that are under the purview of the Commission. We reserve all rights to act in light of these violations as well.

On November 8, 2024, as it sent out its request to you, Ghent University also published a position paper on its website, titled “Discontinuing the collaborations with Israeli Academic

Institutions and Government Agencies – Update on the decision taken by Ghent University on 31 May 2024.”⁴

It states that: “the necessary steps are taken to terminate the collaboration with the Israeli partner concerned”, i.e.:

- Ben-Gurion University of the Negev
- Holon Institute of Technology
- University of Haifa
- Tel Aviv University
- Weizmann Institute of Science.

This position paper also explicitly states that Ghent University is colluding with others “to submit a well-motivated request to discontinue the participation to the consortium coordinator and to the European Commission” as “other European academic institutions that announced they were discontinuing collaborations with Israeli organisations were also contacted, so that lessons could be learned from the steps they had or had not taken.”

By taking steps to terminate collaboration with Israeli partners, including by colluding with European academic institutions, we outline below, without prejudice and without aiming for exhaustivity, the various laws and regulations that Ghent University violated.

3.2.1. Restriction of Academic Freedom

Ghent University violated the fundamental right to academic freedom, as set out by European law⁵, as well as implemented in national constitutional law⁶, and recalled in the case law⁷. It also violated numerous international commitments applicable to academic stakeholders⁸.

Seeking to exclude the Israeli partner and their research community restricts the fundamental right to academic freedom, either as a constitutional principle, or when implementing EU law

⁴ Ghent University Position paper, 8 November 2024, attached as **Annex 2**.

⁵ Article 10 ECHR and Article 13 of the Charter of Fundamental Rights of the European Union.

⁶ See, for example, Article 24 of Belgian Constitution, article 34 of the French Constitution, Article 33 of the Italian Constitution, the Irish Universities Act, and Section 20 (1) (c) of the Spanish Constitution.

⁷ See, for example, ECtHR, 15 April 2014, *Hasan Yazıcı v. Turkey*, 40877/07, § 55 and 69, ECtHR, 15 March 2012, *Aksu v. Turkey* [GC], 4149/04 and 41029/04, § 71, ECtHR, 27 May 2014, *Mustafa Erdoğan and Others v. Turkey*, 346/04 and 39779/04, § 40 and 46, Judgment 6 October 2020, *European Commission v. Hungary*, C-66/18, ECLI:EU:C:2020:792, §228, French DC Decision n° 2020-810 of 21 December 2020, paragraph 6.

⁸ Article 15 (1) and 15 (3) of the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#)., UN Economic and Social Council, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), [E/1991/23](#), §5 UN Committee on Economic, Social and Cultural Rights (CESCR), 14 December 1990 and UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, [E/C.12/1998/24](#), 3 December 1998, Preamble, paragraph 22 (c) and (n), [UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel](#), Article 13 and 16 (a)(i), [UNESCO Recommendation on Science and Scientific Researchers](#) (2017), Annex 1 of [The Rome Ministerial Communique of the European Higher Education Area and its annex about academic freedom](#) (2020)., Annex 1 of [The Rome Ministerial Communique of the European Higher Education Area and its annex about academic freedom](#) (2020).

through EU funding (Article 13 of the EU Charter of fundamental rights), or by restricting their freedom of speech (guaranteed under Article 10 ECHR). This not only restricts the academic freedom of Israeli researchers that participate in EU programs, but also of European researchers in other Horizon partners, including Ghent University's own researchers, who have not been consulted on the matter.

Ghent University further disregards the EESC global approach to research and innovation, which highlights the importance of academic freedom in the EU, as it states that the EU strategy in that field is *"to preserve openness in international research and innovation cooperation, while promoting a level playing field and reciprocity underpinned by fundamental values."*

3.2.2. Violation of the principle of non-discrimination and equal treatment

By selectively, unreliably and inconsistently applying restrictive measures to Israeli partners, Ghent University violated the principle of non-discrimination and equal treatment, as set out in European law⁹, as well as implemented in national constitutional law¹⁰, and recalled in the case law¹¹.

In particular, the EU Financial Regulation, which regulates all EU spending, as well as settled case law of the CJEU, all insist on the strict application of nondiscriminatory and transparent rules when managing public funds, and that principle of equal treatment be respected. The CJEU has long clarified that equal treatment means that participants should be afforded *"equality of opportunity"*, and that the obligation of transparency was meant *"to preclude any risk of [...] arbitrariness"*.¹²

Note that Ghent University chose to publish **seven** statements expressing concerns on Israel since October 2023 (more than for all other countries in the world, ever, combined). There are merely six other statements in total on Belarus, Egypt, Iran, Russia, and Turkey.¹³

As stated above, the selective and biased application of an unrealistic standard only to Israeli institutions, based on geopolitical events beyond the control of Horizon partners, is discriminatory.

⁹ Article 10 TFEU, article 21 of the EU Charter and article 18 TFEU, Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin prohibits discrimination on the basis of race or ethnicity and the EU Financial Regulation.

¹⁰ See for example Article 11 of the Belgian Constitution, article 1 of the French Declaration of Human and Civic Rights Of 26 August 1789 and article 225-1 of the French Penal Code, art. 3 of the Italian Constitution, article 40 (1) of the Irish Constitution, Section 14 of the Spanish Constitution.

¹¹ Judgment of 2 June 2016, *Pizzo*, EU:C:2016:404, C-27/15, *"the principle of equal treatment requires [...] to be afforded equality of opportunity"*, §36 and Order 223/2024, 14 June 2024, Contentious-administrative court number 3 of Granada, *"we must not lose sight of the fact that the controversial measures directly affect the principle of non-discrimination, personal dignity and academic freedom of the Spanish Constitution, which means that the weighing of interests at stake that must necessarily"* p. 3

¹² See judgment of the General Court of 9 September 2009, *Brink's Security Luxembourg SA v. Commission*, Case T-437/05, ECLI:EU:T:2009:318

¹³ <https://www.ugent.be/en/ghentuniv/mission/human-rights>

At any rate, by creating obstacles to the participation of a specific category of Horizon partners, Ghent University also violates the principle of equal treatment by limiting opportunities afforded to other Horizon partners.

This risk had been identified by the Council in its recommendations of 23 May 2024 on enhancing research security – while research actors implement safeguarding measures, they must “ensure that every effort is made to avoid all forms of direct as well as indirect discrimination and stigmatisation of groups or individuals that could occur as an unintended consequence of safeguarding measures and ensure the full respect of fundamental rights as enshrined in the Charter.”

3.2.3. Violation of Transparency and Neutrality Obligations

As a beneficiary of public funding, Ghent University’s behavior contributes to a violation of transparency and neutrality obligations as enshrined in EU law¹⁴, as well as national constitutional law¹⁵, and recalled in the case law¹⁶. By failing to respect its obligation of transparency and neutrality, Ghent University is also failing to respect fundamental rights set out under the ECHR. in light of the European Court of Human Rights ruling in *Willem v. France* (which also concerned a boycott targeting Israel), individuals or entities managing public funds are barred from discriminating and must abide by a duty of neutrality.¹⁷

Since it has been demonstrated that Ghent University took no steps to avoid arbitrariness through procedural safeguards, and further discriminated against Israeli partners, equally eligible to Horizon funding, based on reasons that it admitted were completely unfounded, it has contributed to the violation of transparency and neutrality obligations.

This includes disruption in the ongoing collaboration with other universities willing to comply with their duty of neutrality.

3.2.4. Violation of Financial Obligations

Ghent University also violated the EU Financial Regulation¹⁸ and the principle that the selection and award criteria for grants shall be based on objective and transparent criteria.

¹⁴ See for example the EU Financial Regulation.

¹⁵ See for example Art. 24 §1 of the Belgian Constitution, article 1 and 10 of the French Constitution, Articles 2, 3, 7, 8, 19, and 20 of the Italian Constitution and The Additional Protocol to Law No. 121 of 1985, ratifying the Agreement between Italy and the Holy See, Section 14 (1) (b) (ii) and (iii) of the Irish Universities Act, 1997.

¹⁶ See for example Judgment of 19 October 2022, *Lenovo Global Technology Belgium BV v. European High-Performance Computing Joint Undertaking (EuroHPC)*, ECLI:EU:T:2022:640, T-717/20, §31, EU General Court, Judgment of 4 May 2017, *Meta Group Srl v European Commission*, ECLI:EU:T:2017:304, T-744/14, §212, Judgement of the Italian Constitutional Court of 12 April 1989, n° 203.

¹⁷ ECtHR *Willem v. France*, n° 10883/05, 16 July 2009.

¹⁸ The EU Financial Regulation, which governs all EU spending, does not allow for discriminatory and politically motivated exclusions. On the contrary, the Financial Regulation establish a clear system to detect and respond to possible situations that would justify an exclusion (EDES), none of which is applicable to any Israeli research institutions.

By taking steps aimed to remove entities based in Israel from participation in EU funded projects even though they meet harmonised criteria, Ghent University introduced an additional eligibility or participation criterion in an arbitrary way, which undermines the participation to EU programs by certain entities.

As regards ethical rules, the Horizon Regulation establishes conditions that must be complied with (Arts. 18 and 19) to be eligible for funding. The Horizon Regulation also provides for the procedure to be followed in case of ethical issues: Art. 19(5) and (6) establish that the Commission is solely responsible for performing ethics checks in case of serious or complex ethics issues (unless the Commission delegates this task to the funding body).

In its case law on related issues, the Court of Justice has found that the mere risk that certain actions could have an impact on the budget could justify sanctions, even if the actual damage is not established. The Court reasoned: ‘*it cannot be ruled out that [an action] may have an impact on the [EU] budget*’ because it is “*liable, by its very nature, to influence the award of [funding]*”,¹⁹.

In this context, Ghent University must be considered as illegally influencing allocations of EU funds.

Moreover, considering that the infringement of the above legal and contractual obligations affects the quality of the EU funded program, as originally prospected, which may entail a prejudice for the EU financial and non-financial interests, the implementation of entire project may be subject to check, project review, audits, or investigations by the granting authority or the European Anti-Fraud Office (OLAF), with subsequent penalties.

3.2.5. Unlawful concerted practice

By colluding with others to act for the removal of certain Israeli universities from EU projects, Ghent University is engaging in a prohibited concerted practice, as set out in EU treaties and national law²⁰, and recalled in the case law²¹. As such, and beyond the risks of significant fines, University of Ghent also should be excluded from EU public tenders²².

Competition law fully applies to universities active in the EU, when offering goods or services on a given market, such as the market for scientific publications or public-funded research market.

On the substance of the competition law infringement, this case is not different from Case C-68/12 *Slovak Banks*.

In that case, three banks monitored a competitor’s activity, conferred with each other and decided, by common agreement, to terminate in a coordinated manner the contracts they had

¹⁹ Judgment of 8 June 2023, *Azienda Nazionale Autonoma Strade SpA (ANAS) v Ministero delle Infrastrutture e dei Trasporti*, C-545/21, EU:C:2023:451, §39.

²⁰ Article 101 of the Treaty on the Functioning of the EU.

²¹ Judgment of the EU Court of justice of 7 February 2013, *Slovenská sporiteľňa*, C-68/12.

²² Article 57(4)(d) and Recital 101 of the Directive 2014/24/EU.

concluded with that competitor. This is exactly what Ghent University is admitting to in its position paper.

There as well, the boycotting entities tried to suggest that their boycott was somehow lawful and intended to correct the unacceptable position of their competitor. The Court stated unambiguously: the fact that “an undertaking that is adversely affected by an agreement whose object is the restriction of competition was allegedly operating illegally on the relevant market at the time when the agreement was concluded is of no relevance to the question whether the agreement constitutes an infringement.”

“It is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements. [...] the application of statutory provisions may call for complex assessments which are not within the area of responsibility of those private undertakings or associations of undertakings.”

These undertakings could “lodge a complaint with the competent authorities in that respect and not to take it upon themselves to eliminate the competing undertaking from the market.”

The threshold for excluding Ghent University from EU public tenders is even lower when it comes to possible anticompetitive practices.

The EU Court of Justice held that contracting authority can exclude an undertaking based on “*sufficiently plausible indications to conclude*” that the latter infringed prohibition of anticompetitive agreements; moreover, the concept of “anticompetitive agreements” is broader than under Article 101 TFEU.²³

* * *

For all of these reasons, we trust that the Commission will act decisively to oppose the politicization of research and will warn any beneficiary of EU funds that similar actions would make them ineligible for any EU funding.

Beyond legal standards, should the Commission accept the politicization of research based on dubious claims, without respect for contradictory principles, departing from well-established principles of ethical reviews, the Commission would, far from respecting institutional autonomy, enable policies that risk resulting in the misuse of public funds, violation of non-discrimination and equal treatment obligations, anticompetitive practices, and, most importantly, a significant decrease in research quality.

Ghent University, or any other institution, should not be permitted to derail EU projects, or skew the level playing field between Horizon partners. It is essential that the Commission takes active steps to protect the integrity of research, academic freedom and the financial interests of the European Union. In the instant case, this means ensuring that Ghent University should be solely responsible in the event they elect to withdraw from the project. However, and more

²³ Judgment of 15 September 2022, J. Sch. Omnibusunternehmen and K. Reisen, C-416/21, §38-40, 44

generally, Ghent University must be prevented to further applying these behaviors elsewhere, including in consortium building if they maintain their position of excluding Horizon partners, which is why the reference to Article 138(e) of the Financial Regulation is important.

In any event, should Ghent University elect to pursue their detrimental actions, my clients will escalate this and file multiple complaints, as well as launch any necessary or useful proceedings.

We thank you in advance for your cooperation in this matter.

Sincerely,



Yohan Benizri
Member of the Brussels Bar (A List)

Annexes

- Annex 1 - Ghent University 30 May Advice
- Annex 2 - Ghent University 8 November Position Paper