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Case No: AC-2025-LON-001378

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice, Strand, London, WC2A 2LL

Date: 3 June 2026

Before :

THE HONOURABLE MRS JUSTICE DIAS

- -

Between :

THE KING on the application of ASSOCIATION OF INDEPENDENT MEAT SUPPLIERS — **Claimant**

- and –

FOOD STANDARDS AGENCY — **Defendant**

- and -

(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) NATIONAL FARMERS' UNION
(3) BRITISH MEAT PROCESSORS' ASSOCIATION — **Interested Parties**

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Gordon Nardell KC and **James Burton** (instructed by **Roythornes LLP**) for the **Claimant**
Adam Heppinstall KC and **Thomas Mallon** for the **Defendant**
Toby Fisher for the **First Interested Party**
Malcolm Birdling KC and **Jagoda Klimowicz** for the **Second Interested Party**
The **Third Interested Party** did not appear and was not represented at the hearing

Hearing dates: 21-22 April 2026

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Approved Judgment

This judgment was handed down remotely at 19am on 3 June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Dias :

A: Introduction

1. These judicial review proceedings arise from a dispute as to the basis on which the Food Standards Agency (the "**FSA**") has levied (and proposes to continue to levy) charges on Food Business Operators ("**FBO**"s) for 2025/26, specifically in relation to the exercise of official controls and other activities at slaughterhouses. The charges in question were first published to industry in the form of a set of Cost Data Slides on 28 February 2025. Following certain criticisms and queries by, amongst others, the Claimant ("**AIMS**"), an amended set of slides was produced in December 2025 and circulated in January 2026, although the actual charging rates remained identical.

2. The following matters are not in dispute:

   (a) The FSA is the competent authority in England and Wales responsible for ensuring industry compliance with legislation governing sanitary and phytosanitary matters. Much of this legislation was originally derived from EU legislation and regulations and, given the significant degree of cross-border trade in meat products, compliance by domestic operators is clearly important.

   (b) For that purpose, the FSA must perform activities, including the carrying out of official controls, the cost of which is financed in part by general taxation and in part by charges levied on the industry, i.e., on the FBOs.

   (c) While the present dispute is only concerned with charges for activities relating to slaughterhouses, the relevant legislation obviously extends more widely. Moreover, I am concerned here only with the rules and regulations applicable in England and Wales. Scotland and Northern Ireland have separate arrangements.

   (d) Many of the activities in question must be carried out or supervised by an official veterinarian ("**OV**"). The FSA does not itself employ any OVs; these are all employed by the FSA's service delivery providers which are independent commercial contractors.

   (e) While the FSA is entitled to delegate certain official control tasks to another body or natural person, it has not in this case delegated any tasks to its contractors. It nonetheless makes use of the OVs employed by those contractors in order to perform its functions and, to that extent, has delegated to natural persons.

   (f) The Cost Data Slides split the charges by reference to, amongst other things, a *"Meat Controls Hourly Rate"* (the "**Main Rate**") and an *"Hourly Enforcement Rate"* (the "**Enforcement Rate**"). The Main Rate is said to apply to chargeable time relating to meat controls and comprises both direct costs and indirect support costs. It is broadly calculated by reference to anticipated costs for the forthcoming year, divided by the number of hours budgeted for the relevant controls as agreed in advance with the FBOs. It excludes costs and time spent on enforcement or export activity or on government matters. Charges are then billed to individual FBOs on the basis of the number of hours actually attributable to that FBO multiplied by the Main Rate. The Enforcement Rate is the hourly rate applied by the FSA to activities addressing regulatory non-compliance other than meat controls and is calculated using a similar methodology.

3. The legality of these charges has been challenged by AIMS, which is a trade association and spokesperson for the UK meat industry. Three headline grounds are asserted:

   (a) Ground 1 – Main Rate

   This raises two separate issues:

   (i) The extent to which overheads can be included in the cost base used to arrive at the Main Rate. AIMS says that only costs incurred in the actual performance of official controls and activities *"inextricably linked"* to the performance of official controls can be included. Accordingly costs such as those incurred in relation to matters such as internal audit, the management of contractors, supervision of inspectors and other pure overheads must be excluded from the calculation. The FSA submits that the limitation on what can be charged for is not as narrow as AIMS contends. (Limb 1)

   (ii) Whether the FSA is entitled to recover the costs of work carried out by vets who have not yet completed their probationary period (Novice Official Veterinarians or "**NOV**"s), or who are not members of the Royal College of Veterinary Surgeons and only have a temporary registration (Temporarily Registered NOVs or "**TRNOV**"s). (Limb 2)

   (b) Ground 2 - Enforcement Rate

   Three issues arise under this head:

   (i) Whether a proportion of the indirect costs included in the calculation of the Main Rate may also be included in the calculation of the Enforcement Rate;

   (ii) What activities can properly be charged for at the Enforcement Rate;

   (iii) Whether supervision of NOVs can be carried out remotely and/or whether remotely supervised NOVs can be charged for.

   (c) Ground 3 – Transparency AIMS submits that the FSA is in breach of its obligation of transparency because it is impossible to discern from the Cost Data Slides how the cost base for either the Main Rate or the Enforcement Rate has been calculated.

4. It may safely be inferred that this matter would not have come to court if the FSA's charges had remained stable or had decreased. In fact, they have increased beyond the rate of inflation and this is predictably putting pressure on industry in areas where margins are already notoriously low.

5. Permission to bring judicial review proceedings was not opposed and was granted by Sweeting J on the papers on 12 November 2025. Three interested parties were notified. The National Farmers' Union ("**NFU**") generally supported AIMS but also made further submissions on Grounds 2 and 3. The Secretary of State was represented before me – essentially on a watching brief – but in the event only spoke to clarify one point. The British Meat Producers' Association did not participate in the oral hearing but had previously indicated that it supported AIMS' challenge.

6. There were a number of applications before me by both AIMS and the FSA to rely on evidence which had been served out of time. None of these was opposed and, since I took the view that it was better for the court to have the full picture, I granted them all. In the event, only limited reference needed to be made to the factual evidence.

B: Relevant legislative framework

(1) Legislative timeline

7. From 1 January 2006, the main regulation of relevance was EU Reg. 882/2004 (the "**Predecessor OCR"**) which applied in England and Wales directly.[1] This was a harmonising measure designed to ensure the application of uniform rules throughout the internal market. Amongst other things, it governed the extent to which national authorities could recover their costs from operators.

8. Although the Predecessor OCR itself was directly applicable in the UK, it is common ground that the power to charge operators in relation to some (but not all) of its provisions required domestic legislation: see *R (Jaspers (Treburley) Ltd) v Food Standards Agency,* [2013] EWHC 1788 (Admin); [2013] PTSR 1271.

9. For this purpose, the Meat (Official Controls Charges) (England) Regulations 2009 ("**MOCCR**") and an identical set of regulations for Wales were enacted with effect from 28 September 2009 in order to implement the Predecessor OCR. These Regulations have been subsequently amended but not in any respects germane to this dispute. Separate domestic provision for operators to pay the expenses incurred by the FSA in relation to enforcement was made in the Official Controls (Animals, Food and Feed) (England) Regulations 2006.

10. On 6 May 2013, the European Commission issued a proposal for a new Official Controls Regulation designed to modernise and update the rules and replace the previous piecemeal regulation of different sectors of the industry with a unique set of rules applicable to official controls in all agri-food chain sectors. This led to the introduction with effect generally from 14 December 2019[2] of EU Reg. 2017/625 on *"official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products"* (the "**OCR**").

11. On 11 April 2018, the FSA first published its Manual for Official Controls. This has been subject to numerous amendments and updates.

12. On 14 December 2019, EU Reg. 2019/624 (the "**Qualifications Regulation**") came into force making provision about the minimum qualifications for persons performing official controls.

13. With effect from the same date, the 2006 Regulations dealing with charges for enforcement activity were replaced by the Official Controls (Animals, Feed and Food, Plant Health Fees

[1] Save for Articles 27 and 28 which only applied from 1 January 2007.

[2] With some exceptions: see Article 167.

etc.) Regulations 2019 (the "**Fees Regulations**"). These continued to make separate provision for expenses incurred in relation to enforcement.

14. The OCR and the Qualifications Regulation were "direct EU legislation" within the meaning of the EU Withdrawal Act 2018 ("**EUWA**"). Accordingly:

    (a) On the date of the UK's withdrawal from the EU (31 January 2020), they continued to apply as part of UK domestic law for the duration of the transitional period until 31 December 2020;

    (b) Thereafter, they continued to have domestic effect as "retained EU legislation";[3]

    (c) From 1 January 2024, by virtue of the Retained EU Law Act 2023 ("**REULA**"), they became "assimilated direct EU legislation" to which the rules of interpretation set out in sections 5 and 6 of EUWA apply, as well as the ministerial power under sections 12-15 of REULA to restate, revoke, replace and update them. As to this latter, it should be noted that:

        (i) The power to revoke or replace cannot be used unless the relevant national authority considers that the overall effect will not increase the regulatory burden either in financial terms or by creating an obstacle to trade or innovation;

        (ii) The power to update enables account to be taken of technological or scientific developments.

15. By contrast, MOCCR and the Fees Regulations are "EU-derived domestic legislation" within the meaning of EUWA and continue in the form in which they existed as at 31 December 2020.

16. In 2021, the UK and the EU concluded a Trade and Cooperation Agreement which, amongst other things, seeks to ensure a level playing field between the UK and EU Member States. Assimilated instruments are one of the means by which the UK implements this agreement.

17. Article 81 of the OCR was amended on 30 April 2024 and again on 10 February 2025. The effect of these amendments was a key matter in dispute to which I shall return.

(2) Approach to statutory interpretation

18. In addition to the well-known principles of statutory interpretation set out in *R (O) v SSHD,* [2022] UKSC 3; [2023] AC 255 at [29], AIMS made a number of submissions about the appropriate approach as follows:

    (a) Any tax or charge for the benefit of public funds requires clear legislative language as a matter of both UK and EU law. The position in that regard is unchanged following Brexit.

[3] This was subject to the possibility of amendment under EUWA. Although some amendments were made, these essentially only put the Regulations into domestic form. No substantive changes were made.

(b) EU texts should, so far as possible, be given a meaning consistent with their language and purpose as interpreted by the CJEU pre-Brexit. In this regard, Mr Gordon Nardell KC, who appeared on behalf of AIMS, referred me to *C. G. Fry and Son Ltd v Secretary of State for Housing, Communities and Local Government,* [2025] UKSC 35; [2025] PTSR 1823 which confirms that the court will take account of the EU origins of an instrument which remains part of domestic law, including interpretative decisions of the CJEU which are part of its historical context.

(c) EUWA reinforces this approach. Section 6(3) provides that *"any question as to the validity, meaning or effect of any assimilated law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it – (a) in accordance with any assimilated case law…" "Assimilated case law"* is defined to include any decisions of the CJEU or of domestic courts as they stood immediately before 31 December 2020. By section 6(6), even if a provision has been modified, the interpretative principle set out in section 6(3) may still be applied if to do so would be consistent with the intention of the modifications.

(d) Following REULA, any unavoidable conflict between assimilated provisions and any saved domestic implementing legislation (such as MOCCR or the Fees Regulations) is to be resolved in favour of the latter.

(e) The court should start from the assumption that, when making any amendments to assimilated or EU-derived legislation, the domestic legislator intended that the amended provisions should form part of a coherent overall scheme comprising pre-Brexit EU legislation, post-Brexit amended provisions and saved domestic implementing legislation.

19. I did not understand the FSA to take issue with any of these propositions and I have accordingly applied them as necessary.

C: Ground 1 – Main Rate

20. This ground is principally concerned with the interpretation of the OCR. As already stated, the present dispute is only concerned with charges concerning official controls and other activities carried out in slaughterhouses which fall within Article 18. Examples would be checks for contamination, lungworm and other diseases or abnormalities. It does not take much imagination to appreciate that inadequate checks can (and, according to evidence served on behalf of AIMS, actually do) result in consignments of meat being turned away at the French border with all the wasted costs that that entails.

21. "Official controls" are defined in Article 2 of OCR as:

> *"activities performed by the competent authorities, or by the delegated bodies or the natural persons to which certain official control tasks have been delegated in accordance with this Regulation, in order to verify:*
> *a compliance by the operators with this Regulation and with the rules referred to in Article 1(2); and*

b that animals or goods meet the requirements laid down in the rules referred to in Article 1(2), including for the issuance of an official certificate or official attestation.

Essentially they are activities performed in order to ensure compliance by operators with the rules and regulations and are to be contrasted with "other official activities" which are defined as:

"activities, other than official controls, which are performed by the competent authorities, or by the delegated bodies or the natural persons to which certain other official activities have been delegated in accordance with this Regulation, and with the rules referred to in Article 1(2), including activities aimed at verifying the presence of animal diseases or pests of plants, preventing or containing the spread of such animal diseases or pests of plants, eradicating those animal diseases or pests of plants, granting authorisations or approvals, and issuing official certificates or official attestations.

22. It was not in dispute that the OCR itself did not confer any power on the FSA to levy charges for carrying out official controls. That power is contained in regulation 3 of MOCCR which stipulates that any "official controls charge" as defined and notified in accordance with the Regulations should be payable on demand.

23. By way of contextual background, prior to 2009, the UK charged for official controls on a "headage approach", i.e., by way of a fixed rate per animal. This is the basis on which most of the EU Member States still charge. However, it required re-calculation every time there was a change to the rate applied in the EU and in 2009, the UK abandoned the headage approach and enacted MOCCR to give domestic effect to the charging provisions in the Predecessor OCR but by reference to time-based charges.[4]

24. Thus:

    (a) In accordance with the definition in regulation 2 of MOCCR , an "official controls charge" must be calculated in accordance with Schedule 2, i.e., as *"such percentage of the time costs generated by those premises in that period as the [FSA] considers appropriate."*

    (b) The relevant *"time costs"* are to be calculated in accordance with paragraphs 7-9 of Schedule 2 as follows:

        (i) Paragraph 7 effectively requires the time spent *"by each inspector exercising controls at those premises"* to be multiplied by the hourly rate applicable to that inspector *"determined in accordance with paragraph 10"*.

        (ii) Paragraph 10 contemplates that the FSA might calculate different hourly rates for different classes of inspector.

        (iii)However, paragraph 11 explicitly provides that the hourly rate shall be calculated *"so as to reflect such proportion of the costs of the items listed in Articles 81 and*

[4] AIMS submits that a time-based approach incentivises the FSA's contractors to load the overheads which can be included in the charges and to increase the number of hours spent. This was denied by the FSA but, even if true, it is irrelevant if the charges can be lawfully recovered.

82 of [the OCR] incurred by that inspector or class of inspector in exercising controls ... as the [FSA] considers it appropriate to apportion to that hourly rate."

25. As presented in the Cost Data Slides, the FSA derived its hourly rate essentially by taking the overall budgeted cost of delivering official controls for the forthcoming year and dividing it by the budgeted hours for performing those official controls. The budgeted hours were based on agreements reached with each FBO as to its likely requirements. The hourly rate so produced was then applied to the actual hours attributable to each FBO. A discount was allowed by reference to the number of hours spent on official controls in relation to a particular FBO. In order to protect the smaller operators, the size of the discount was in inverse proportion to the number of hours spent.

26. As will therefore be obvious, the hourly rate is sensitive to the items included in the budgeted costs (i.e., the costs base), while the actual charge is dependent on the number of hours spent on the activities for which charges are levied. AIMS challenges both these aspects of the charges. In relation to the costs base, it submits that under paragraph 11 of Schedule 2, only charges incurred by inspectors *"in exercising controls"* can properly be included and that on their proper interpretation these words are limited to the actual performance of the official controls and such activities as are *"inextricably linked"* to such performance (the "costs base issue"). In relation to the number of hours spent, it submits that on a proper interpretation of the legislation, official controls can only be performed by fully qualified OVs and that the FSA is accordingly not entitled to charge for official controls carried out by NOVs or TRNOVs (the "qualifications issue").

(1) The costs base issue

27. Battle under this head was waged in relation to:

    (a) The identification of the costs which could be considered for inclusion. This turned on the meaning of the words *"costs of items listed in Article 81"*;

    (b) The extent to which such costs could properly be considered to be incurred *"by an inspector... in exercising controls"*.

<u>Pre-Brexit</u>

28. I start with the uncontroversial proposition that MOCCR were originally introduced to provide for charges under the Predecessor OCR. At that stage, the position was entirely straightforward:

    (a) Paragraph 11 of Schedule 2 was drafted in precisely the same terms as now save that it referred to the *"costs of items listed in Annex VI [to the Predecessor OCR]"*. This was in conformity with Article 27 of the Predecessor OCR which stipulated that fees collected for the purposes of official controls should not be higher than the costs borne by the responsible competent authority in relation to the items listed in Annex VI.

    (b) Annex VI itself was headed *"CRITERIA TO BE TAKEN INTO CONSIDERATION FOR THE CALCULATION OF FEES"* and listed three items only:

    "1. the salaries of the staff involved in the official controls;

> 2. *the costs of the staff involved in the official controls, including facilities, tools, equipment, training, travel and associated costs;*
> 3. *the laboratory analysis and sampling costs."*

29. These provisions fell to be considered by the CJEU in the case of *Kødbranchens Fællesråd v Ministeriet for Fodevarer, Landburg og Fiskeri* (17 March 2016). The question for the court was whether, when calculating the fees charged to industry, the Danish authorities were entitled to include expenditure on the salaries and training of official auxiliaries where such auxiliaries did not conduct inspections either before or during such training.

30. At paragraphs 39-41 of its judgment, the court held as follows:

"39 In that regard, it should be observed that, whereas Article 26 of Regulation No 882/2004 provides for both the use of general taxation and the establishment of fees or charges to finance the provision of 'the necessary staff and other resources for official controls', Article 27 of that regulation refers only to fees and charges and, in paragraph (1) thereof, authorises the Member States to levy such fees and charges only to 'cover the costs occasioned by official controls'. It follows from the foregoing that the fees may be intended to cover only the costs which the Member States actually incur in performing controls in food establishments and their purpose is not to impose the cost of the initial training of those staff members on undertakings in the relevant sector.
40 Therefore, Annex VI to Regulation No 882/2004, to which Article 27 of that regulation refers, must be interpreted as referring exclusively to the salaries and costs of persons who are actually involved in performing the official controls.
41 Furthermore, it should be recalled that those controls, as noted in paragraph 29 of the present judgment, are normally carried out by the official veterinarians who may be assisted only by official auxiliaries or, in certain cases, by the slaughterhouse staff. It is not apparent from any provision of Regulation No 854/2004 that persons who follow the compulsory basic training for official auxiliaries may, during that training, participate in the performance of official controls."

31. This reasoning was subsequently applied in *Gosschalk v Minister for Agriculture, Nature and Food Quality of the Netherlands* (19 December 2019) where the court had to consider these provisions again, but this time in a context where the new OCR had come into force between the occurrence of the relevant events and the date of judgment. A number of questions were raised but the relevant ones for present purposes concerned the following:

    (a) The salaries of administrative and support staff involved in logistical organisation and monitoring and whether these were *"staff involved in the official controls"* within Annex VI to the Predecessor OCR, or whether the latter was limited to the salaries and costs of the OVs and official auxiliaries alone;

    (b) Whether it was permissible to include sums levied to cover salaries relating to official controls which had been booked but which were never paid (because the control was not carried out for some reason) on the basis that they could be reallocated to general overhead costs;

    (c) Whether contractors engaged by the Danish authority were entitled to build up buffer reserves to meet a potential crisis.

32. The court answered these questions as follows and I set out its reasoning at some length.

58 From that point of view, in accordance with Article 26 of Regulation No 882/2004, read in conjunction with recital 32 of that regulation, Member States must ensure that adequate financial resources are available, inter alia, to provide the staff necessary for the organisation of official controls.

59 To that end, Article 27(1) and (4)(a) of that regulation provides that Member States may collect fees or charges to cover the costs occasioned by official controls, provided that the fees collected for the purposes of official controls are not higher than the costs borne by the responsible competent authorities in relation to the items listed in Annex VI to that regulation.

60 Whereas it is clear that the effectiveness of official controls depends primarily on the quality of the inspection work carried out by official veterinarians and official auxiliaries, administrative and support staff also contribute to it.

61 As the Advocate General noted in point 49 of his Opinion, administrative and support staff are responsible for relieving official veterinarians and official auxiliaries of the logistical organisation of inspection work and for contributing to the monitoring of those controls, which is defined in Article 2(8) of Regulation No 882/2004.

62 Thus, monitoring fully contributes to ensuring the effectiveness of official controls, inter alia, by contributing to the identification of slaughterhouses where a risk exists and, accordingly, to determining the frequency of official controls, which should, according to Article 3(1) of Regulation No 882/2004, read in conjunction with recital 13 thereof, be regular and proportionate to the risk.

63 Thus, administrative support staff makes it possible for official veterinarians to focus on their inspection role in the strict sense.

64 As the Advocate General noted, in essence, in point 51 of his Opinion, the EU legislature, by stating that the system of financing must be established by the Member States to ensure 'the organisation' — and not just the 'performance' — of the official controls, intended the objective of such financing to be to enable the Member States to establish a comprehensive system of official controls which is not limited just to the actual performance of control tasks.

65 In those circumstances, such financing can also cover the salaries and costs of administrative and support staff.

66 However, in order not to exceed the costs borne by the responsible competent authorities in relation to the items listed in Annex VI to Regulation No 882/2004 or to infringe Article 27(4)(a) of that regulation or the principle of proportionality, only the time required by administrative and support staff for activities inextricably linked to the performance of official controls may be taken into consideration in the calculation of the fees.

67 It follows that Article 27(1) and (4)(a) of Regulation No 882/2004, read in conjunction with points 1 and 2 of Annex VI thereto, must be interpreted as meaning that Member States may consider the salaries and costs of administrative and support staff as being costs occasioned by official controls and as not exceeding the costs borne by the

competent authorities, in proportion to the time objectively required of that staff for activities inextricably linked to the performance of official controls.

68 In that regard, it must be noted that the term 'associated costs' in point 2 of Annex VI to Regulation No 882/2004, must be interpreted strictly, if the list in that annex is not to be rendered redundant. It is apparent from the wording of Article 27(4)(a) of Regulation No 882/2004 that that annex lists exhaustively the criteria that may be taken into consideration in the setting of the fees connected to the official controls carried out in slaughterhouses (judgment of 17 March 2016, Kødbranchens Fællesråd, C-112/15, EU:C:2016:185, paragraph 33).

69 The interpretation adopted in paragraph 67 above is supported by the historical context of EU legislation on official controls. As noted by the referring court and pointed out in paragraph 30 above, neither the wording nor the preparatory work of Regulation 2017/625 make it possible to discern any intention on the part of the EU legislature to depart from the system in force under Regulation No 882/2004. Similarly, neither the wording nor the preparatory work of Regulation No 882/2004 show any intention on the part of that legislature to depart from the interpretation of recoverable costs as referred to in Directive 85/73.

…

85 As noted in paragraph 59 above, it follows from Article 27(1)(a) and (4)(a) of Regulation No 882/2004 that fees may be levied only to finance costs actually occasioned by official controls and borne by the competent authority, within the meaning of Article 2(4) of Regulation No 882/2004.

86 It follows that, as contracted official veterinarians are not paid for quarter-hour periods requested but not worked, the competent authority cannot, without infringing Article 27(1) and (4)(a) of the regulation, levy in connection with the fee provided for in that article, sums corresponding to the remuneration that those veterinarians would have received had the quarter-hour periods requested been worked; such sums do not correspond to costs occasioned by official controls and actually borne by the competent authority.

87 Therefore, for each quarter-hour period requested but not worked, the competent authority, within the meaning of Article 2(4) of Regulation No 882/2004, may, at most, charge the slaughterhouse subject to control a sum corresponding to the amount of the fee less the salary costs of contracted official veterinarians, if it is established that the balance thus obtained genuinely corresponds to general costs falling within one or more categories of costs referred to in Annex VI to Regulation No 882/2004.

88 Having regard to the foregoing considerations, the answer to Question 3(b) in Case C-477/18 is that the answer to Question 3(a) in that case may also apply where, first, official controls have been carried out by contracted official veterinarians who are not paid for quarter-hour periods requested by slaughterhouses but not worked and, second, the share of the fee corresponding to those quarter-hour periods requested but not worked is allocated to covering the general overhead costs of the competent authority, within the meaning of Article 2(4) of Regulation No 882/2004, if it is established that the share of the fee relating to those quarter-hour periods does not include the unpaid salary costs of contracted official veterinarians and genuinely

corresponds to general overhead costs falling within one or more cost categories referred to in Annex VI to that regulation.

…

98 It follows from the wording of Article 27(4)(a) of Regulation No 882/2004 that the fees collected for the purposes of official controls can only compensate for the costs actually borne by the responsible competent authorities in relation to the items listed in Annex VI to that regulation. Moreover, Article 27(10) of that regulation provides that the Member States must not collect any fees other than those referred to in that article for the implementation of the regulation.

99 It follows from the foregoing that the fees for official controls may be used to cover only the costs which Member States actually incur in performing controls in food establishments (judgment of 17 March 2016, Kødbranchens Fællesråd, C-112/15, EU:C:2016:185, paragraph 39). Furthermore, as noted in paragraph 68 above, Annex VI to Regulation No 882/2004 lists exhaustively the criteria that may be taken into consideration in setting fees connected to official controls carried out in slaughterhouses.

100 In those circumstances, the financing of a provision such as that at issue in the main proceedings cannot be envisaged by means of fees collected pursuant to Article 27 of Regulation No 882/2004."

33. AIMS relies on paragraph 69 in support of its submission that the new OCR was not intended to depart from the interpretation of recoverable costs under the Predecessor OCR. It submitted that the court should therefore adopt a similar approach to the interpretation of MOCCR, since they had admittedly been introduced to implement the Predecessor OCR and had not been subsequently amended, either when the OCR was adopted in the UK or when it was later amended in 2024 and 2025.

34. It argued that the *ratio* of *Gosschalk* was that:

    (a) Charges can only relate to costs actually borne by the competent authority AND which are either:

        (i) incurred in the actual performance of official controls and are listed in Annex VI, which is an exhaustive list of what can be taken into account; or

        (ii) are overhead costs which are inextricably linked to the performance of official controls and genuinely correspond to one of the listed cost categories in Annex VI;

    (b) *"associated costs"* must be construed restrictively otherwise category 2 of Annex VI would be deprived of all meaning.

35. Mr Nardell submitted that the requirement for an inextricable link articulated in *Gosschalk* emphasised the need for a close relationship between the official control and any support activities and that the court seemed to have had in mind tasks that would otherwise have fallen on the OVs themselves, such as monitoring the results of official controls, and certainly not all costs that might be said to facilitate the system as a whole. (In this connection, I note that in paragraph 62 the court in *Gosschalk* was referring to monitoring the compliance record of FBOs, rather than supervision of the inspectors themselves.) He

further suggested that the decision on the accumulation of buffer reserves was relevant because it neatly illustrated the distinction between costs actually incurred in exercising official controls and other costs which were not, even though the latter may have been incurred for entirely sensible and laudable purposes. He also pointed to paragraph 8 of Schedule 2 of MOCCR which made express provision for the inclusion of overtime and allowances and suggested that this specific inclusion was a powerful indication that MOCCR were otherwise to be interpreted in a similarly strict fashion.

Post-Brexit

36. How, then, did the position change after the implementation of the OCR and Brexit?

37. As already stated, it is clear from the judgment in *Gosschalk* that the introduction of the OCR was not intended to bring about any change in the approach to charging. As originally enacted in the EU, Article 81 of the OCR amalgamated the provisions previously contained in Article 27 and Annex VI of the Predecessor OCR with some updating as follows:

"The fees or charges to be collected in accordance with point (a) of Article 79(1) and with Article 79(2) shall be determined on the basis of the following costs, insofar as these result from the official controls concerned:

(a) the salaries of the staff, including support and administrative staff, involved in the performance of official controls, their social security, pension and insurance costs;

(b) the cost of facilities and equipment, including maintenance and insurance costs and other associated costs;

(c) the cost of consumables and tools;

(d) the cost of services charged to the competent authorities by delegated bodies for official controls delegated to these delegated bodies;

(e) the cost of training of the staff referred to in point (a), with the exclusion of the training necessary to obtain the qualification necessary to be employed by the competent authorities;

(f) the cost of travel of the staff referred to in point (a), and associated subsistence costs;

(g) the cost of sampling and of laboratory analysis, testing and diagnosis charged by official laboratories for those tasks."

38. As with the list in Annex VI, the list of costs in Article 81 was exhaustive, albeit somewhat expanded. It also seems tolerably clear that the amendment to point (a) to refer to support and administrative staff was intended to give effect to the decision in *Gosschalk.*

39. Article 81 has not subsequently been amended in the EU. It has, however, been amended twice in the UK as part of a broader set of amendments, so that it now reads as follows (amendments shown in bold):

"The fees or charges to be collected in accordance with point (a) of Article 79(1) and with Article 79(2) ***may*** *be determined on the basis of* ***the costs of official controls and costs connected with official controls, including but not limited to****:*
(a) the salaries of the staff, including support and administrative staff, involved in the performance of official controls, their social security, pension and insurance costs;
(b) the cost of facilities and equipment, including maintenance and insurance costs and other associated costs;
(c) the cost of consumables and tools;
(d) ***costs borne by the competent authorities in connection with their duties under this Regulation and legislation made using the powers included in this Regulation, including in respect of -***
(i) the delegation of official controls;
(ii) the collection and recovery of debts, including for unpaid fees;
(e) the cost of training of the staff referred to in point (a), with the exclusion of the training necessary to obtain the qualification necessary to be employed by the competent authorities;
(f) the cost of travel of the staff referred to in point (a), and associated subsistence costs;
(g) the cost of sampling and of laboratory analysis, testing and diagnosis charged by official laboratories for those tasks.

40. Neither of the Explanatory Notes introducing the amendments makes any specific reference to Article 81. Indeed the Explanatory Note to the 2025 amendments merely states that:

"Part 2 amends the Official Controls Regulation. This includes amendments to enable official plant health officers to carry out more functions, the removal of a requirement for all imported consignments to be subject to a documentary check, an expansion of the available exemptions from official controls, including of the powers to set these, and provision for both civil sanctions and appeals against decisions made under the legislation."

41. There was no prior consultation on either set of amendments and in neither case was any full impact assessment carried out *"as no, or no significant impact on the private, voluntary or public sector is foreseen."* Importantly, despite these amendments to the OCR, MOCCR were left untouched.

The rival submissions

42. Against this background, it is common ground that there is a limit to the extent of overhead costs which can be taken into account by the FSA in arriving at its cost base. On the one hand, AIMS does not argue that all overheads must be excluded. On the other, the FSA equally does not say that all overheads can be included. The dispute is as to where the line should be drawn.

43. AIMS' case can be summarised as follows:

(a) The interpretation placed by the CJEU on Article 27 and Annex VI of the Predecessor OCR in *Kødbranchens* and *Gosschalk* still holds good for Article 81. Article 81 should therefore be limited to the costs of actually performing official controls (e.g., the salaries of the inspectors and travel/subsistence) and overheads which are actually

borne by the FSA, genuinely relate to one or more of the listed categories in the Article and are *"inextricably linked"* to the performance of official controls.

(b) Not only is this the interpretation placed on the Predecessor OCR, but it was also clearly the intention of the domestic legislator in drafting MOCCR which, in paragraph 11, limited chargeable costs to a proportion of the costs of the items listed in Annex VI *"incurred by an inspector in exercising controls"*.

(c) Costs can only sensibly be regarded as being *"incurred by an inspector in exercising controls"* if they are an inseparable part of the performance by that inspector of those controls. Such costs do not include costs incurred by the competent authority for quality control purposes or for supervision of the overall system or supervision of the inspectors themselves.

(d) The same approach should be adopted by parity of reasoning now that Annex VI has been replaced with a reference to Article 81. There is nothing in the language of the unamended Article 81 or in the Commission proposal to suggest that it was intended to introduce any broader recovery with regard to overheads. To the contrary, *Gosschalk* confirms that there was no intention to bring about any change of approach to charging.

(e) The 2024/2025 amendments to Article 81 in England do not alter that position. If the domestic legislator had intended to permit broader recovery of costs, then MOCCR would also have been amended over and above the mere substitution of a reference to Articles 81 and 82 in place of Annex VI.

(f) Furthermore, to increase the extent of costs imposed on industry would skew the supposedly level playing field against domestic FBOs. It must be assumed that this was not the intention of the domestic legislator, particularly given the Trade and Co-operation Agreement and the lack of any impact assessment.

(g) The wording of Article 81 is in any event only permissive, not mandatory. It is common ground that Article 81 does not itself contain a power to charge. The power to charge derives only from MOCCR which may, but need not, authorise charges to the full extent of Article 81. There is accordingly no conflict between MOCCR and Article 81 in any event, although if there were, MOCCR as the domestic provisions would take precedence by virtue of section 5(A2) of EUWA.

44. The response of Mr Adam Heppinstall KC on behalf of the FSA was short and to the point. The only obligation under paragraph 11 of Annex 2 of MOCCR is to *"reflect"* a proportion of the costs listed in Article 81 and this wording is apt to include anything falling within the ambit of the Article. The amendments to Article 81 made in 2024 and 2025 not only introduced a permissive *"may"* but also explicitly authorised the recovery of costs *"connected with official controls, including but not limited to"* the categories thereafter set out. The combined effect of these provisions gives the FSA a large element of discretion and effectively authorises the recovery of overheads which are *"connected with"* official controls, including all costs which facilitate the conduct of official controls. The only proviso is that the charges cannot exceed costs actually incurred. Even if that is wrong, in accordance with the *Gosschalk* test, the FSA is entitled to recover all costs which are *"inextricably linked"* to the performance of official controls, and all the costs which it has

included in the calculation of the Main Rate satisfy this test because their purpose was to facilitate the carrying out of official controls.

Discussion

45. Prior to the 2024 and 2025 amendments, there was no difficulty in applying paragraphs 7-11 of MOCCR because Article 81 (like its predecessor Annex VI) set out an exhaustive list of items which could be included in the charges. The FSA's case is that the amendments entitle it to charge for the entire range of costs that it incurs provided that they are costs of or *"connected with"* official controls.

46. I cannot accept this argument. First, it seems to me to start in the wrong place by commencing with the wording of Article 81. However, the starting point can only be MOCCR, because (as is common ground) it is only MOCCR which contain an authorisation to charge. Paragraph 11 of Schedule 2 of MOCCR refers specifically to costs incurred by an inspector *"in exercising controls"*. It does not say anything about costs incurred by the FSA or a contractor, or costs *"connected with"* the exercise of controls, or costs which *"facilitate"* the carrying out of official controls. Undoubtedly Article 81 *permits* charges to be authorised on a wider basis which includes costs connected with official controls or which facilitate official controls and such costs may potentially range more widely than the specific categories set out in Article 81. However, Article 81 itself does not impose any charge or levy and if it had been intended that such costs should be recovered, then appropriate amendments should have been made to MOCCR.

47. Such an interpretation is consistent with the decision of the Supreme Court in *Fry* that CJEU case law on the interpretation of EU legislation is part of the context for understanding the objective and purpose of that legislation as assimilated into UK domestic law. It is also consistent with section 6(3) of EUWA. Despite the amendment to Article 81 in the UK, there is nothing to suggest that any change in the scope of charging was intended and the application of assimilated case law to the interpretation of the provision is accordingly entirely orthodox.

48. I also reject the FSA's argument that it can reach the same result by reading the words *"items listed"* in paragraph 11 as including the chapeau to Article 81. First, I do not regard the natural meaning of *"items listed"* as including introductory or prefatory wording. More importantly, it seems to me that such a reading would be contrary to the EU interpretation of the legislation which MOCCR were designed to implement and unless I can discern any intention in the amendments to alter that approach, I am entitled to apply that interpretation. In my judgment, much clearer wording would be needed in MOCCR to achieve the result for which the FSA contends.

49. Further, it seems unlikely that the domestic legislator intended to depart from the EU interpretation since that would have been to disadvantage the domestic industry as against its EU competitors. There is force in AIMS' submission that if that had been intended or perceived as a likely consequence one would have expected an impact assessment to be carried out. As it is, no such impact assessment was performed and there is nothing in the Explanatory Notes to suggest an intention to impose any increased burden on industry. To the contrary, it is expressly stated that no such impact was foreseen, which no doubt explains why there were no impact assessments.

50. But even if I am wrong about all that, paragraph 11 of Schedule 2 limits the hourly rate to a proportion of the costs *"incurred by an inspector … in exercising controls"*. On the *Gosschalk* test of 'inextricable link' this may or may not include some costs which can also be described as *"connected with official controls"* but there is no necessary implication that it includes all such costs. If that were the case, one would have expected MOCCR to be amended simply to refer to *"the costs set out in Articles 81 and 82"* without any reference to them having been *"incurred by an inspector ... in exercising controls"*. Thus the full range of costs contemplated by the chapeau of Article 81 is not automatically within the scope of paragraph 11 in any event.

51. For all these reasons, I accept AIMS' submission that the recovery of overheads is limited to costs which are incurred by an inspector in exercising official controls or are inextricably linked to the exercise of official controls and which genuinely relate to one or more of the specified heads in sub-paragraphs (a)-(g) of Article 81. Insofar as the FSA has adopted a different approach, it is in my judgment wrong in principle.

52. As to whether costs have been included unlawfully as a result, the FSA complains that AIMS has not explained what costs are or are not *"inextricably linked"* with official controls. That particular phrase is, of course, derived from *Gosschalk* so it is a question of discerning the *ratio* of that decision. The court in *Gosschalk* gave the example of administrative support which relieved OVs of tasks which they would otherwise have had to do for themselves. This is a question of fact and it is difficult to draw a bright line in the abstract. This is an exercise best done by reference to specific facts. However, a useful threshold rule of thumb might be to ask whether an official control can be performed without the activity in question. If it cannot, then the activity will almost certainly be inextricably linked to the performance of the official control. Transport, subsistence and equipment maintenance spring readily to mind. If, on the other hand, the official control can be performed without the activity in question, it may well not be inextricably linked, although this will not necessarily be the case. Each activity will have to be scrutinised with some care since payroll costs, for example, might well be considered as indispensable for the performance of official controls whereas the provision of wellbeing days for OVs might not.

53. The extent to which the FSA has included items falling outside the permissible scope is not entirely clear from the Cost Data Slides and this ties in with AIMS' challenge under Ground 3. That said, it is a fair assumption that if the FSA has relied exclusively on the untrammelled wording of Article 81 in arriving at its cost base, it is likely to have included some costs for which it had no power to charge. Paragraph 15 of Mr Churchyard's first witness statement, for example, refers to *"costs directly and wholly incurred in order to provide controls"* which, self-evidently, is not necessarily the same as costs incurred *"in exercising controls"*.

54. Relying on the evidence of Mr Hewson, AIMS has calculated that the percentage of overheads included by the FSA far outstrips the actual salary costs of the OVs involved. It submits that, so far as one can tell from the Cost Data Slides and subsequent correspondence, the FSA has included costs such as:

    (a) Internal audit and quality control of the inspections;

(b) Performance management and governance, including the supervision of inspectors;

(c) Dealing with Parliamentary questions and complaints handling.

55. I agree that none of these can form part of the permissible charge, both because they are not costs incurred *"by an inspector"* and because they are not costs incurred *"in exercising controls"* or *"inextricably linked"* to the performance of official controls. Such costs may well facilitate, or be a necessary or desirable part of the overall system. No-one, least of all AIMS, suggests that such activities are not a thoroughly good idea. But that is not sufficient to enable the costs of such activities to be recovered through charges on industry. In this connection, I note Article 6(1) of the OCR which provides that:

"To ensure their compliance with this Regulation, the competent authorities shall carry out internal audits or have audits carried out on themselves and shall take appropriate measures in the light of the results of those audits."

56. This makes it abundantly clear that the costs of internal audit are to ensure the compliance of the *competent authorities* with the OCR, as distinct from official controls which are to ensure the compliance of *FBOs* with the Regulations. As such, internal audits cannot themselves be official controls but are, at best, other official activities. This is further confirmed by the Commission Notice on the implementation of the OCR which points out that *"the verification of compliance of the competent authority with OCR rules would not be considered an 'official control', because the 'competent authority' in the meaning of Article 32(3) of the OCR is not an 'operator' in the meaning of Article 3(29) of that Regulation."* AIMS finally points out in its Statement of Facts and Grounds that since the FSA has not delegated any of its functions to its contractors, the contractors' costs of supervising inspectors are not recoverable in any event.

57. I therefore conclude that both the direct and indirect costs attributable to the activities mentioned in paragraph 54 above fall outside the scope of chargeable costs.

58. In his evidence on behalf of the FSA, Mr Churchyard states that Mr Hewson's calculations are incorrect. However, this rather misses the point. Mr Churchyard does not deny that the costs base includes a large overhead component but, at present, it is unclear quite what and to what extent. Paragraph 19 of his first statement refers, for example, to costs for *"corporate staff", "operational management team"* and *"UK graduate bursaries"*. He also accepts that the FSA has charged for *"operational assurance costs"* including *"contract and Service Level Agreement management"*. It is far from evident to me how any of these fall within paragraph 11.

(2) The qualifications issue

59. Article 18 of the OCR provides, amongst other things, that ante-mortem inspections in slaughterhouses are to be performed by an OV, while post-mortem inspections are to be performed either by an OV, or under the supervision of the OV or, where sufficient guarantees are in place, under the responsibility of the OV. Article 17 defines what is meant by these concepts:

(a) *"under the responsibility of the official veterinarian"* means that the OV assigns the performance of an action to an official auxiliary;

(b) *"under the supervision of the official veterinarian"* means that the action is carried out by an official auxiliary under the responsibility of the OV and that the OV is present on the premises at the time.

60. In practical terms, therefore, both ante-mortem and post-mortem inspections require the involvement of an OV.

61. Article 3(32) of the OCR defines an OV as:

"a veterinarian appointed by a competent authority, either as staff or otherwise, and appropriately qualified to perform official controls and other official activities in accordance with this Regulation …"
Article 13 of the Qualifications Regulation provides that:
"Official veterinarians performing tasks provided for in Article 18 of [the OCR] shall comply with the minimum specific requirements set out in Chapter I of Annex II to this Regulation.

62. Chapter 1 of Annex II provides that:

"1. The competent authorities may appoint as an official veterinarian only veterinarians who have passed a test meeting the requirements set out in point 3.
[Points 2 and 3 deal further with the content of and arrangements for the prescribed test.]
4. The official veterinarian must have aptitude for multidisciplinary cooperation.
5. Each official veterinarian must undergo practical training for a probationary period of at least 200 hours before starting to work independently. Relevant training during veterinary studies may be included in the probationary period. During this period the probationer is to work under the supervision of existing official veterinarians in slaughterhouses, cutting plants and on holdings…
6. The official veterinarian must keep up-to-date and keep abreast of new developments through regular continuing education activities and professional literature in the areas referred to in point 3. The official veterinarian must, wherever possible, undertake annual continuing education activities."

63. The challenge under this head centres on the status of NOVs and TRNOVs. As already indicated, these are not categories which are contemplated by the legislation but were devised by the FSA itself in order to address a shortage of qualified OVs following Brexit. NOVs are vets who have not yet completed the prescribed probationary period. TRNOVs are those who are not registered as members of the RCVS (usually because they have not demonstrated proficiency in English to the required standard) but have been given a temporary registration otherwise than as members. I was informed that there is in fact only one person left in this category.

64. On behalf of AIMS, Mr James Burton (supported by the NFU) submitted that:

(a) Article 13 of the Qualifications Regulation makes it mandatory for an OV to comply with the *"minimum specific requirements set out in Chapter I of Annex II"*;

(b) As a matter of statutory interpretation, compliance with all the paragraphs of Chapter I is a pre-condition to eligibility for appointment as an OV, save only for paragraph 6 which is obviously an ongoing requirement, relating, as it does, to continuing professional development;

(c) NOVs cannot therefore be OVs as they have not, by definition, satisfied the mandatory probationary requirement;

(d) TRNOVs cannot be OVs as they do not satisfy the FSA's own eligibility requirement contained in its Manual for Official Controls of being a member of the RCVS;

(e) It follows that NOVs and TRNOVs cannot carry out official controls independently and even if it is lawful for them to do so under supervision (not an issue directly before me for decision), the FSA is not entitled to include either their costs or the costs of their supervision in arriving at its cost base for the hourly rate.

65. For its part, the FSA pointed to the obvious difficulty of regarding the continuing professional development requirement in paragraph 6 of Chapter I as a *pre-condition* to appointment as an OV. It argued that, as a matter of interpretation, the only mandatory pre-condition for eligibility was the test specified in paragraphs 1-3 of Annex II Chapter I. Even if a vet was still in his or her probationary period, that did not mean that they could not carry out official controls at all, only that they could not do so independently but only under supervision. They were nonetheless still OVs and properly to be regarded as such.

66. In my judgment, AIMS and the NFU are correct in their interpretation of the Qualifications Regulation.

67. The required qualifications for a person carrying out official controls were originally contained in the predecessor of the Qualifications Regulation. They were considered in *Kødbranchens* where the court held at paragraph 41 that there was nothing in them to suggest that people undergoing mandatory training to become official auxiliaries could themselves participate in the performance of official controls. Those earlier regulations were replaced by the Qualifications Regulation but, as recital 3 makes clear:

"The rules laid down in this Regulation should ensure a continuation of the requirements currently laid down in [the earlier Regulation] taking into account the experience gained since the date of adoption of that act, as well as new scientific evidence…"

68. Paragraph 1 of Annex II Chapter I provides that a vet must pass a test in the prescribed form before they can be appointed as an OV. It does not say that they may be regarded as an OV as soon as they have passed that test. The French text of the Regulation (which was shown to me at my request without objection) is to the same effect. In other words, passing the test is a necessary but not sufficient requirement for becoming an OV.

69. In my judgment, the wording of paragraph 5 most naturally means that a vet has to undergo practical training before they can become an OV. While I accept that the provision can be read as the FSA submits, I regard my preferred interpretation as confirmed by the following:

(a) Relevant training in veterinary studies may be included in the probationary period. However, if a vet is still undergoing veterinary training despite having passed the

prescribed test, it cannot sensibly have been intended that they should be regarded as an OV, whether or not working independently;

(b) Paragraph 5 refers to the vet during this probationary period as a *"probationer"* rather than an OV;

(c) Probationers have to work under the supervision of *"existing"* OVs, implying that they do not themselves become OVs until the probationary period has been completed.

70. Further support can be found in Article 13 itself which allows a derogation for students who have passed the prescribed test in paragraph 3 of Chapter I and who are temporarily working in the presence of an OV. This provision is significant for two reasons. First, it draws a clear distinction between an OV and a student who has passed the test and is still being supervised. Secondly, the fact that a special derogation is needed for such students gives rise to the inevitable inference that, absent such derogation, they are not OVs and cannot be regarded as such.

71. This is also consistent with paragraph 1.1.2 of the FSA's own Manual for Official Controls which provides that in order to be eligible for appointment as an OV, a candidate must (amongst other things) *"have successfully completed their practical probationary period and passed the assessment which is conducted at the end of the probationary period."* This being a lawful policy, it would be expected that the FSA would follow it.

72. The FSA makes the fair point that the Manual only deals with eligibility for appointment as an OV *by the FSA*, rather than qualifications for the purposes of the Qualifications Regulation more generally. However, these are its published criteria and they are far from consistent with the interpretation that the FSA advanced before me. Moreover, if the FSA were correct, the consequence would be that NOVs would be entitled to supervise official auxiliaries pursuant to Article 17 of the OCR, which I consider to be a most unlikely intention to ascribe to the legislator.

73. In relation to TRNOVs, I regard it as irrelevant that they may be fast becoming an endangered species. The issue has to be addressed as a matter of principle and charges for both NOVs and TRNOVs will necessarily have affected the FSA's calculations of the charging rates to some extent. In any event, there may yet be more TRNOVs to come in the future and it cannot therefore be said that this is an entirely sterile debate.

74. It follows in my judgment that the FSA was not entitled to include the costs of employing NOVs and TRNOVs in the cost base, or to charge for the hours spent by them.

75. This conclusion makes it unnecessary to consider the further point made by the NFU that, even if it were lawful to charge for NOVs while working under supervision, such supervision had to be in person and could not be remote. Mr Birdling KC, who addressed me on behalf of the NFU, relied on the wording of paragraph 5 which he argued required the supervising OV to be on the premises at the time of the relevant activity. He drew an analogy with the definitions in Article 17 of the OCR. Mr Heppinstall, on the other hand, submitted that paragraph 5 only identified those locations where the NOV required supervision, while the supervision itself could be remote. He argued that the definitions in

Article 17 were only concerned with official auxiliaries and since (on this hypothesis) NOVs were already OVs, they did not require in-person supervision in the same way.

76. On that premise, I accept that the textual arguments are finely balanced. However, since I consider the premise to be incorrect, I say no more about it.

D: Ground 2 – Enforcement Rate

77. Ground 2 sought to challenge the Enforcement Rate applied by the FSA. Again, the applicable legislation does not contemplate separate Main and Enforcement Rates. The categorisation was apparently devised by the FSA in response to an industry request that the costs of enforcement action should be borne primarily by those in respect of whom enforcement action had to be taken rather than being borne by innocent FBOs as well.

78. It emerged that there had been a considerable amount of confusion on all sides as to the source of FSA's power to charge for enforcement activities and this extended, regrettably, to the court as well.

79. The FSA's initial assertion that its power to charge derived from Article 80 of the OCR was abandoned in correspondence when it was pointed out that the competent authority for the purposes of Article 80 was the Secretary of State and not the FSA. Matters then proceeded for a while on the (apparently) common assumption that the relevant power was contained in Article 10 of the Fees Regulations which provides that:

"Any expenses incurred by… a designated authority in carrying out enforcement activities under these Regulations, or measures under Articles … 138 [of the OCR] may be recovered from the relevant business operator, and such expenses must be paid on written demand."

80. Article 138 of the OCR is in the following terms:

*"**Actions in the event of established non-compliance***
1 Where the non-compliance is established, the competent authorities shall take:
a any action necessary to determine the origin and extent of the non-compliance and to establish the operator's responsibilities; and
b appropriate measures to ensure that the operator concerned remedies the non-compliance and prevents further occurrences of such non-compliance.
When deciding which measures to take, the competent authorities shall take account of the nature of that non-compliance and the operator's past record with regard to compliance.
2 When acting in accordance with paragraph 1 of this Article, competent authorities shall take any measure they deem appropriate to ensure compliance with the rules referred to in Article 1(2), including, but not limited, to the following:
…
f order certain activities of the operator concerned to be subject to increased or systematic official controls;
…
3 The competent authorities shall provide the operator concerned, or its representative, with:
a written notification of their decision concerning the action or measure to be taken in accordance with paragraphs 1 and 2, together with the reasons for that decision;
…

4 All expenditure incurred under this Article shall be borne by the responsible operators."

81. On that basis AIMS made written and oral submissions as to why at least some of the components included in the Enforcement Rate could not lawfully be charged and that was the basis on which I too proceeded in my initial draft judgment circulated to the parties. It was then helpfully drawn to my attention that I had misunderstood the position and overlooked the abandonment of Article 10 by Mr Heppinstall in his skeleton argument and oral submissions on the basis that, once again, it was the Secretary of State and not the FSA which was the relevant designated authority. Article 10 too was thus consigned to the dustbin of history along with Article 80.

82. Instead, the FSA pinned its colours to the mast of Article 138(4), a position which it had previously expressly disavowed in paragraph 60 of its Detailed Grounds of Resistance. Conversely, AIMS argued in reply that Article 138(4) did not on its proper interpretation confer a free-standing power to levy but required domestic implementation, notwithstanding that its skeleton argument had been rather less categoric in this regard, accepting that the language was obscure (while making the point (on its then understanding that Article 10 was the operative provision) that Article 138 was expressly referenced in Article 10 and so added nothing in any event).

83. I agree that the language of Article 138 could be clearer. On the one hand, Article 138(1) mandatorily requires the competent authority to take certain actions, while Article 138(4) provides that all expenditure incurred under the Article (which, be definition, can only have been by the competent authority) shall be borne by the operators. Since the Article thus identifies the person incurring the expenditure and the persons who are to bear it, it is hard to resist inferring that the intention of the legislator was to join the dots and confer on the former the power to impose the necessary charges on the latter without the need for further implementing legislation. Otherwise, while the Secretary of State could recover his or her costs of enforcement activities under Article 10, there would be no mechanism whereby the FSA as the competent authority could do likewise. This inclines me to the view that, contrary to the parties' initial positions, Article 138(4) does authorise the imposition of charges by the FSA - although this by no means concludes Ground 2 in the FSA's favour, as discussed below.

84. The FSA further argued it could charge for enforcement activities under Article 79(2)(c) of the OCR which provides that:

"The competent authorities shall collect fees or charges to recover the costs they incur in relation to:

...

c official controls which were not originally planned, and which;

(i) have become necessary following the detection of a case of non-compliance by the same operator, during an official control performed in accordance with this Regulation; and

(ii) are performed to assess the extent and the impact of the case of non-compliance or to verify that the non-compliance has been remedied."

85. As is clear from the wording of the Article – and, indeed, was not ultimately contentious, Article 79(2)(c) is limited to *official controls* which were originally unplanned etc. and is thus inapt to permit charges to be levied for enforcement activities generally. I therefore

agree with the NFU's submission that the costs of official controls related to enforcement are different in principle from the costs of other enforcement activities and that it is not possible to have costs which are recoverable as both the costs of official controls under Article 79(2)(c) and the costs of enforcement actions/measures once an official control has established a non-compliance.

86. That said, I see no reason in principle why the FSA should not recover the costs of enforcement-related official controls under Article 79(2)(c) at a different rate to that applied to other official controls if it so chooses. However, the fact that Article 79(2)(c) is limited to official controls necessarily means that any charges for those controls would have to meet all the requirements discussed under Ground 1. Thus the rate for enforcement official controls would have to be calculated separately by reference to the costs and time specifically related to those specific official controls. Not only will this be a different calculation to that for other enforcement activities but it will also be a different calculation to that for other official controls.

87. Accordingly, (i) the FSA was not entitled to charge an undifferentiated Enforcement Rate for both enforcement official controls and other chargeable enforcement activities and (ii) if the same indirect costs have been included in the cost base for both the Main Rate and the Enforcement Rate, that is in my judgment unlawful.

88. Turning back to Article 138, AIMS (supported by the NFU) submitted that:

    (a) Article 138 in terms only applies where non-compliance has already been established and covers actions to determine the origin and extent of non-compliance and appropriate measures taken to remedy the same and prevent recurrence. By necessary implication, therefore, it only covers enforcement activities which are not in themselves official controls. The existence of non-compliance may have been established by the exercise of official controls but these are separately provided for so far as charging is concerned.

    (b) Furthermore, Article 138(1) contemplates that any actions or measures taken by the FSA will be the subject of a decision, and Article 138(2) requires written notice to be given of such decision.

    (c) The lack of transparency means that it is impossible to tell exactly what has been included in the Enforcement Rate, although it apparently includes a proportion of Main Rate indirect costs.

    (d) The FSA has also confirmed that it includes charges for the provision of written advice regarding non-compliance. The evidence is that the FSA has charged for the time spent by contractor staff in preparing advice which is then signed and sent out by a member of the FSA's staff. However, written advice is not a decision as to actions/measures within Article 138 and, in any event, since the FSA has not delegated any of its enforcement functions to the contractors, it cannot charge for contractor time as if it were its own. For either or both of these reasons, the costs of providing written advice cannot be recovered.

89. I accept that there can be no overlap between Article 138 and official controls. I also accept that Article 138 does not cover the provision of written advice, save insofar as the written advice itself amounts to written notification of a decision concerning action/measures following an established non-compliance. Moreover, since written advice is not an action to verify compliance within the meaning of Article 2 of the OCR, it cannot itself be an official control and is therefore not recoverable under Article 79(2)(c). Indeed, I regard the contrary as almost unarguable.

90. The question of self-reported non-compliance was also raised before me. While I can see that the costs of addressing this might fall within Article 138, I fail to see how they could be covered by Article 79 and indeed this was accepted by the FSA.

91. On this basis, it follows that the FSA has included at least some matters in the calculation of the Enforcement Rate which it was not lawfully entitled to take into account.

E: Ground 3 – Lack of transparency

92. It was a recurrent theme of AIMS' submissions that there was insufficient breakdown in the Cost Data Slides to enable a reader to understand whether it was being charged lawfully or not. They claimed in particular that the "direct costs" included in the Main Rate had not been broken down to show how much was being claimed for OVs as opposed to NOVs and TRNOVs, or how much was attributable to the supervision of different categories of inspector. The latest iteration of the Cost Data Slides only gave figures *"inc Management"* without specifying what that comprised. It had also requested copies of the last three exam papers for official veterinarians and the pass/fail results for each but in vain.

93. The FSA, on the other hand, maintained that it had given a sufficient breakdown of its costs in the Cost Data Slides and that it was under no duty to ask its contractors to break down their costs so as to split out the management component. It pointed out that the overhead component could be worked out in any event. As regards the exam papers, these were irrelevant because only vets who passed the exam were appointed and in any event, the papers were held by the exam provider (in this case Bristol University) and were accordingly outside its control.

94. I was referred by both parties to *R (Gill) v Food Standards Agency,* [2022] EWHC 1709 (Admin) where Mostyn J addressed the duty of transparency imposed by Article 85 of the OCR in the following terms at [21]-[22]:

"The wording of Article 85, read against the backdrop of Recitals 39 and 68, tells me that:

i) the duty of transparency is "high"'

ii) it must have been formulated following consultation with FBOs;

iii) it must reflect the obligation of accountability of the FSA to the meat industry and the public at large;

iv) it is owed formally to the public alone, meaning that there is only one standard of transparency;

v) it specifically requires a high level of transparency as regards:

a) *the total costs, broken down by reference to the categories in Article 81, that are sought to be charged to FBOs by way of fees;*

b) *the method and data used to calculate the hourly rates, and*

c) *the amount of the charges then calculated.*

22. If a non-tangible thing, such as a piece of information is required to be transparent then the person considering the thing must be able to drill down to its foundations and thereby to understand how the thing has been constituted. Therefore, the 'high level of transparency' required by Article 85 means that sufficient information must be provided to enable a reasonably astute member of the public to understand, broadly (and I emphasise broadly) how the hourly rates have been calculated. This means that the source data must be clearly stated, and the steps in the calculation process clearly explained, using plain English."

95. Given the conclusions I have already reached on Grounds 1 and 2, Ground 3 does not add much and I therefore say little about it save that, while a reasonably astute member of the public probably could understand from the mapping exercise in Annexes 3 and 4 of the Cost Data Slides that some indirect costs had been included which do not fall within the scope of permissible charges on a proper interpretation of the legislation, it is far from clear whether anything else has been included which should not have been. For example, in one of the slides addressing the transparency requirements of *Gill*, the FSA referred to costs being included in the Main Rate which *"result from the official controls concerned"* and the inclusion of a reasonable proportion of overheads *"that fairly reflects the provision of official controls"*. However, neither of these is the correct touchstone. In accordance with paragraph 11 and *Gosschalk*, the correct test is whether the costs have been incurred *"in exercising controls"* or are inextricably linked with the provision of official controls.

96. I am inclined to the view that Article 85 requires the costs to be broken down in such a way as to enable the reader to form a view as to whether they are expenses incurred in accordance with the interpretation of the legislation which I believe to be correct. This would necessarily require separating FSA staff from contractor staff, and OVs from NOVs/TRNOVs, and identifying heads of cost with sufficient particularity to be able to tell whether they are inextricably linked with official controls (Main Rate), or are costs of Article 79 official controls, or of actions/measures within Article 138 (Enforcement Rate).

97. As it is, however, I have been able to determine that at least some costs have been unlawfully included in the assessment of both the Main Rate and the Enforcement Rate. Since it is impossible for me to separate these out, it follows that the calculations of both rates as whole must be quashed, as well as the Cost Data Slides in so far as they relate to the Main Rate and Enforcement Rate.

98. I will hear counsel on the appropriate form of order and costs.