



NCN: [2026] UKFTT 00104 (GRC)

Case Reference: FT/EA/2025/0112

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Heard by: CVP  
Heard on: 19, 20 and 21 November 2025  
Decision given on: 26 January 2026**

**Before**

**JUDGE SOPHIE BUCKLEY  
MEMBER JO MURPHY  
MEMBER RAZ EDWARDS**

**Between**

**SA CERTIFICATION LTD**

**Appellant**

**and**

**(1) THE INFORMATION COMMISSIONER  
(2) WILDFISH CONSERVATION**

**Respondents**

**Representation:**

For the Appellant: Stephen Kosmin (Counsel)

For the First Respondent: Reuben Andrews (Counsel)

For the Second Respondent: Estelle Dehon KC (Counsel)

**Decision:** The appeal is dismissed

# REASONS

## Introduction

1. I apologise for the delay in promulgation which arose out of the need to seek further submissions and leave of the Judge and panel members over the Christmas period.
2. This is a long decision, in part because it was of assistance to the Judge and the panel members to set out the arguments of the parties in detail. The decision is accompanied by an open annex which contains a detailed summary of the skeleton arguments and oral submissions.
3. The structure of the main decision is as follows:

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4. This appeal arises out of a request for information dated 24 May 2024, made by WildFish Conservation (WildFish) to SA Certification Limited (SA Certification) for inspection reports associated with the certification of organic salmon farms.
5. The appeal is made against the Commissioner's decision notice IC-324806-C7N7 of 10 February 2025 which held that SA Certification was a public authority for the purposes of the Environmental Information Regulations 2004 (EIR).
6. The following regulations contain the relevant regulatory framework:
  - a. Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (Retained EU legislation) - 'Regulation 834/2007'
  - b. Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control (Retained EU Legislation) - 'Regulation 889/2008'
  - c. Commission Regulation (EC) No 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries (Retained EU Legislation) - 'Regulation 1235/2008'
  - d. The Organic Product Regulations 2009 - 'the OPR'.

## **Factual background**

7. SA Certification is a wholly owned subsidiary of Soil Association Ltd, which is a company limited by guarantee and a not-for-profit registered charity. SA Certification is an accredited certification body for the delivery of certification under a number of regulations and standards. SA Certification has been applying its own certification standards since about 1976. It was incorporated on 15 June 1962.

8. The Department for Environment, Food and Rural Affairs (Defra) is obliged, under assimilated EU and domestic legislation to maintain a 'control system' for the labelling of organic products. As part of that obligation Defra is permitted to delegate control tasks to one or more 'control bodies'. SA Certification has been a control body since EU regulation was introduced in 1991. It is currently one of six control bodies in the United Kingdom.
9. The Approval Document, by which Defra approves SA Certification as a control body, sets out that:

"2. SA CERTIFICATION LTD shall undertake the functions of a control body required under the assimilated EU Regulations. In relation to any individual operator in respect of which SA CERTIFICATION LTD acts as a control body, the control body's activities are referred to in this document as "licensing", and like terms in this document should be construed accordingly. The approval certified in this document in respect of SA CERTIFICATION LTD is limited to licensing the scopes of operation accredited by UKAS and indicated in the accreditation schedule on the UKAS website

...

4. As a control body, subject to the approval continuing in effect SA CERTIFICATION LTD has the powers and functions provided for in regulations 3(2) and 5 of the Organic Products Regulations 2009, and in addition to those functions and the functions referred to in paragraph 2 above, Defra delegates the further function of receiving applications made under Articles 36 and 37 of assimilated Commission Regulation 889/2008 to reduce conversion periods required under Article 17 of assimilated Council Regulation 834/2007, so far as they may be exercised in respect of the operations described in Paragraph 2 above."

10. Annex 1 of the Approval Documents sets out the Conditions that SA must comply with, including:

"7. SA CERTIFICATION LTD will provide Defra with the following information:

By the tenth day of each month, details of new licensees, suspensions and terminations for the previous month. Defra requires this information to monitor the situation concerning organic operators.

By 31 January at the latest each year, a list of their licensees as at 31 December of the previous year (using Form A1 attached at Annex 3 to this document). This is required by Article 27(14) of assimilated Council Regulation 834/2007.

By 16 February 2025 at the latest, a summary report of the control activities carried out during the previous year, including information on its licensees and control system and details of any non-compliances as requested (using Templates 1A, 1B and 1C attached at Annex 3 to this document). This is required by Article 27(14) of assimilated Council Regulation 834/2007.

By 16 February 2025 at the latest, details of the standard control procedure to be followed, including a detailed description of the control measures and precautions SA CERTIFICATION LTD undertakes to impose on its licensees (using Form C1 attached at Annex 3 to this document). This is required by Article 27 of assimilated Council Regulation 834/2007.

By 16 February 2025 at the latest, details of the measures SA CERTIFICATION LTD applied where irregularities and/ or infringements are found (using Form C1 attached at Annex 3). This is required by Article 30 of assimilated Council Regulation 834/2007.

...

9. SA CERTIFICATION LTD shall ensure that it has suitable arrangements with its licensees for the tracing of products at all stages of production, preparation and distribution as referred to in Article 27(13) of assimilated Council Regulation 834/2007.

10. SOIL ASSOCIATION CERTIFICATION LTD will provide its licensees with documentary evidence as provided in Article 29 of assimilated Council Regulation 834/2007 and Article 68 and Annex XII of assimilated Commission Regulation 889/2008 that they meet the organic standards laid down in assimilated Council Regulation 834/2007 in respect of which they are licensed by the control body.

11. SA CERTIFICATION LTD will provide information to other competent authorities, control authorities or organic control bodies as provided in Article 31 of assimilated Council Regulation 834/2007 and Article 92 of assimilated Commission Regulation 889/2008 and shall ensure that its terms of licensing are such that it has any necessary consents to use and disclose information it is required under the assimilated EU Regulations to disclose to Defra or other

competent authorities acting pursuant to the assimilated EU Regulations.”

11. Operators who wish to market their products as organic (the Operators) cannot lawfully do so unless certified by one of the control bodies. The mechanism by which this is achieved is by Operators entering into private law contracts with their chosen control body.
12. SA Certification uses a standard contract (the Client Contract) in relation to every standard certified by them. It contains the following relevant parts:

**“RECITALS**

- A. ...
- B. SA Cert is an accredited certification body for the delivery of certification under a number of regulations and standards including but not limited to EU Organic Regulations (EC) 834/2007 & 889/2008 as retained in the UK, Soil Association standards, Forest Stewardship Council® (“FSC®”) FSC Licence Code FSC® A000525, Programme for Endorsement of Forest Certification (“PEFC™”) PEFC™ Licence Code PEFC/16-44-917, UK Woodland Carbon Code, Global Organic Textile Standard (GOTS) and COSMOS-standard and their amendments.
- C. The Client is desirous of achieving certification to the Qualifying Standards and on the terms and conditions as set out in this agreement.
- D. SA Cert has agreed to evaluate the Client on the terms as set out in this Agreement to consider, and if thought fit, to issue a Certificate of Registration.

**1. DEFINITIONS AND INTERPRETATION**

...  
**“Evaluation”** - an evaluation of the Client by SA Cert against the Qualifying Standards which may include any number of Audits;

...  
**“Qualifying Standards”** - the standards to which the Client makes an application for certification and from time to time published or updated. The Qualifying Standards will set out which Scheme Logos or Trademarks the Client is permitted to use, and the Client will be required to comply with the Qualifying Standards at all times;

...

### **3. BASIS OF AGREEMENT**

3.1 SA Cert has agreed to enter into this Agreement to carry out an Evaluation of the Client, to determine whether the necessary Qualifying Standards have been met and to consider issuing a Certificate of Registration. The Evaluation shall continue throughout the term of this Agreement.

...

3.3 The Client agrees to supply SA Cert with such details as it may require to certify the Client in accordance with the Qualifying Standards and allow the issue of a Certificate of Registration....

...

3.5 SA Cert and the Scheme Owner reserve the right to revise the requirements of the certification and/or the Qualifying Standards from time to time upon reasonable notice to the Client. If the Client fails to comply with the Qualifying Standards, then SA Cert may either amend, suspend or revoke the Certificate of Registration in whole or in part or terminate this Agreement.

...

### **5. CLIENT OBLIGATIONS**

5.1 The Client shall:

5.1.1. comply in all respects with the Qualifying Standards;

...

5.1.7. Permit SA Cert, SA Cert's Accreditors, and/or Scheme Owners access to the Sites, documents, equipment, records (including complaints), contractors, and personnel that SA Cert or its Accreditors or Scheme Owners determine necessary to access. Such visits will be during normal working hours and may be made at short notice or without prior notice to check compliance with the Qualifying Standards or, for example, in response to complaints received by SA Cert, Accreditors, and/or Scheme Owners;

5.1.8. Permit SA Cert, SA Cert's Accreditors, and/or Scheme Owners to enter the Sites (or procure that SA Cert, SA Cert's Accreditors, and/or Scheme Owners may enter any Sites not owned or occupied by the Client) and take any required samples for analysis at any reasonable time without prior notice;

5.2 In the event that a Certificate of Registration is suspended or revoked by SA Cert or this Agreement is terminated for any reason by either party, the Client shall co-operate with SA Cert and (at the Client's own expense) shall (or shall procure that such actions are taken where required) immediately upon notice from SA Cert to the Client:

- 5.2.1 cease to make or allow to be made any use of the Scheme Logo, Trademarks, or SA Cert's Intellectual Property Rights;
- 5.2.2 cease to sell or allow to be sold any products which are labelled or marked using the Scheme Logos or Trademarks;
- 5.2.3 cease to make any claims that imply that the Client or anything it produces, or allows to be produced, complies with the requirements of the Qualifying Standards;
- 5.2.4 cease to make any claims or references to the Qualifying Standards and withdraw any existing marketing material that makes such a claim or reference;
- 5.2.5 remove all uses of SA Cert's Intellectual Property, the Scheme Logos, or Trademarks."

13. Organic Control Bodies Contract C-20037 ('the Data Contract') between Defra and SA Certification deals with the supply of data by control bodies. The purpose of the Data Contract is set out in Annex 2:

"The purpose of this contract is for organic Control Bodies to provide certain information to Defra to assist the Department to meet legal requirements under Retained Regulation No 834/2007, Retained Regulation No 889/2008 and Retained Regulation No 1235/2008 on organic food and farming and generally to assist with the governance of the organic food and farming sector in GB"

14. Under the Data Contract, SA Certification is required to transmit certain organic data to Defra, listed in a table in Annex 2. This data (and any data that SA Certification is required to generate, process, store or transmit pursuant to the Data Contract) is referred to in the Data Contract as 'Authority Data'.

15. Clause 17 of the Short Form Enhanced Conditions of Contract of the Data Contract provides as follows:

“17. When you can share information

17.1 The Supplier must tell the Authority within 48 hours if it receives a Request For Information.

17.2 Within the required timescales the Supplier must give the Authority full co-operation and information needed so the Authority can:

(a) comply with any Freedom of Information Act (FOIA) request;

(b) comply with any Environmental Information Regulations (EIR) request.

17.3 The Authority may talk to the Supplier to help it decide whether to publish information under clause 17. However, the extent, content and format of the disclosure is the Authority’s decision, which does not need to be reasonable.”

16. WildFish is a not-for-profit company established as the Salmon and Trout Association in 1903. Its charitable objectives include promoting the protection of fish stocks of United Kingdom origin and improving their aquatic environment. The request arises out of WildFish’s campaign to protect wild salmonids (a group which includes, *inter alia* salmon and trout) from harm caused by Scottish salmon farms. As part of the campaign WildFish are calling for SA Certification to remove organic certification from salmon and trout farms.

17. The request for information was intended to increase WildFish’s understanding of the inspection regime applied by SA Certification pursuant to its role as a control body. WildFish is concerned that the inspection regime is not robust, and that sanctions are insufficient to incentivise change.

### **The request**

18. WildFish made a request to SA Certification on 24 May 2024 for the following information:

“1) Reports of all inspections carried out on or in relation to Scottish salmon farms, by Soil Association Certification Limited (“SAC”), its servants or agents, pursuant to SAC’s role as a control body under

assimilated EU Regulation (EC) 834/2007 (certification of organic foods etc) covering the last 3 years to date; and

2) referring to SA Certification's Organic Standards for Great Britain Aquaculture Version 1.4, as published on 21st March 2024, Standard 12.6.1, pages 14-15, details of any “major non-compliance”, “critical non-compliance”, “manifest infringement” and “severe or repeated non-compliance” in relation to any Scottish salmon farm, as found by, or reported to SAC, its servants or agents, covering the last 3 years to date.”

19. SA Certification sent the request to Defra on 5 June 2024. SA Certification provided Defra with some information within the scope of the request.
20. On 12 June 2024 SA Certification confirmed to WildFish that the request had been sent to Defra as the public authority holding the requested information.
21. WildFish requested an internal review of the decision to pass the request to Defra on 13 June 2024.
22. On internal review, SA Certification upheld its decision to pass the request to Defra and stated that SA Certification was not a public body under EIR.
23. Separately, Defra responded to WildFish on 24 June 2024 providing some information and withholding some information under regulation 12(5)(e) (commercial confidence). On internal review, Defra stated that it should not have relied on regulation 12(5)(e) and instead relied on regulation 12(4)(a) on the basis that it did not hold the information at the time when the request was received. SA Certification assert that Defra now accept that this was incorrect, and that Defra accept that they did hold the information at the relevant time for the purposes of FOIA. The evidence on this point is dealt with below.

### **Decision notice**

24. In a decision notice dated 10 February 2025 the Commissioner decided that SA Certification was a public authority for the purposes of the EIR. The Commissioner ordered SA Certification to respond to the request in accordance with the EIR within 30 days.
25. The Commissioner noted that it was agreed that SA Certification had been entrusted under the applicable law with the ability to carry out public administrative functions, because SA Certification is an accredited certification body for the delivery of certification in the field of organic production under Regulation (EC) 834/2007 and Regulation (EC) 889/2008 as retained in the UK.

26. In relation to special powers, the Commissioner held that Article 27(5) of Regulation 834/2007, which provides that the competent authority may delegate control tasks to a particular control body where certain conditions are met, is more relevant to the issue of entrustment than the vesting of special powers. He held that the reference to notification of non-compliance to the competent authority seems to fall short of the special level of influence required to meet the test. The Commissioner held that the reference to 'powers' in the approval document between Defra and SA Certification does not provide a definitive position on whether special powers have been vested.
27. The Commissioner held that article 28 of Regulation 834/2007 sets out a legal requirement for persons who wish to market any products as organic to submit their undertaking to a control system. The Commissioner accepted that article 30 was worded as a duty, but that it appeared to vest a power on the control body to prohibit the Operator concerned from marketing products which refer to the organic production method in the labelling and advertising for a period agreed with the competent authority. Title IV of Regulation 889/2008 sets out the minimum control requirements to be applied to an Operator, including a requirement under article 67 for the Operator to provide the control body, for control purposes, with access to all parts of the unit and premises as well as to the account, relevant supporting documents and any information reasonably necessary for the purposes of control.
28. The Commissioner acknowledged that clause 5 of the example contract provided by SA Certification suggested that the powers used were, practically, exercised by the control body via contract law. He held that this did not mean that the powers were just controlled by the rules of private law and that there were no special powers.
29. The Commissioner did not agree with SA Certification that all the provisions of the contract could be freely negotiated. He held that there were a number of minimum requirements prescribed by law which, in effect, provided a power, such as a power of entry, that cannot in reality be contracted out of. He held that if a body wants to market any products as organic, they must submit their undertaking to a control system and must agree to the contractual provisions giving the control body those powers.
30. For those reasons the Commissioner decided that SA Certification had been vested with special powers and fell within definition of public authority contained in regulation 2(2)(c).

### **Amended grounds of appeal**

31. The Ground of Appeal is that the Commissioner erred in finding that SA Certification was a public authority for the purposes of regulation 2(2)(c). SA Certification submits that it lacks special powers.

32. In particular SA Certification argues that:

*Textual analysis*

- a. As a matter of textual analysis, nothing in the definition of a public authority in the EIR supports its scope being extended to include SA Certification, whose relationship with Operators is regulated by the private law of contract and which, in a carefully constructed legislative regime, has not been given powers of enforcement or any other powers to be exercised with the threat or reality of compulsion. To regard the Company as a public authority having special powers in that context is an erroneous interpretation of reg. 2(2)(c) which runs contrary to the ordinary meaning of that term.

*Purposive interpretation*

- b. A purposive interpretation of reg. 2(2)(c) EIR does not support the Company falling within the scope of the definition of public authority. The legislative purposes of the Directive and the Aarhus Convention are given full effect upon Defra, rather than the Company, being recognised as the proper public authority to have responded to the Request.

*Case law*

- c. Case law does not support the finding that SA Certification is a public authority and **Fish Legal v Information Commissioner [2015] UKUT 52 (AAC) (Fish Legal UT)** was misapplied:
  - The special powers in **Fish Legal** were characterised by the 'shadow of compulsion', which is absent here.
  - SA Certification's functions differ fundamentally from those privatised water companies, which were established by legislation after decades of public ownership of water and sewerage services. SA Certification was incorporated decades prior to the legislative regime and has always operated under private contractual arrangements.
  - SA Certification's powers are independent of Regulations 834/2007, 889/2008, and the OPR. The powers would subsist even if the legislation was repealed.
  - The appellant submits that case-law on amenability to judicial review supports its position and that applying the 'cross-check' from **Cross v Information Commissioner and Cabinet Office [2016] UKUT 153 (AAC) (Cross)** leads to the same conclusion.

*Misunderstanding of the contract/legislative scheme*

d. The Commissioner misunderstood the relationship between the contract and the full legislative scheme, omitting any reference to the OPR. The contractual powers of access are distinguishable from the powers to compel access conferred on others by the OPR. The limited obligation on the Company to notify and provide information under regulation 16 OPR 2009 is neither a necessary nor an exclusive precondition for the lawful exercise of enforcement powers by 'authorised officers'. Case law does not support a finding that an entity has 'special powers' if it itself lacks powers of compulsion by which to obtain 'practical benefits'.

*Single power*

e. In the alternative, the definition of public authority is not met where only a single 'special power' can be established.

### **WildFish's response**

33. WildFish sets out the regulatory framework and highlights a number of specific points, including, *inter alia*:

- a. The power of delegation is extensive, with the competent authority able to delegate all its control functions to control bodies, apart from two: the supervision and audit of other control bodies, and some aspects of the power to grant exceptions.
- b. Whatever mechanism is chosen by the control body to implement the regime, it has to provide the requisite powers specified in article 27 of Regulation 834/2007 (see articles 4(3)(f) and 5 of Regulation 1235/2008).

34. In relation to the EIR the second respondent highlights, *inter alia*, the following:

- a. **Fish Legal CJEU** held that legal persons which fall within Article 2(2)(b) - regulation 2(2)(c) - can be governed by public law or private law (paragraph 52).
- b. **Fish Legal UT** clarified that the 'powers' in issue are not restricted to the ability to alter legal relations, but that the word is used 'in the more general sense of an ability to do something that is conferred by law' (paragraph 104). The question is one of substance, not form (paragraph 106).
- c. The Upper Tribunal explicitly rejected the argument that 'special' adds some additional element, such that the powers must be in some way

unusual; rather, it is a 'composite phrase that captures the contrast between the powers vested in the bodies in question and those that result from the rules of private law' (paragraph 103), and the 'power need not be unique to a particular body, sector or industry' (paragraph 110).

- d. The question is whether the specific body in issue has, as a matter of substance, a power which gives that body 'an ability that confers on it a practical advantage relative to the rules of private law' (paragraph 106). Such practical advantages include (paragraph 107):
  - The power to promote the power;
  - Privileged access to officials and advisers of government; and
  - Leverage in commercial negotiations.
- e. It is an incorrect reading of **Fish Legal UT** to say that special powers must be characterised by the 'shadow' or reality of compulsion. For example, privileged access to officials and advisers of government, to check whether actions on the part of the company will meet with approval, is not.
- f. In **Fish Legal UT**, the Upper Tribunal left open the question of whether the test would be satisfied if just one special power were identified (paragraph 105). It is submitted that one special power would be sufficient.
- g. The 'cross-check' is merely a sense check to correct a manifestly inappropriate application of the two part test.

35. In relation to the ground of appeal, WildFish submits in general that:

- a. The Commissioner's Decision records agreement that entrustment has occurred because SA Certification has been entrusted with the functions of 'an accredited certification body for the delivery of certification in the field of organic production under Regulations (EC) 834/2007 on organic production and labelling of organic products, and Regulation (EC) 889/2008 laying down the detailed rules for the implementation of Council Regulation (EC) 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control, as retained in the UK' (paragraph 20).
- b. It is not particularly relevant to the Tribunal's determination that SA Certification was incorporated and operated before the EU regime set out above was developed, or that it provided an organic certification service before that point, because the factual and legal landscape change completely when that regime was put in place.

c. The special powers given to SA Certification include:

- the powers relating to licensing and inspection functions, such as the ability of SA Certification to access the site and, as it considers necessary, the documents, equipment, records (including complaints), contractors and personnel of a body subject to the scheme, during a control visit (which can be random and unannounced),
- the fact that SA Certification's 'clients' are required to agree contractual terms which reflect the regulatory licensing and inspection functions also amounts to a special power, because special powers also include the means by which the powers are promoted and leverage in commercial negotiations,
- the privileged access to government given by the reporting obligation on SA Certification in relation to irregularities or infringements. Unlike members of the public, other organic producers, or NGOs – all of whom may wish to report producers who appear to be infringing the rules – SA Certification has a direct relationship with the Secretary of State, such that SA Certification's reports of irregularity or infringement, forming as they do part of the regulatory control system, go well beyond those of other private bodies.

36. In relation to SA Certification's particular submissions WildFish submits:

*Textual analysis*

a. When 834/2007 entered into force, it was the free and active decision of SA Certification to take up the entrustment proposed by Defra and become a "control body" under that EU Regulation. In doing so it moved from any arrangements as may have existed prior to the entering into force of 834/2007 into a position where its activities were empowered by an EU-wide regime applicable then across all Member States, now assimilated law in the UK post-Brexit. The fact that the law of contract has been used to implement the functions entrusted to SA Certification when it accepted the role of a "control body" does not transmute SA Certification's statutory powers and duties relating to the functions delegated to it under 834/2007 and other now-assimilated EU law into private law matters. WildFish relies on the Approval Document of 1 April 2024 in support of this.

*Purposive interpretation*

b. The response of Defra shows that there is a lacuna. Even if there were no lacuna, that is not determinative, Clause 17 of the contract with Defra does not require that Defra responds to EIR requests that SA Certification receives and cannot in any event exclude the duty of SA Certification to reply to EIR requests.

### *Case law*

- c. Explicit or implicit compulsion is not required. It is in any event clear that to deliver the functions of a control body, the contract between SA Certification and Operators does have the shadow of compulsion, because it is the vehicle for implementing the statutory scheme, so it operates differently from a normal commercial contract. For example, a contractual obligation requires the client to permit SA Certification access, not just to the site but also to documents, equipment, records (including complaints), contractors and personnel which SA Certification considers necessary to access. The clauses are prefaced with 'The Client shall:...permit'. The contract, drafted according to the regulatory regime, effectively pre-weights the matter such that the regulated entity already gives permission to SA Certification to carry out the inspection regime. There is no qualification to the requirement in clause 5.1.7 to permit access – no phrase such as "reasonably permit" is used, such as is usual in private law contracts. The key limitation (that the visit be within 'normal working hours') is specified in the clause. The fact the contract refers to the client giving permission does not mean SA Certification lacks powers of compulsion. The Upper Tribunal in **Fish Legal UT** rejected the contention that a power being subject to requirements for it to be exercised meant it did not amount to a special power. Compulsion also arises from the consequences were the client to refuse access.

### *Misunderstanding of the contract/legislative scheme*

- d. WildFish submits that the Commissioner was right about the extensive powers given to control bodies via Regulation 834/2007. It was not necessary to refer directly to the OPR. It does not matter that SA Certification does not possess all relevant special powers that could be applied to organic certification generally. The regime as a whole, in particular articles 27 and 30 of 834/2007, gives control bodies ample special powers.
- e. It is argued that it does not matter that Operators would still be able to trade without certification, because they would not be able to trade as organic producers. Nor does it matter that there are five other control bodies in the United Kingdom.
- f. WildFish say that the contract between SA Certification Operators is constrained within the legal obligations placed on the control body flowing from the legal regime. SA Certification is not at liberty to agree a contract with organic producers that does not meet the legal obligations of the assimilated EU Regulations and the functions delegated to it by the Approval Document.

### **The Commissioner's response**

- 37. The Commissioner understands that the entrustment of public administrative functions is not disputed, and that the question for the tribunal is whether SA

Certification has been vested with special powers for carrying out those functions.

38. In brief, the Commissioner argues that Defra delegates functions and powers to SA Certification through the regulatory framework for certifying and labelling organic products. When a non-formalistic approach is taken to construing the framework, the Commissioner says that is it clear that SA Certification has:
  - a. The power to promote enforcement of the framework, which confers an advantage when negotiating with Operators.
  - b. The power of access, imported into contracts with Operators through the regulatory framework.
39. The Commissioner asserts that the following 'superficial' matters relied on by SA Certification are not material:
  - a. That other control bodies exist (relying on paragraph 110 of Fish Legal UT);
  - b. That SA Certification's labelling and certification services pre-date the EU Regulations requiring the government to establish a control system for the labelling and certifications of organic products, because:
    - The question is not whether a particular power is by nature a 'State power', this is no more than a check and historical contingencies are irrelevant (paragraph 113 and 116 of Fish Legal UT)
    - If the control bodies did not exist, Defra would have to carry out the functions. In the present day regulating the certification of products for environmental reasons is a legitimate 'public administrative function'.

#### Special Power (1): Power to promote enforcement

40. The Commissioner submits that although article 30(1) of Regulation 834/2007, as filtered through the OPR, is framed more as a duty, it effectively provides SA Certification with a power to promote enforcement that a private individual lacks:
  - a. Unlike private individuals, SA Certification is empowered to require certain information from Operators via the regulatory framework and has a prerogative for ensuring that Operators comply with the regulations. In the light of this and the information-sharing obligations in the Approval Document, Defra would take reports of irregularities by SA Certification very seriously. The requirement for SA Certification to provide information which a "control authority" may "reasonably require for the purpose of enforcing [the regulations]", underscores that notification anticipates enforcement.

- b. If SA Certification puts an Operator on notice that it is concerned that there be maybe a relevant irregularity or infringement, it is in the Operator's best interest to cooperate with SA certification.
- c. This provides a practical advantage by making it more likely that Operators will abide by the terms of their certification and allowing access to Operators' facilities and or information requested by SA Certification.
- d. The fact that notification does not inherently prompt enforcement and that SA Certification does not formally execute enforcement functions is not material. The advantage could be framed as the value of the opportunity to promote the exercise of the Secretary of State's power as recognised in **Fish Legal UT** at paragraph 109.

Special Power (2): Powers of access via “minimum requirements”

- 41. The obligation on Operators to permit access to SA Certification in line with Article 67(1) of Regulation 889/2008' is a 'minimum requirement' of the Regulations incorporated into the contracts that SA Certification has with Operators under clause 5.
- 42. The Commissioner submits that it is illusory to suggest that Operators freely agree to these terms as part of a commercial decision to seek certification:
  - a. If an Operator wishes to inter alia market its products as "organic" it has no choice but to submit to these contractual terms, which favour SA. These are not contractual terms which emanate from negotiation between the parties, but terms which would exist regardless of the parties' respective bargaining power. This stands in contrast to the description of private law in **Fish Legal UT** at paragraphs 121 and 123.
  - b. The power of access imported into the contract under the 'minimum requirements' does not exist purely in the context of the contract, but also the context of a fall-back of enforcement via Defra or 'control authorities'. The power is neither conferred consensually (as is the case for private law powers), nor is its force secured purely through the mechanisms of the contract.

Residual points

- 43. The Commissioner addresses three further arguments made by SA Certification:
  - a. The assertion that the **Cross** cross-check provides a basis for concluding that SA Certification is not a public authority is no more than an unreasoned assertion.
  - b. SA Certification provides no authority or reasoned argument for the contention that a single special power is insufficient.

- c. The Commissioner adopts the view that the factor of 'amenability to judicial review' is circular and does not assist in determining if SA Certification is a public authority.

### **Consolidated reply by SA Certification to the responses**

#### The test for special powers in Fish Legal UT

- 44. SA Certification states that the Commissioner recognises the distinction identified in **Fish Legal UT** between (i) 'essentially facilitative' rules of private law, which flow from the free acceptance of parties to enter into a relationship governing their private law rights, and (ii) special powers' and that he accepts its submission that special powers are characterised by the threat or reality of compulsion.
- 45. SA Certification notes that WildFish rejects the distinction between 'essentially facilitative' rules of private law and special powers characterised by the threat or reality of compulsion. SA Certification argues that WildFish identifies compulsion as a sufficient but not necessary condition of a special power, but leaves open the formulation of the relevant test by which to distinguish rules of private law and special powers. SA Certification submits that WildFish relies only on the cross-check but then acknowledges that this is unlikely to yield a different outcome, which is unsatisfactory.
- 46. SA Certification submits that reliance on the 'stark hypothetical scenario' of which body would undertake certification if control bodies did not exist is misplaced:
  - a. A practical approach is adopted by **Fish Legal UT** which focusses on the specific powers as they are currently distributed and exercised.
  - b. It ignores the key issue of whether the powers that would revert to Defra are special powers. SA Certification submits that the only relevant functions that are delegated are those which are governed by conventional contract law.
  - c. Identifying notional backstops for obligations and rights currently held by private parties leads to anomalous outcomes. The fact that the Financial Services Compensation Scheme would automatically pay consumer losses were a bank to go into insolvency does not render that bank a public authority.

#### The cross-check in Cross

- 47. SA Certification submits that:

- a. It is not apparent whether the Commissioner regards the application of a cross-check to be wrong.
- b. WildFish say that the cross-check is central but apply it merely to confirm its favoured submissions.

#### The relevance of judicial review cases

48. The case-law that has developed specifically in relation to the 'special powers' test under the EIR is limited and arises in materially different factual contexts to the instant appeal. In the light of this, SA Certification submits that three well-established judicial review authorities demonstrate that the Commissioner's decision is strikingly at odds with the approach taken in public law to questions of amenability to judicial review in comparable scenarios.
49. SA Certification submits that the authorities contain detailed and close analysis of whether bodies operating within various regulatory contexts exercise public functions such as to bear the risk of judicial claims being brought in respect of their decision-making. The provenance and substance of the powers held and exercised by the defendants in those cases are broadly consistent with those of the Company.
50. SA Certification submits that it is conspicuous that the respondents have failed to engage with the substance of those authorities. The Commissioner's assertion of circularity is unexplained. WildFish's assertion that the 'factual context of those authorities is patently markedly different from that of the Appellant' is put too high and unexplained.

#### The regulatory framework

51. SA Certification submits that WildFish's summary of the regulatory framework is not wholly accurate, for example:
  - a. Delegation of 'control tasks' should not be conflated with delegation of enforcement functions. The Commissioner's Decision demonstrates the Commissioner's error in that regard. Enforcement functions reside with Defra and 'control authorities' only (see WildFish's Response at paragraph 17 and article 27 of Regulation 834/2007).
  - b. At WildFish's Response at paragraph 20, it is asserted that the 'control system' has been set up and operated ... by the Appellant'. Article 27(1)-(2) identifies the 'relevant authority' as responsible for the maintenance of the control system, and 'one or more competent authorities [as] responsible for controls in respect of the obligations established by this Regulation'.

Points relating to the Commissioner's response

52. SA Certification does not understand the Commissioner's objection to the description of Operators 'freely accepting' the contractual rights and obligations. The contracts are valid and binding under the law of contract in circumstances in which their terms are freely accepted by both contracting parties. That the contractual bargain entails a client accepting certain terms and standards of SA Certification does not undermine that characterisation and is a common feature of contractual transactions.

53. Notwithstanding his acceptance of the distinction between essentially facilitative rules of private law and special powers characterised by compulsion, SA Certification submits that the Commissioner erroneously describes matters bearing on that distinction in the Amended Grounds of Appeal as 'superficial'. As to the matters identified by the Commissioner it is submitted:

- a. SA Certification's powers under the contract are not contingent upon, or augmented by, Regulations 834/2007, 889/2008 or the OPR. If the legislative regime were repealed, the substance of its powers under the contract would subsist, reflecting that they are private law powers.
- b. The fact that SA Certification's relationship with its clients has been governed by the contract (which has been amended over time) from a period pre-dating the introduction of the legislative scheme by decades is a powerful indicator that the powers are, and have at all material times been, conventional contractual, rather than 'special' powers.
- c. SA Certification has not sought to apply a 'state power' test, but the provenance of the powers in question, set in context, is a relevant factor when applying the special powers test.
- d. That there is a thriving market of alternative organic certification providers is a classic feature of a commercial market governed by private law and so is consistent with the SA Certification's submissions.

54. It is submitted that the Commissioner includes the alleged power of access under the banner of the alleged power to promote enforcement and it is not clear if the Commissioner regards this appeal as being a 'single power' case.

*Alleged power to promote enforcement*

55. It is submitted that the Commissioner's arguments are fundamentally flawed:

- a. There is a well-established juristic distinction between powers and duties.

- b. It rests upon a factual assertion lacking any evidential foundation, namely that the alleged 'power to promote enforcement that a private individual lacks' arises because 'it is likely that Defra would take reports of irregularities raised by SA very seriously'. Even if such an implication were warranted, the weight given to a notification by SA Certification is likely a function of the high threshold for the duty to notify under reg.16 OPR, rather than its status per se.
- c. The assertion that SA Certification has a 'heightened ability to negotiate for access and information' from its clients by reason of its duty to notify under reg.16 OPR lacks any evidential foundation.
- d. The Commissioner's assertion that SA Certification gains a 'practical advantage' is misconceived. The duty to notify is not a 'special power', the absence of a practical disadvantage is not a practical advantage and SA Certification's ability to enforce standards arises solely under contract law. Any enforcement with an element of compulsion lies with independent third parties. The error is clear when applied to analogous contexts, such as banks with an obligation to report money laundering, which do not thereby acquire a practical advantage, where it is third parties who have an independent power to take enforcement steps.
- e. The duty of SA Certification under regulation 16 OPR is not analogous to the compulsory purchase powers and byelaws in Fish Legal UT.

*Alleged special powers of access*

- 56. The Commissioner's approach seeks to confine the 'rules of private law' to only those contracts in which each party has equal bargaining power, reflected in each contractual provision having been individually negotiated. It is submitted that acceptance by one contracting party of the other contracting party's standard terms remains free acceptance.
- 57. The Commissioner alleges that the power of access 'imported into the contract' is not 'conferred consensually (as is the case for private law powers)'. The basis for asserting in general terms that the power of access is not consensual (despite it having been assumed in a contract) is not explained, save that the Commissioner places some reliance on 'the wider context of the 'control system''. SA Certification submits that the power of access needs to be addressed with specificity: the 'control body' is not provided with a power to compel access under article 67(1). At most, article 67(1) confers a right on the 'control body' to request access. That is a power no greater than that which otherwise subsists in private law.

Points on WildFish's response

58. SA Certification repeats some of the points already made which are not set out here.
59. SA Certification submits that the special powers alleged by WildFish are defined without proper specificity but appear to be broadly consistent with those identified by the Commissioner.
60. The submission at WildFish's Response, paragraph 71, that Operators are compelled to agree to control visits misunderstands SA Certification's contractual powers. If an Operator does not permit access, or in the case of an unannounced visit if the Operator is not present, then SA Certification has to withdraw from the inspection and determine appropriate next steps against its internal procedures and Defra Guidance Notes. Next steps can range from agreeing a new inspection date to acting upon non-compliance. The only consequences of noncompliance that SA Certification can secure are conventional contractual consequences, e.g. termination of the contract.
61. Clauses 5.17 and 5.18 are freely agreed contractual licences by which the Operator permits SA Certification to have access for limited purposes. It is a private law power.
62. WildFish has failed to construe clause 17 of the Defra Contract properly. It is submitted that on its proper construction, clause 17.3 demonstrates that all information requests made to 'control bodies' are to be responded to by Defra, the 'competent authority', and, for that reason, Defra retains a contractual discretion to determine the manner and extent of such disclosure.

## **Legal Framework**

### Effect of leaving EU

63. The agreed legal position is as follows. Under the European Union (Withdrawal) Act 2018, as amended, EU-derived legislation and retained EU law were incorporated into domestic law at the end of the implementation period. This includes the EU legislation relevant to the present case, which has been assimilated and remains binding.
64. CJEU case law handed down before the implementation date and not expressly excluded or departed from by higher courts continues to apply as assimilated law. That includes all the CJEU cases relied on by the parties in this case.
65. Section 5(4) of the European Union (Withdrawal) Act 2018 excludes general principles of EU law from domestic law after the implementation period.

### The Environmental Information Regulations 2004

66. Council Directive 2003/4/EC on Public Access to Environmental Information ('the Directive') sets out a regime for public access to environmental information held by public authorities in EU Member States. It implements the United Nations Economic Commission for Europe's (UN/ECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 ('Aarhus'). The UK is a State party to Aarhus and its obligations persist after its exit from the EU.

67. The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and the Aarhus Convention. The first recital to the Directive states that:

"increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

68. Recital 23 provides:

"(23) Since the objectives of the proposed Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives."

69. The recitals to the Aarhus Convention include:

"citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters  
...  
improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

70. The EIR are construed, as far as possible, in accordance with the UK's international obligations **DBEIS v Information Commissioner & & Henney** [2017] EWCA Civ 844.

### Public authority

71. Article 2(2) of Aarhus provides:

“‘Public authority’ means:

- (a) Government at national, regional or other level;
- (b) Natural or legal persons performing public administrative functions under national law; including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) ...”

72. UNECE’s document ‘The Aarhus Convention: An Implementation Guide’ (‘the Implementation Guide’) states, of article 2(2)(b) at p. 33:

“‘Public authority’ also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities as determined according to national law. What is considered a public function under national law may differ from country to country. However, reading this subparagraph together with subparagraph (c) below, it is evident that there needs to be a legal basis for the performance of the functions under this subparagraph, whereas subparagraph (c) covers a broader range of situations. As in subparagraph (a), the particular person does not necessarily have to operate in the field of the environment. Though the subparagraph expressly refers to persons performing specific duties, activities or services in relation to the environment as examples of public administrative functions and for emphasis, any person authorized by law to perform a public function of any kind falls under the definition of ‘public authority’”.

73. In the analysis of article 2(2)(c) at p. 33 the Implementation Guide states:

“There are two key differences between this subparagraph and the others. One key difference between subparagraph (c) and (b) is the source of authority of the person performing public functions or providing public services. It can be distinguished from subparagraph (b) in that the bodies addressed derive their authority not from national legislation, but indirectly through control by those defined in subparagraphs (a) and (b).

...

The second key difference distinguishes subparagraph (c) from both previous subparagraphs. While subparagraphs (a) and (b) define as public authorities bodies and persons without limitation as to the

particular field of activities, this subparagraph does so limit the scope of the definition. Only persons performing public responsibilities or functions or providing public services in relation to the environment can be public authorities under this subparagraph.”

74. The Implementation Guide is not legally binding but according to the Court of Justice of the European Union (CJEU) in C-297/12 Fish Legal v Information Commissioner [2014] QB 521 (Fish Legal CJEU) (paragraph. 38):

“may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention.”

75. Article 2(2)(b) of the Directive states:

““Public authority” shall mean:

(b) Any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.”

76. Recital 5 of the Directive states of the Aarhus Convention:

“Provisions of Community Law must be consistent with that Convention with a view to its conclusion by the European Community.”

77. Recital 11 of the Directive states:

“To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment.”

78. Recital 19 of the Directive states:

“Applicants should be able to seek an administrative or judicial review of the acts or omissions of a public authority in relation to a request.”

79. Recital 24 of the Directive provides:

“Since the objectives of the proposed Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.”

80. Regulation 2(2)(c) of the EIR defines public authorities as:

“(c) any other body or other person, that carries out functions of public administration”

81. In Fish Legal CJEU the Court of Justice of the European Union (CJEU) held:

“48. It follows that only entities which, by virtue of the legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within the category of public authorities that is referred to in article 2(2)(b) of Directive 2003/4. On the other hand, the question of whether the functions vested in such entities under national law constitute ‘public administrative functions’ within the meaning of that provision must be examined in the light of European Union Law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept.

50. In addition, the Aarhus Convention Implementation Guide explains that ‘a function normally performed by governmental authorities as determined according to national law’ is involved but it does not necessarily have to relate to the environmental field as that field was mentioned only by way of example of a public administrative function.

52. The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4 concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, *inter alia* in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”

82. In **Fish Legal UT** the Upper Tribunal considered whether water and sewage companies were public authorities, in the light of **Fish Legal CJEU**.
83. The Upper Tribunal held that the CJEU was not using the word 'powers' in the sense of the ability to alter legal relations, but in the more general sense of an ability to do something that is conferred by law (paragraph 104).
84. It was not necessary for the Upper Tribunal to deal with an argument that the test would be satisfied if the Upper Tribunal identified just one special power (paragraph 105).
85. The Upper Tribunal accepted that EU law looks to substance rather than form, and stated that the issue was a practical one: do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law (paragraph 106)?
86. The Upper Tribunal illustrated the application of the practical approach by referring to the power of compulsory purchase under section 155(1) of the Water Industry Act 1991, which provides:

"A relevant undertaker may be authorised by the Secretary of State to purchase compulsorily any land anywhere in England and Wales which is required by the undertaker for the purposes of, or in connection with, the carrying out of its functions."
87. The context of that illustration was the argument by one of the parties that the Secretary of State's involvement prevented the compulsory powers under section 155 being special powers.
88. At paragraph 107 the Upper Tribunal said as follows:

"Section 155 is supplemented by Schedule 11, which deals with the process by which the companies may apply to the Secretary of State for authorisation, the Secretary of State's powers, and compensation. Mr de la Mare called such powers *contingent* powers, whilst Ms Proops preferred *tandem* powers, but labels do not matter. What matters are the practical benefits that this power gives to the companies. There are at least two. One is what Mr Wolfe called the power to promote the exercise of the power. The formal process confers an advantage that is not generally available. In addition to the formal process, it provides the opportunity, which any sensible company would surely take, of checking first with officials on the likely response to an application, thereby conferring privileged access to those who will advise the Secretary of State. The other benefit is the leverage that the power confers in commercial negotiations. The evidence showed that section 155 is little used. It is, however, always present as a fall back if a

company is unable to secure agreement by negotiation. We were not given evidence that this occurs, but it is a fact of commercial life that these purchases take place 'under the shadow of compulsion' (Megarry and Wade, *The Law of Real Property* 6th edition at 22-056). For these reasons, we reject Mr de la Mare's argument that the Secretary of State's involvement prevents the compulsory powers under section 155 being special powers."

89. In paragraph 109 the Upper Tribunal dealt with an argument made by Thomas de la Mare KC, on behalf of the water companies, that the powers conferred on the companies merely allowed them to undertake activities that any landowner might engage in. The Upper Tribunal said:

"He made this point in relation to the companies' power under section 157 of WIA to make byelaws in respect of the public use of their land or waterways. Section 157(3)(d) provides that byelaws can provide for a contravention to constitute a criminal offence. As Mr de la Mare pointed out, this power is subject to Schedule 10, which provides that byelaws have to be confirmed by the Secretary of State. He argued that the section merely gave the companies power to do what any private landowner might want to do - to provide access on terms that protect the land itself and other users of it. The criminal sanction, he went on, merely ensures that the companies are not left without effective powers of enforcement. We do not accept that. We leave aside the value of the opportunity to promote the exercise of the Secretary of State's power; we have already dealt with that point. The point we wish to make here is that Mr de la Mare's argument misunderstands the nature of powers under the CJEU's judgment. The characterisation of the powers to which the CJEU referred (special - beyond the rules of private law) is not limited to activities or outcomes, but includes the means by which they may be secured. The power not only to promote the making of a byelaw, but the making of a byelaw breach of which constitutes a criminal offence, is not a power that is available under private law. It is not comparable to the private landowner's power to enforce a licence to enter on and enjoy land through the civil law."

90. In paragraph 110 the Upper Tribunal held that the power need not be unique to a particular body, sector or industry.

91. In paragraph 111 the Upper Tribunal held that the argument that 'bringing the companies within the scope of EIR would impose considerable, indeed intolerable burdens' was not the Upper Tribunal's concern. The issue for the Upper Tribunal was whether or not the companies were public authorities.

92. In paragraph 112 the Upper Tribunal accepted Mr de la Mare's argument that it was necessary to distinguish a power from a limitation or qualification on a duty:

"Mr de la Mare gave the example of the duty under section 45 of WIA to provide a connection. Section 45 provides for a number of conditions that can be imposed for complying with that duty. Looked at in isolation, section 45 appears to confer a range of powers that would not be available under private law. Seen in their full context, however, these are not powers but part and parcel of the duty to connect. They operate together to create a qualified duty."

93. In paragraph 113 the Upper Tribunal rejected an argument that the companies' powers should be analysed to see if they were by their nature State powers, because the nature of the State is not sufficiently clear. The Upper Tribunal quoted the analysis of the Advocate General in paragraphs 81-85 of his opinion in Fish Legal CJEU in which he said, in summary, that 'public authority' is characterised, if by anything, by the capacity of persons who wield it to impose their will unilaterally without the need for consent of the person under the relevant obligation. The Upper Tribunal said of that analysis:

"That was not how the Court approached it. It did not seek to classify powers as State power or other powers. The judgment directs the national courts to compare the powers in question with those that arise from the rules of private law. That is a different exercise, with a different point of reference. For this reason, we do not consider it safe to rely on the reasoning of the Advocate General in the passages we have cited."

94. The Upper Tribunal did, however, find it helpful 'as a check' to consider whether duties, activities and services, and the means by which they are promoted, carried out and provided, would have been considered as public administrative functions if undertaken directly by Government (paragraph 117).

95. In paragraphs 118-126 the Upper Tribunal considered the comparison between the powers that have been vested in the body in question and the powers that result from the rules of private law. The Upper Tribunal rejected an argument that 'the powers that result from the rules of private law' meant 'the powers that could be obtained by the exercise of private law'. The Upper Tribunal rejected the argument that because the same powers could be acquired under private law through an easement or a licence, these could not be special powers:

"119. ... The test refers to the powers that result from those rules, not to the powers that *could* result from the *exercise* of those rules. In none

of the other language versions that we have consulted is there any suggestion that the appropriate comparator is the possible result of the exercise of the rules.

...

121. The rules of private law include those of contract and property. They are essentially facilitative, allowing the parties to fix the terms on which they are willing to enter into a relationship. They are able to fix the terms of their contracts and to choose which rights of property to create from those recognised by law. They give the parties the power to negotiate and agree. The correlative is that they give a party the power to refuse to engage and to obstruct. Mr de la Mare's argument overlooks that important difference. The companies have the power to compel or, in the case of a tandem power (to adopt Ms Proops' phrase), effectively to compel. It may be that they do not have to use that power often, but it confers an important benefit that saves the need for the companies to negotiate in appropriate cases and, even if they were minded to do so, it could have an overweening effect on the course of the negotiations.

122. The law of property does recognise some rights that have not arisen from consent. For example: an easement may arise by implication or by prescription. The techniques by which it does so are instructive. Despite the fact that the court is imposing an analysis on the parties, the rules operate on the basis of assumed consent or acquiescence. Often, these are ways in which the law regularises activity for which no legal basis can be identified. As such, they arise only after an activity has become an established usage.

123. Moreover, Mr de la Mare's argument only works because of the level of generality with which it is presented. It fails to take account of the personal equation. At what price would a landowner be prepared to allow pipes to be laid? Over what route? When would access be allowed for the work or for repairs – only at weekends, during school holidays or after the harvest is safely gathered in? The element of compulsion allows the companies effectively to override the individuality that can be a feature of the exercise of private law powers.

124. The rules of private law are not merely facilitative. They can also regulate what the parties may and may not do within a relationship. There are rules of public policy, rules about the validity and interpretation of exclusion clauses, and so on. They may be stated in the most general terms, but they usually operate within existing relationships. They may also operate where no legal relationship exists. For a common law example, take the right of self-help allowing

access to another's land in order to abate a nuisance. For a statutory example, take the Access to Neighbouring Land Act 1992. This allows landowners to gain access to neighbouring land in order to preserve their property. But even in these examples, the operation of the rule is narrowly confined by reference to the existing proximity of the land.

125. In contrast, some of the powers given to the companies operate outside any existing relationship and without any practical limit...."

96. In paragraph 127, the Upper Tribunal described as 'attractive' the argument that the powers were susceptible to judicial review and, as such, special powers, but said that there was a danger of circularity in the argument and, as they had not heard argument on it from the other parties, they did not rely on it.
97. In Cross the Upper Tribunal gave extensive guidance on the interpretation and application of Fish Legal CJEU, Aarhus, the Directive and the EIR:

"33. Later at paragraph 67, when it is dealing with the issue of control and reflecting paragraphs 50 and 51, the CJEU said:

"67. Thus, in defining three categories of public authorities, Article 2(2) of the Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State."

34. These citations show and confirm the hierarchy of the provisions of the Directive and the EIR. They also reflect the purposes set out in the quotation from the UNECE guide and recital (11) to the Directive cited above.

35. The CJEU describe the first two stages using the neutral expression "entities" which are organically or functionally administrative authorities.

36. The hierarchy or structure of the Directive is an important factor to be taken into account when determining whether entities are administrative authorities that fall within the definition of public authorities. It provides a further indication that if, at the functional stage, the functions or services of public interest with which the relevant entity is entrusted do not have a sufficient link with the public administration or executive of the State at national or local levels it would be surprising if the Directive and the EIR applied to the environmental information held by that entity, even though there

was a strong public interest in it being disclosed because, for example, it was used by a public figure who benefitted from public funding.

37. The language relating to the links in the chain of the hierarchy or structure differ between the Directive and the EIR. Articles 2(2)(b) and (c) of the Directive both make reference to the environment whereas regulation 2(2)(c) of the EIR does not.

38. However, there is no effective difference between an entity “performing public administrative functions” (the language of the Directive) and an entity that “carries out public administration” (the language of the EIR). So this language of the EIR replicates the functional test under Article 2(2)(b) of the Directive at the Regulation 2(2)(c) stage of the hierarchy or structure of the EIR.

39. Paragraph 52 of the judgment of the CJEU describes that functional test. The second part of the paragraph has to be read with, and is informed by, the overarching description of the entities as administrative authorities. Paragraph 52 provides that it is the combination of the following that makes an entity a functional administrative authority, and therefore a public authority:

i) the entity is a legal person governed by public or private law,

ii) the legal regime applicable to it has entrusted it with the performance of services of public interest, *inter alia* in the environmental field, and

iii) it has been vested with special powers.

40. In our view, applying the description or test in paragraph 52 of *Fish Legal (EU)*:

i) the special powers also have to be vested in the entity by the legal regime applicable to that entity, and

ii) it is the vesting of special powers that makes a service of public interest an administrative function that counts or qualifies in determining whether the entity is an administrative authority (and so a public authority under the functional definition).

...

93. *Linkage between organic and functional public authorities.* The opening reference in paragraph 52 of **Fish Legal CJEU** to “administrative authorities defined in functional terms” provides a clear link between a public authority at the second tier of the

hierarchy and the entities which, organically, are administrative authorities at the first tier of the hierarchy. This is because it states that this category again concerns administrative authorities but defined in functional terms rather than by an organic approach.

94. In our view, this means that what the entity does must have a sufficient connection with what entities that are organically part of the administration or the executive of the state do.

95. In our view, by paragraph 52 of Fish Legal CJEU the CJEU captures the need for this link by referring to entities (a) being entrusted with the performance of services of public interest, and (b) being vested with special powers. That combination is important because it is what makes a service of public interest one that counts or qualifies in determining whether the entity is an administrative authority and so a public authority under the functional definition (see [39] and [40] above).

96. In our view, the use of these combined factors to describe what counts or qualifies for consideration under the functional test means that it is not appropriate to proceed on the basis that the CJEU was referring to services of public interest in a way in which it has used that description and “services of general economic interest” in other contexts. However, this does not mean that those contexts do not on an application of a Community law approach inform what are and are not the functions and special powers that together mean that the relevant entity is within the functional definition of an administrative authority and of a public authority.

97. It follows that we do not accept the submission made on behalf of the Cabinet Office that “services of public interest” was used in a special sense by the CJEU. Rather, it was stating that the combination of what the relevant entity is entrusted to perform (services of public interest) and the special powers given to it to assist it to do so is what has to be considered in determining whether the entity is a public authority.

98. *The applicable legal regime.* As mentioned in [40] above, we consider that both the services of public interest and the special powers must be entrusted to and vested in the relevant entity by the legal regime applicable to that entity. In our view, this linkage points to a conclusion that the combination of the performance of the services entrusted to an entity and the powers vested in it to perform those services (in the words of paragraph 52 “for this purpose”) must provide a sufficient connection between what entities that are organically part of the administration or the executive of a state do and what entities that qualify under the functional test do. So here the combination of the functions, services and powers relied on must

provide a sufficient link between (a) the Sovereign, and (b) the Crown in the sense of government.

99. *Rigidity/flexibility.* In our view, the general approach to the interpretation of a Directive and Regulations to implement it carries over to the interpretation and application of the functional test as set or described by the CJEU with the result that the CJEU description should not be applied in place of the tests set by the Directive and the EIR. Rather, it is important and binding guidance on what those tests mean and how they are to be applied, and like the test set by the Directive, the test set by the CJEU (which contains concepts and words that have a range of meaning) should be applied so as to give effect to the underlying objectives and purposes of the Directive including those relating to its breadth and the public interest in environmental information being made available to the public.

100. It follows that the CJEU test should not be applied rigidly or without reference to, and a cross-check with, both the words of the Directive and the EIR and their underlying objectives and purposes. That cross check involves standing back and asking whether in all the circumstances of the case the combination of what are, or are arguably, the factors identified by the CJEU in its test result in the relevant entity being a functional public authority. The key issue on that approach is whether taking these factors together there is a sufficient connection between the Sovereign's Functions and Powers that are relied on and what entities that organically are part of the administration or the executive of a state do."

98. The Upper Tribunal in The Information Commissioner v Poplar Housing and Regeneration Community Association & Or [2020] UKUT 182 (AAC) (Poplar) suggested obiter that the 'cross check is not a 'distinct or freestanding element of any legal test or condition' of the test for whether an entity is a 'public authority' (paragraph 86). The Upper Tribunal did not rule on this point, as it had already found that the 'cross check' did not add anything to the analysis in that case.

99. The Commissioner's guidance on the definition of public authority under the EIR says the following about special powers:

- "The vesting of **special powers**. This means that you have been given powers, created in law, that give you practical benefits which are not available to entities or persons whose relations are governed by the normal rules of private law. Private law governs and regulates relationships between individuals and organisations. This is opposed

to public law, which governs the conduct of public bodies and legal persons. The rules of private law include:

- allowing a person to buy and sell property or license its use;
- voluntarily entering into contracts; and
- taking legal action after a breach of legal or contractual obligations.

In the Fish Legal case, the UT argued that the rules of private law are 'facilitative in nature'. They allow the parties to enter a relationship willingly, to freely negotiate and agree terms or, alternatively, to refuse to engage in negotiations. In contrast to this, a special power gives an entity which has been granted it the ability to compel an action.

Special powers include not only the activities giving you a practical advantage, but also the means through which you can secure it.

Examples of special powers include, but are not limited to:

- Compulsory purchase, ie you can apply directly to the Secretary of State to force the sale of land.
- Requiring access to and use of private property, ie in order to carry out the administrative function you have been entrusted with, you have the power to access and use private land without the owner's permission. Despite being subject to some legal oversight when exercising this power (eg you might need a judge's approval), the power still gives you a practical benefit that an entity without the special powers does not enjoy.
- Creating new laws and criminal sanctions, ie the ability to apply directly to government to request the creation of new pieces of legislation or the introduction of new sanctions, in order to safeguard your assets or your ability to perform the administrative function you have been entrusted with.
- Special levels of influence or advisory roles, ie the ability – given to you by statute – to formally advise other public authorities or influence public policy. For the purposes of regulation 2(2)(c), the fact that the role has been conferred to you through legal provisions is what sets you apart from other entities having the ability to lobby or influence government through formal or informal means.

...

When considering if you have special powers for the purposes of regulation 2(2)(c), there is one key question to think about. That is whether – for the performance of the functions of public

administration you have been entrusted with – you have been granted one or a range of powers which give you a **practical advantage** relative to the rules under private law. Another factor to take into account is that it is the fact that the powers are **available** to you that matters, not whether you actually use them or how often you do so.

For example, if you have the power of compulsory purchase, you might not necessarily have to use it when negotiating with landowners. However, as the UT concluded in the Fish Legal case mentioned above, the fact that the power is available to you is likely to influence the outcome of the negotiations in your favour. This gives you a practical advantage over other buyers who do not have access to the power.

However, if the power has fallen into disuse or if you genuinely cannot enforce it, it is likely that it is not a special power for the purposes of regulation 2(2)(c) of the EIR.”

### The organic regulatory regime

*Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (Retained EU legislation) - 'Regulation 834/2007'*

100. Regulation (EU) 2018/848 on organic production and labelling of organic products and its associated delegated and implementing acts which repealed Regulation 834/2007 did not come into force until 1 January 2022 and has not been adopted by the United Kingdom.
101. The preamble to Regulation 834/2007 sets out that organic production plays a dual societal role: it provides for a specific market responding to a consumer demand for organic products and delivers public goods contributing to the protection of the environment and animal welfare, as well as to rural development.
102. The preamble states that the Community legal framework governing the sector of organic productions should pursue the objectives of:
  - a. ensuring fair competition and a proper functioning of the internal market in organic products, and
  - b. maintaining and justifying consumer confidence in products labelled as organic, and
  - c. providing conditions under which the sector can progress in line with production and market developments.
103. The following entities are defined in article 2 of Regulation 834/2007:

- a. The 'competent authority' means 'the central authority competent for the organisation of official controls in the field of organic production in accordance with the provisions set out under the Regulation...'. For present purposes the competent authority is Defra.
- b. A 'control authority' means 'a public administrative organisation to which the competent authority has conferred, in whole or in part, its competence for the inspection and certification in the field of organic production in accordance with the provisions set out under the Regulation...'. These include local trading standards authorities, port health authorities and the Animal and Plant Health Agency.
- c. A 'control body' means 'an independent private third party carrying out inspection and certification in the field of organic production in accordance with the provisions set out under the Regulation...'. SA Certification is one of six control bodies.

104. Article 17 (Conversion) provides:

"1. The following rules shall apply to a farm on which organic production is started:

- a. the conversion period shall start at the earliest when the operator has notified his activity to the competent authorities and subjected his holding to the control system in accordance with Article 28(1);
- b. during the conversion period all rules established by this Regulation shall apply;
- c. conversion periods specific to the type of crop or animal production shall be defined;
- d. on a holding or unit partly under organic production and partly in conversion to organic production, the operator shall keep the organically produced and in-conversion products separate and the animals separate or readily separable and keep adequate records to show the separation;
- e. in order to determine the conversion period referred to above, a period immediately preceding the date of the start of the conversion period, may be taken into account, in so far as certain conditions concur;
- f. animals and animal products produced during the conversion period referred to in subparagraph (c) shall not be marketed with

the indications referred to in Articles 23 and 24 used in the labelling and advertising of products."

2. The measures and conditions necessary for the implementation of the rules contained in this Article, and in particular the periods referred to in paragraph 1(c) to (f) shall be defined by the appropriate authority, by regulations.

105. Article 23 provides:

"(1) For the purposes of this Regulation a product shall be regarded as bearing terms referring to the organic production method where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described in terms suggesting to the purchaser that the product, its ingredients or feed materials have been obtained in accordance with the rules laid down in this Regulation. In particular, the terms listed in the Annex, their derivatives or diminutives, such as 'bio' and 'eco', alone or combined, may be used... for the labelling and advertising of products which satisfy the requirements set out under or pursuant to this Regulation.

...

(2) The terms referred to in paragraph 1 shall not be used ... for the labelling, advertising and commercial documents of a product which does not satisfy the requirements set out under this Regulation, ...

Furthermore, any terms, including terms used in trademarks, or practices used in labelling or advertising liable to mislead the consumer or user by suggesting that a product or its ingredients satisfy the requirements set out under this Regulation shall not be used."

106. In order to ensure that organic products are produced in accordance with the requirements laid down under the Community legal framework on organic production, activities performed by Operators at all stages of organic production must be submitted to a 'control system'.
107. Under article 27(1), the relevant authority (the Secretary of State or the Scottish or Welsh Ministers) has a duty to maintain a system of controls in respect of the obligations established by the Regulation.
108. Article 27(2) provides that '[i]n addition to the conditions laid down in Regulation (EC) No 882/2004, the control system set up under this Regulation must apply such precautionary and control measures as the appropriate authority may specify in regulations'.
109. Article 27(3) provides that the 'the nature and frequency of the controls shall be determined on the basis of an assessment of the risk of occurrence of

irregularities and infringements' and provides that all Operators (subject to specified exceptions) 'shall be subject to a verification of compliance at least once a year'.

110. Under article 27(4) the 'competent authority' (Defra in this case) may:
  - a. confer its control competences to one or more other control authorities. Control authorities shall offer adequate guarantees of objectivity and impartiality, and have at their disposal the qualified staff and resources necessary to carry out their functions;
  - b. delegate control tasks to one or more control bodies. In that case, the relevant authority shall designate authorities responsible for the approval and supervision of such bodies.
111. Article 27(5) provides that the competent authority may delegate control tasks to a particular control body where certain conditions are met, including, in article 27(5)(d) that:

"the control body communicates the results of the controls carried out to the competent authority on a regular basis and whenever the competent authority so requests. If the results of the controls indicate non-compliance or point to the likelihood of non-compliance, the control body shall immediately inform the competent authority;"
112. Article 27(7) provides exceptions to that power to delegate, including the supervision and audit of other control bodies and the competence to grant exceptions, unless this is provided for in the specific conditions laid down by the appropriate authority in accordance with article 22(3).
113. Article 27(9) provides:

"... the competent authority shall:

  - (a) ensure that the controls carried out by the control body are objective and independent;
  - (b) verify the effectiveness of its controls;
  - (c) take cognisance of any irregularities or infringements found and corrective measures applied;
  - (d) withdraw approval of that body where it fails to satisfy the requirements referred to in (a) and (b) or no longer fulfils the criteria indicated in paragraph 5, 6 or fails to satisfy the requirements laid down in paragraphs 11, 12 and 14."

114. Article 27(12) provides that the control authorities and control bodies shall ensure that at least the precautionary and control measures referred to in 27(2) are applied to Operators subject to their control.

115. Article 28 provides:

### **Article 28 Adherence to the control system**

“1. Any operator who produces, prepares, stores, or imports from a third country products in the meaning of Article 1(2) or who places such products on the market shall, prior to placing on the market of any products as organic or in conversion to organic:

- (a) notify his activity to the competent authority;
- (b) submit his undertaking to the control system referred to in Article 27.

The first subparagraph shall apply also to exporters who export products produced in compliance with the production rules laid down in this Regulation.

Where an operator contracts out any of the activities to a third party, that operator shall nonetheless be subject to the requirements referred to in points (a) and (b), and the subcontracted activities shall be subject to the control system.

- 2. Nothing in this Regulation prevents the relevant authority from using any power the authority has to exempt from the application of this Article Operators who sell products directly to the final consumer or user provided they do not produce, prepare, store other than in connection with the point of sale or import such products from a third country or have not contracted out such activities to a third party.
- 3. The relevant authority shall designate an authority or approve a body for the reception of such notifications.
- 4. The relevant authority shall ensure that any operator who complies with the rules of this Regulation, and who pays a reasonable fee as a contribution to the control expenses, is entitled to be covered by the control system.
- 5. The control authorities and control bodies shall keep an updated list containing the names and addresses of Operators under their control. This list shall be made available to the interested parties.

6. The appropriate authority may, by regulations, prescribe rules to provide details of the notification and submission procedure referred to in paragraph 1 of this Article in particular with regard to the information included in the notification referred to in paragraph 1(a) of this Article.”

116. Article 29(1), ‘Documentary evidence’, provides:

“The control authorities and the control bodies referred to in Article 27(4) shall provide documentary evidence to any such operator who is subject to their controls and who in the sphere of his activities, meets the requirements laid down in this Regulation. The documentary evidence shall at least permit the identification of the operator and the type or range of products as well as the period of validity”

117. Article 30, ‘Measures in case of infringements and irregularities’, provides

“1. Where an irregularity is found as regards compliance with the requirements laid down in this Regulation, the control authority or control body shall ensure that no reference to the organic production method is made in the labelling and advertising of the entire lot or production run affected by this irregularity, where this would be proportionate to the relevance of the requirement that has been violated and to the nature and particular circumstances of the irregular activities.

Where a severe infringement or an infringement with prolonged effect is found, the control authority or control body shall prohibit the operator concerned from marketing products which refer to the organic production method in the labelling and advertising for a period to be agreed with the competent authority [...].

2. Information on cases of irregularities or infringements affecting the organic status of a product shall be immediately communicated between the control bodies, control authorities and the competent authority. The level of communication shall depend on the severity and the extent of the irregularity or infringement found.

The appropriate authority may, by regulations lay down specifications regarding the form and modalities of such communications.”

*Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and*

118. Chapter 5 deals with conversion rules. Article 36 (plant and plant products) provides:

"1. For plants and plant products to be considered organic, the production rules as referred to in Articles 9, 10, 11 and 12 of Regulation (EC) No 834/2007 and Chapter 1 of this Regulation and where applicable the exceptional production rules in Chapter 6 of this Regulation must have been applied on the parcels during a conversion period of at least two years before sowing, or, in the case of grassland or perennial forage, at least two years before its use as feed from organic farming, or, in the case of perennial crops other than forage, at least three years before the first harvest of organic products.

2. The competent authority may decide to recognise retroactively as being part of the conversion period any previous period in which:

- (a) the land parcels were subject of measures defined in a programme implemented pursuant to Regulation (EU) No 1305/2013, or in another official programme, provided that the measures concerned ensure that products not authorised for organic production have not been used on those parcels, or
- (b) the parcels were natural or agricultural areas which were not treated with products not authorised for organic production.

The period referred to in point (b) of the first subparagraph can be taken into consideration retroactively only where satisfactory proof has been furnished to the competent authority allowing it to satisfy itself that the conditions were met for a period of at least three years.

3. The competent authority may decide, in certain cases, where the land had been contaminated with products not authorised for organic production, to extend the conversion period beyond the period referred to in paragraph 1.

4. In the case of parcels which have already been converted to or were in the process of conversion to organic farming, and which are treated with a product not authorised for organic production, the relevant authority may shorten the conversion period referred to in paragraph 1 in the following two cases:

- (a) parcels treated with a product not authorised for organic production as part of a compulsory disease or pest control measure imposed by the competent authority ...;

- (b) parcels treated with a product not authorised for organic production as part of scientific tests approved by the competent authority ....

In the cases provided for in points (a) and (b) of the first subparagraph, the length of the conversion period shall be fixed taking into account of the following factors:

- (a) the process of degradation of the product concerned shall guarantee, at the end of the conversion period, an insignificant level of residues in the soil and, in the case of a perennial crop, in the plant;
- (b) the harvest following the treatment may not be sold with reference to organic production methods."

119. Article 37 (specific conversion rules for land associated with organic livestock production) provides:

"1. The conversion rules as referred to in Article 36 of this Regulation shall apply to the whole area of the production unit on which animal feed is produced.

2. Notwithstanding the provisions in paragraph 1, the conversion period may be reduced to one year for pasturages and open air areas used by non-herbivore species. This period may be reduced to six months where the land concerned has not during the last year, received treatments with products not authorised for organic production."

120. Under article 65 the control authority or control body shall carry out at least once a year a physical inspection of all Operators as well as primarily unannounced random control visits, taking into account the risk of non-compliance.

121. Article 67, 'Access to facilities', provides:

"1. The operator shall:

- (a) give the control authority or control body, for control purposes, access to all parts of the unit and all premises, as well as to the accounts and relevant supporting documents;
- (b) provide the control authority or control body with any information reasonably necessary for the purposes of the control;

(c) submit, when requested by the control authority or control body, the results of its own quality assurance programmes.”

*The Organic Products Regulations 2009*

122. Under the 2009 Regulations, “authorised officer” means a person authorised in writing by a local authority, a port health authority or the Secretary of State for the purposes of these Regulations.

123. Regulation 5 provides:

“A control body may permit the use of non-organic seed and seed potatoes for the purposes of Article 45(1)(b) and in accordance with Article 45 of Commission Regulation 889/2008.”

124. Regulation 14(2) provides:

**“Fees relating to the control system**

14 (1) A control body must charge an operator a fee in respect of any expenses reasonably incurred by it in carrying out an inspection of the operator’s holding, premises or facilities.

(2) Where an operator has been unable to reach agreement with a control body for the carrying out of an inspection, the Secretary of State must, if so requested by the operator, arrange for another control body to carry out an inspection.

(3) In this regulation, “inspection” means an inspection or control visit carried out for the purposes of Article 65 of Commission Regulation 889/2008.”

125. Regulation 16 provides:

“16. For the purposes of Article 30 of the Council Regulation (measures in case of infringements and irregularities), where a control body believes that an irregularity, severe infringement or infringement with prolonged effect has been found, it must—

(a) notify that belief in writing to the Secretary of State, the local authority and, if there is one, the port health authority for the area concerned; and

(b) give the local authority or port health authority any information which it may reasonably require for the purpose of enforcing these Regulations.”

126. Regulations 18 and 19 provide:

“18. (1) The Schedule (specified... provisions) has effect.

(2) It is an offence for a person to contravene any of the specified ... provisions or regulation 6.

(3) It is an offence for a person, knowing a consignment to be a controlled consignment –

(a) to move it or cause it to be moved otherwise than in accordance with the written consent of an authorised officer; or

(b) to remove or cause to be removed from it a label which has been affixed under regulation 7(6).

19. A person guilty of an offence under these Regulations is liable on summary conviction to a fine not exceeding level 5 on the standard scale.”

127. The ‘specified provisions’ in the Schedule include, for example, articles 23(1), (2) (3) or (4) of Regulation 834/2007 (Use of terms referring to organic production in labelling, advertising etc.)

128. Regulation 22 provides:

“22. – (1) Subject to paragraphs (2) and (3), these Regulations and the specified ... provisions are enforced by the local authority within its area.

(2) In relation to products imported from third countries, where there is a port health authority for the place of import or other place from which release for free circulation in Great Britain is being sought, these Regulations and the specified ... provisions are enforced by that authority instead of by the local authority.

(3) In relation to cases of a particular description, or a particular case, the Secretary of State may give written directions to a local authority or a port health authority concerning the enforcement of these Regulations, and such directions may also be given –

(a) in relation to Scotland, by the Scottish Ministers;

(b) in relation to Wales, by the Welsh Ministers; and

(c) in relation to Northern Ireland, by the Department of Agriculture and Rural Development.”

129. Regulation 23(1) provides:

“An authorised officer may, on producing (if so required) a duly authenticated document showing the officer's authority, at all reasonable hours enter any premises for the purposes of enforcing the specified provisions or these Regulations.”

130. Regulation 24(1) confers powers on ‘authorised officers’ to inspect seize and detain records.
131. Regulation 26 provides:

**“Obstruction etc. of authorised officers**

26.—(1) It is an offence for a person—

- (a) intentionally to obstruct a person acting in the execution or enforcement of these Regulations or the specified... provisions; or
- (b) without reasonable excuse, the proof of which lies on the person, to fail to comply with any requirement made by an authorised officer under regulation 25.

(2) A person who, in response to a requirement made under regulation 25, makes any representation which is false or misleading in a material particular and does so recklessly or knowing it to be false or misleading in that particular is guilty of an offence.

(3) Nothing in paragraph (1)(b) requires a person to answer any question or give any information if to do so might incriminate the person.”

## **The role of the Tribunal**

132. The Tribunal’s remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

## **List of issues**

133. The issue for the tribunal to determine is whether SA Certification is a public authority under regulation 2(2)(c) EIR which in this appeal turns on whether it has special powers for the purpose of carrying out its public administrative function.

## **Evidence**

134. We read an open bundle.

135. We read a written statement and heard oral evidence from:

- a. Dominic Ian O'Connor Robinson, CEO of SA Certification.
- b. Sarah Hathway, Head of Technical at SA Certification.
- c. Justin Neal, in-house solicitor, WildFish.

## Submissions

136. The Tribunal read skeleton arguments and heard oral submissions from each party. A detailed summary of those arguments is included in the annex. They are included in the main decision due to length, but anyone reading the decision should note that the parties' arguments, particularly in relation to the asserted powers, have evolved from the position set out in the pleadings above. The up-to-date position is set out in the annex.

137. The tribunal gave permission for short additional written submissions following the hearing and took those into account.

## Discussion and conclusions

### The hierarchy of 'public authorities'

138. As the Upper Tribunal in Cross makes clear in paragraphs 33-38, set out above, paragraphs 40 to 52 and 67 of Fish Legal CJEU 'show and confirm the hierarchy of provisions of the Directive and EIR' and 'reflect the purposes set out in the ...UNECE guide and recital (11) to the Directive'. In paragraph 67, for example, the CJEU said:

"Thus, in defining three categories of public authorities, Article 2(2) of the Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State."

139. That hierarchy expressly includes not only entities which are organically administrative authorities but also those which are empowered by the State to act on its behalf, and are functionally administrative authorities, whether they are 'legal persons governed by public law or by private law' (paragraph 52 of Fish Legal UT).

140. Thus the imposition of onerous EIR obligations on a private entity, governed by private law, is fully in accordance with both the underlying purpose and the hierarchy explicitly set out in the Directive and EIR provided that the entity is functionally an administrative authority as defined in the legislation and elucidated in Fish Legal.

141. It is not in dispute that SA Certification is entrusted with functions of public interest. The parties are agreed that SA Certification has been entrusted with the performance of services of public interest because SA Certification has been entrusted with the functions of an accredited certification body for the delivery of certification in the field of organic production under Regulation (EC) 834/2007 and Regulation (EC) 889/2008 as retained in the UK.
142. The issue for us to determine is whether SA Certification has been vested with special powers for the purpose of carrying out its public administrative function.

#### The special powers test

143. 'Powers' is not used in **Fish Legal CJEU** in the sense of the ability to alter legal relations. As explained in paras 104-106 of the **Fish Legal UT**, the issue is a practical one: has the law conferred on the body an ability to do something. The analysis is one of substance rather than form. That means, for example, the use of mandatory language (such as 'shall') does not preclude a finding that powers have been vested if, viewed in its full context, the applicable legal regime confers on the body the ability to do something that confers on it a practical advantage relative to the rules of private law.
144. The powers must be 'vested' in the body by the legal regime applicable to that entity 'for the purposes of performing the services with which it has been entrusted'.
145. Powers may be vested or conferred expressly or may arise by necessary implication under ordinary principles of statutory construction, where such powers are reasonably required to enable the body to discharge its statutory functions.
146. The identification of an express or implied power is not determinative. The question of whether or not the body has been vested with a power of the type that triggers the application of regulation 2(2)(c) is a separate question to whether or not it has been given a power - vested by law with an ability to do something - at all.
147. For example, in paragraph 106 of **Fish Legal UT** the Upper Tribunal distinguishes between the two, reading the practical approach that it took to one across to the other (our emphasis):

"106. Mr de la Mare's argument was that EU law looks to the substance rather than the form. We accept that argument. This accords with our interpretation of powers. The issue is a practical one. Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law?"

148. That is important because without a power - in the sense of a legally vested ability to do something - a practical advantage alone will not suffice.
149. The critical question is whether the powers vested in the body are 'beyond those which result from the normal rules applicable in relations between persons governed by private law' (paragraph 1, Fish Legal CJEU).
150. In order to answer this, the Upper Tribunal in Fish Legal UT held that the approach was a practical one and asked whether the powers give the body an ability that confers on it a practical advantage relative to the rules of private law.
151. The Upper Tribunal illustrated the application of the practical approach by reference to the power of compulsory purchase in paragraph 107. This was an explicitly introduced as an illustration of the application of the approach.
152. The Upper Tribunal expressly acknowledged its lack of accumulated experience of other bodies in paragraph 97:

"We have, therefore, tried to be as helpful to the Commissioner and the First-tier Tribunal as we can through our reasons on the public authority issue. We cannot, however, lay down broad, general principles in quite the way that Ms Proops requested for these reasons. First, because the nature of the issue does not permit that. Second, because we have to act in the context of a case. We should not write a treatise on a particular issue, however interesting and useful that might be. Third, because useful guidance must be based either on a wide range of experience, such as the judges of this Chamber have in social security matters, or on detailed evidence covering the scope of the guidance, such as the Immigration and Asylum Chamber receives in its Country Guidance cases. We do not yet have the accumulated experience of other bodies than the companies and we did not have evidence on other types of body."

153. The illustration in paragraph 107 should not therefore be taken as the only way in which a power might confer a practical advantage. However, it is a useful illustration in a number of ways.
154. First, it shows that powers can be vested by a combination of provisions, which do not, in explicit terms, state that a power is conferred on the body. The power in question was the power of compulsory purchase. The relevant powers are contained in section 155(1) WIA, which states that an undertaker may be authorised by the Secretary of State to purchase land compulsorily, supplemented by schedule 11 which deals with the process by which the companies may apply for authorisation, the Secretary of State's powers and

compensation. That combination was recognised by the Upper Tribunal to confer powers, which the parties in that case labelled as 'contingent powers', or 'tandem powers'.

155. Second, it illustrates how 'practical advantage' can be identified.
156. The first practical benefit of the powers identified by the Upper Tribunal was a twofold advantage not generally available, collectively termed 'the power to promote the exercise of the power': first the formal process itself and second the 'opportunity which any sensible company would surely take, of checking first with officials on the likely response to an application, thereby conferring privileged access to those who will advise the Secretary of State'. The Upper Tribunal is not here identifying 'privileged access' as a special power. It is identifying privileged access as one of the practical advantages of the tandem or contingent powers in section 155 and schedule 11.
157. The second practical benefit was the leverage that section 155 provided in negotiations. The Upper Tribunal said: 'The evidence showed that section 155 is little used. It is, however, always present as a fall back if a company is unable to secure agreement by negotiation. We were not given evidence that this occurs, but it is a fact of commercial life that these purchases take place 'under the shadow of compulsion' (Megarry and Wade, *The Law of Real Property* 6th edition at 22-056).'
158. It is clear from the context in which the phrase the 'shadow of compulsion' is used that it does not support an argument that the Upper Tribunal was, in paragraph 107, laying down a general requirement that a power must be compulsive in order to qualify as a special power. The Upper Tribunal was identifying the second practical benefit of the powers. The 'shadow of compulsion' only arose because it created commercial leverage. The Upper Tribunal made no mention of compulsion when considering the first practical benefit.
159. Further, at paragraph 116 the Upper Tribunal stated they did not consider it safe to rely on the reasoning of the Advocate General in paragraphs 81 to 85, in which he considered the characteristics of 'state power' including the capacity to impose the authority's will unilaterally, without consent. The Upper Tribunal held:

"That was not how the Court approached it. It did not seek to classify powers as State power or other powers. The judgment directs the national courts to compare the powers in question with those that arise from the rules of private law. That is a different exercise, with a different point of reference."

160. At paragraphs 118 onwards the Upper Tribunal considers the proper interpretation of 'the rules of private law' which it uses as a convenient shorthand for 'the normal rules applicable in relations between persons governed by private law.'

161. It is important to remember the 'health warning' in paragraph 97 and to note that these paragraphs are in the context of a submission by Mr de La Mare that the 'rules of private law' meant powers that could be obtained by the exercise of the rules of private law. For example, he submitted that the power to lay pipes could be acquired under private law through an easement or a licence.

162. The Upper Tribunal rejected that argument at paragraph 119:

"The test laid down by the CJEU requires the national court to undertake a comparison between the powers that have been vested in the body in question and the powers that result from the rules of private law. The test refers to the powers that result from those rules, not to the powers that could result from the exercise of those rules."

163. The Upper Tribunal then identified a number of ways in which the powers of the companies contrasted with the powers that result from, or (as this had been argued by Mr de la Mare) could result from private law.

164. Accordingly although we consider that those paragraphs give clear guidance on the nature of the rules of private law, to the extent that they draw a contrast with the companies' 'power to compel... or effectively to compel', we bear in mind:

(a) the Upper Tribunal did not yet have accumulated experience of other bodies than the companies and did not have evidence on other types of body

(b) the powers in question in that case were undoubtedly compulsive and

(c) that the context of that statement was an argument that equivalent powers could be created at private law and that reference was used to illustrate a particular feature of the companies' powers in that case that had been overlooked in Mr de la Mare's arguments.

165. On that basis, and in the light of paragraph 116 of **Fish Legal UT**, we do not accept Mr Kosmin's argument that the case law establishes that it is necessary for a power to be compulsive or to carry the 'shadow of compulsion' to constitute a special power.

166. It is necessary to say something about powers and duties, and paragraph 112 of **Fish Legal UT**, where the Upper Tribunal held that it was necessary to distinguish a power from a limitation or qualification on a duty:

“Mr de la Mare gave the example of the duty under section 45 of [the Water Industry Act 1991] to provide a connection. Section 45 provides for a number of conditions that can be imposed for complying with that duty. Looked at in isolation, section 45 appears to confer a range of powers that would not be available under private law. Seen in their full context, however, these are not powers but part and parcel of the duty to connect. They operate together to create a qualified duty.”

167. Under section 45 of the Water Industry Act 1991, once a valid connection notice has been served and the statutory preconditions in s 45(2)(a)–(b) are satisfied, the undertaker is under a duty to make the connection. The undertaker’s ability to require information under s 45(3), to impose conditions pursuant to ss 47–50, and to levy charges under s 45(6) might, if viewed in isolation, be described as powers. However, those abilities exist solely to regulate the manner and terms on which the connection duty is performed. They do not confer on the undertaker any discretion as to whether the connection should be made. The undertaker is compelled to achieve a predetermined outcome, namely the provision of a connection, and the relevant abilities – whether express or implied – operate only to facilitate compliance with that obligation and to neutralise the burdens arising from it. They do not confer any practical advantage relative to private law.
168. This is reflected in obiter dicta in paragraph 106 in *Poplar*. There, the Upper Tribunal accepted that the body in question had certain powers, including the ability to obtain orders in relation to anti-social behaviour. However, when viewed in context, those abilities operated to mitigate the disadvantages arising from the regulatory obligations to which the body was subject – in particular the requirement to grant at least periodic assured tenancies – and did not confer any practical advantage over non-regulated private actors. They did not therefore give the body a practical advantage relative to the rules of private law and did not amount to ‘special powers’.

*De minimis/proportionality/single power*

169. Section 5A(4) of the European Union (Withdrawal) Act 2018 excludes general principles of EU law from domestic law after the end of 2023. Accordingly, proportionality as a general principle is not applicable.
170. However, Recital (23) to Directive 2003/4/EC does not operate as a general principle in domestic law; it forms part of the interpretative context of the Directive, explaining that its provisions were designed in accordance with proportionality and subsidiarity. This recital therefore informs the scope and purpose of the assimilated Directive but does not revive proportionality as an independent principle. This informs our consideration of, for example, the ‘cross-check’.

171. We do not accept that a purposive interpretation of the Directive, taking account of recital 23 and the other matters set out in the legal background section above, supports the inclusion of a 'de minimis' rule.
172. We agree with the submission of Mr Andrews that it does not follow that information held by a body that has a single or a small number of special powers would not assist the public to participate in environmental decision making.
173. We also think that the 'number' of powers is a blunt instrument for assessing whether or not a body's powers are 'de minimis' or whether it would be disproportionate to make them subject to the EIR.
174. Overall, we are not persuaded that it would be right for the First-tier Tribunal to introduce what is, in effect, a requirement that a body has at least two special powers to be considered a public authority.

Other factors said to be relevant to our decision

175. It is convenient to deal here with a number of factors relied on by the parties that were either said to feed into our decision on special powers, or to form part of our consideration of the 'cross-check' under Cross.

*Information sharing under clause 17 of the Organic Control Bodies Contract C-20037 ('the Data Contract')*

176. We are not determining whether SA Certification holds the requested information. Nor are we determining whether Defra holds the requested information. These questions are not relevant to whether or not SA Certification is a public authority. The issue of whether or not there would be a 'lacuna' is not relevant to whether or not SA Certification is a public authority or to the cross-check. Accordingly, Defra's view on whether or not it holds the requested information is not relevant.

*Burden*

177. The burden that would be imposed on SA Certification is not a relevant factor - see paragraph 111 of Fish Legal UT.

*Amenability to judicial review*

178. Recital 19 in the Directive does not bear on this point - the reference to 'judicial review' in recital 19 is not a reference to judicial review in the administrative court, it means, in effect, review by a tribunal or court, which is why there is a right of appeal to the First-tier Tribunal provided in the EIR.

179. We do accept that, in principle, the amenability of a particular body to judicial review might be relevant to the question of whether or not a body has special powers, because there is some overlap between the applicable legal tests. In particular it might be useful as a 'check' either under **Cross** or in the way that the Upper Tribunal considered state powers in paragraph 117 of **Fish Legal UT**
180. However, Mr Kosmin does not rely on a decision that SA Certification or any other control body is susceptible to judicial review. None of the bodies in the authorities relied on are certification bodies. None of the bodies appear to have been entrusted, under the legal regime applicable to them, with the performance of services of public interest.
181. The authorities relied on by Mr Kosmin relate to different bodies with different powers in a different regulatory context. In those authorities the Courts applied a different multifactorial test, including factors that are not part of the test that we have to apply, to different bodies. We do not accept that the bodies are truly analogous and we have not found their amenability to judicial review to be of assistance in determining this appeal.

#### The test for implying powers

182. Taking into account the submissions filed by the parties following the hearing, and the authorities referred to therein, the test that we have applied is whether implication is necessary for the discharge of the relevant functions, powers or duties.

#### Consideration of the asserted special powers

183. Under article 27(4) of Directive 834/2007 the 'competent authority' (Defra/the Secretary of State) may delegate control tasks to one or more control bodies. The Approval Document is the means by which those control tasks have been delegated to SA Certification. The carrying out of those control tasks is the performance of services of public interest, *inter alia* in the environmental field, with which SA Certification has been entrusted.
184. Only special powers which have been vested in SA Certification for the purposes of performing those services fall within the definition in **Fish Legal CJEU**.

#### *Power 1 - the power to certify as organic and to suspend or terminate certification*

185. The applicable legal regime is contained in Regulation 834/2007, Regulation 889/2008, Regulation 1235/2008 and the OPR. The Approval Document certifies that SA Certification Ltd has been approved pursuant to article 27(4)(b) by Defra (acting for the Secretary of State) as a control body for the

purposes of that legal regime, subject to the conditions in the Approval Document and to the terms of the annexes to the Approval Document.

186. The legal regime establishes a system under which an Operator may market a product as organic only if it complies with Regulation 834/2007, including submitting to the mandatory control system. Regulation 18 OPR makes it an offence to contravene any of the provisions specified in the Schedule, including provisions in Regulation 834/2007 which prohibit the labelling, advertising or marketing of a product as organic where the requirements of Regulation 834/2007 are not satisfied. Accordingly, where an Operator markets a product as organic without being certified, or continues to do so following the suspension or withdrawal of its certificate, that conduct constitutes an offence under regulation 18.
187. It is not disputed that control bodies, including SA Certification, have the power to certify and the power to suspend or withdraw a certificate and that it is not lawful to sell and market products as organic without a certificate. For example, in Ms Hathway's statement at paragraph 18 she says:

"...the only power a Control Body has to prohibit the marketing of a product is to remove the product or enterprise from the scope of the certificate and inform the operator that the status has been removed. The organic regulation prevents the sale and marketing of products as organic without a valid certificate."
188. These powers necessarily arise under Regulation 834/2007. A control body is defined in article 2 as a body carrying out 'inspection and certification'. Article 27 permits the relevant authority to delegate 'control tasks' to a control body, as long as it describes those tasks. In the Approval Document those tasks are described as 'the functions of a control body required under the assimilated EU Regulations'. Under article 28(1)(b) an Operator is required to submit to the control system and under article 29 once an Operator has been certified the control body has to provide documentary evidence that the Operator meets the requirements laid down in the regulations.
189. Although not explicitly set out in terms, in order for a control body to discharge its functions, it is necessary that it is given the power to 'certify' that a body has or has not met the requirements in the regulations, and the concomitant power to suspend or terminate certification. That implied power is vested by the Regulations.
190. It is not SA Certification's contract with the clients that gives it the power to certify a product as organic under Regulation 834/2007 and the concomitant power to suspend or withdraw that certification. We do not accept that the contract is the source of the powers: they are not powers that can be generated by a contractual agreement between two private parties. A contractual

agreement to that effect would not have the desired consequences if one of the parties had not been vested with those powers by the state. The fact that those powers are reflected in the terms of the contract does not change their source. For the same reasons, we do not accept that it is not 'necessary' to imply those powers because they are provided for in the contract.

191. We do not accept Mr Kosmin's argument that SA Certification only has a duty to certify (or suspend or terminate certification) rather than a power. It is for the control body to make the substantive decision on whether or not the requirements of the regulation are met. SA Certification makes the decision whether or not to certify, suspend or terminate and then has the power to take those actions. SA Certification has been given the ability to do something. That falls within the practical approach to identifying a power adopted in **Fish Legal UT**.
192. We do not accept that this is to confuse entrustment with the vesting of powers for that purpose. SA Certification has been entrusted with the functions of a control body. In order to perform those functions it has implied powers to certify, suspend and terminate a certificate.
193. The powers that have been vested in SA Certification are beyond those which result from the normal rules applicable in relations between persons governed by private law. We accept that, in substance, SA Certification performs a licensing function and acts as a gateway to lawful marketing of organic products. This is a power to make legal an activity that would otherwise constitute an offence under a regulatory framework. That is a power that is not available under private law and gives SA Certification a practical advantage in carrying out its control functions.
194. The comparison with licensing the use of a trademark falls foul of paragraph 119 of **Fish Legal UT**, but in any event, that does not convert a prohibited market activity into a lawful one under a regulatory system.
195. It is not fatal that the exercise of the power in any particular case is contingent on SA Certification entering into a contract with a particular Operator. The existence of the power gives it a practical advantage: it confers leverage in commercial negotiations, it has an overweening impact on the contractual agreement between SA Certification and the Operator, providing a shadow of compulsion. A company that wishes to operate on the organic market must apply for certification with a control body. It does not have the ability to 'shop around' for a control body that will dispense with the minimum requirements. The option of refusing to engage is not available for a company that wishes to lawfully market products on the organic market.
196. We do not accept that it is necessary for powers to have a compulsive element, but these powers do have that element, as set out in the previous paragraph.

197. On that basis, we conclude that SA Certification, which has been entrusted with the performance of services of public interest, *inter alia* in the environmental field, has been, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

*Power 2 - the power to access premises and information*

198. The regulations do not confer on SA Certification a power to access premises and information to ensure compliance. They provide that Operators have to give the control authority or control body access to premises and other information and documents. The ability to access premises and information is not only something that could be agreed under the rules of private law, it is in fact conferred on SA Certification by the terms in its standard contracts. It is not therefore necessary to imply a statutory power of access to premises and information for SA Certification to be able to carry out its functions.

199. The OPR in regulations 23 and 24 specifically confer powers of entry inspection and seizure other bodies, exercisable only by an authorised officer, carefully backed up by appropriate safeguards. Not only is it not necessary to imply a power of entry and 'access to information' to control bodies, such an intrusive power would have to operate via specified individuals and be subject to appropriate safeguards. If Parliament had intended that control bodies be given such intrusive powers, it would have included them in the OPR.

200. On that basis we do not accept the applicable legal regime vests a power in SA Certification to access premises and information. The power is conferred by contractual agreement and it is not vested by the applicable legal regime, even if, in reality, an Operator has no choice but to accept that term if it wishes to obtain organic certification.

*Power 3 - the power to promote enforcement*

201. Regulation 16 provides as follows:

For the purposes of Article 30 of the Council Regulation (measures in case of infringements and irregularities), where a control body believes that an irregularity, severe infringement or infringement with prolonged effect has been found, it must—

(a) notify that belief in writing to the Secretary of State, the local authority and, if there is one, the port health authority for the area concerned; and

(b) give the local authority or port health authority any information which it may reasonably require for the purpose of enforcing these Regulations.

202. The use of the word 'must' is not determinative. Fish Legal UT tells us to take a broad and practical approach to the concept of a power. However, even on a broad and practical approach, regulation 16 does not confer on a control body an ability to do something it could not otherwise do. Even without regulation 16 SA Certification has the ability to notify the Secretary of State or the port health authority of the relevant belief and the ability to provide information to the local authority or port health authority. Regulation 16 does not vest any powers in SA Certification. It is, both in form and in substance, a duty not a power.

203. The fact that a statutory duty may carry a practical advantage is insufficient to convert it into a special power.

204. The discussion of the 'power to promote the exercise of the power' in paragraph 107 of Fish Legal UT does not assist the Commissioner or WildFish here. There are no 'tandem powers' or 'contingent powers'. There is no power at all conferred by regulation 16.

205. On that basis we conclude that SA Certification is not vested by the applicable legal regime with a power to promote enforcement.

*Power 4 - preferential access to government*

206. The evidence relied on by Ms Dehon, of regular progress meetings, meetings about the request for information and the fact that meetings have not, in practice, been refused, is not sufficient to establish that SA Certification has been vested, by the applicable legal regime, with a power. Practical advantage alone does not suffice. As above, the discussion of the 'power to promote the exercise of the power' in paragraph 107 of Fish Legal UT does not assist WildFish. This is not a situation of tandem or contingent powers. There is no express or implied power conferred by the regulations.

207. That is the position, but it is supported by Mr Kosmin's point that if a practical advantage 'unmoored from a power' sufficed, then the question of whether the special powers test is met and whether a body is a public authority turns into a question of fact in every case. It would depend on a series of opaque and open-textured considerations, including the degree of access that one body has to central government as compared to others – matters into which a tribunal may not meaningfully have good insight.

*Power 5 – the power to recognise reduce conversion periods required under article 17 of Regulation 834/2007*

208. Article 17 of Regulation 834/2007 establishes rules on conversion that apply to a farm on which organic production is started. It is an offence under the OPR to market products as 'organic' during the conversion period, save where EU legislation expressly permits marketing as a 'product under conversion to organic farming' subject to specified conditions. Articles 36 and 37 of Regulation 889/2008 set out the detailed rules governing conversion periods and give the power to reduce conversion periods.

209. Article 36 of Regulation 889/2008 sets out the general rules governing the conversion of land used for plant and plant products. It establishes the length of conversion periods and provides that 'the competent authority may decide' to recognise retroactively certain previous periods subject in certain cases to 'satisfactory proof' being furnished to allow the competent authority to satisfy itself that conditions were met for a minimum period. Article 36 also allows the competent authority, in certain defined situations, to extend the conversion period or to shorten it.

210. Article 37(1) applies the conversion rules in Article 36 to land used to produce animal feed. Article 37(2) provides:

"Notwithstanding the provisions in paragraph 1, the conversion period may be reduced to one year for pasturages and open air areas used by non-herbivore species. This period may be reduced to six months where the land concerned has not during the last year, received treatments with products not authorised for organic production."

211. As Mr Kosmin points out, there is no mention of control bodies in articles 36 or 37 but they form part of the 'control tasks' which can be delegated to control bodies under article 27(4)(b).

212. The Approval Document delegates not only the function of receiving applications to reduce conversion periods, which must then be authorised by Defra, but also, in relation to land being used for pigs and poultry, the power to authorise the reduction without authorisation from Defra:

"The conversion period may be reduced to 12 months where the land is being used for non-herbivores (i.e. pigs and poultry). Control Bodies are able to authorise this reduction without authorisation from the Competent Authority. This conversion period may be further reduced to 6 months if the operator can demonstrate that the land concerned has not had any prohibited inputs applied in the previous 12 months (as opposed to 3 years). Again, Control Bodies are able to authorise this reduction without authorisation from the Competent Authority."

213. The difference in provision in relation to pigs and poultry is recognised by Ms Hathway in her witness statement:

“The Control Body cannot take the decision to award the reduced conversion period. The Defra guidance to Control Bodies (Exhibit 6) details what operators must provide to Defra and any actions Control bodies must take. With regard to retroactive conversion, the only example where Defra approval is not required is in relation to land used for pasturages by pigs and poultry, this does not need authorisation at all, just verification by Control Bodies during their contracted annual controls, that the conditions for a reduced conversion for non-herbivores have been met. This function by the Control Body is no different to the audit carried out during inspection for any scheme requirement.”

214. Ms Hathway’s characterisation is not consistent with the language of article 37(2) or the terms of the delegation, which provide for a decision to be taken and for the power to make that decision to be delegated to the Control Body (‘the conversion period may be reduced’, ‘Control Bodies are able to authorise this reduction without authorisation from the Competent Authority’). Until that decision is taken, the Operator cannot lawfully market products as organic. The decision of SA Certification accordingly determines whether the statutory prohibition on marketing as organic continues to apply, and in doing so alters the Operator’s legal position. That is a power not available at private law and is qualitatively different from an audit. Taking into account the reasons given in relation to power 1, we find that this is a special power as defined in **Fish Legal UT**.

215. In contrast, for the purposes of the function of receiving applications for reduced conversion periods where the decision to authorise is taken by Defra, no decision-making power is vested in the control body. It forms part of the overall enforcement mechanism, but it does not thereby vest SA Certification with any express or implied power beyond those which result from the normal rules applicable in relations between persons governed by private law.

#### Cross-check

216. In accordance with **Cross** the CJEU test should not be applied rigidly or without reference to, and a cross check with, both the words of the Directive and the EIR and their underlying objectives and purposes. That cross check involves standing back and asking whether in all the circumstances of the case the combination of what are, or are arguably, the factors identified by the CJEU in its test result in the relevant entity being a functional public authority.

217. The key issue on that approach is whether taking these factors together there is a sufficient connection between SA Certification’s functions and the powers

that are relied on and what entities that organically are part of the administration or the executive of a state do.

218. In our view, it is relevant that delegation to a control body is optional but the functions for the purpose of which these powers are conferred are not. This is part of a mandatory regulatory scheme which Defra is obliged to implement. It is not necessary to delegate control tasks to control bodies, and if it did not do so, it would have to carry out those tasks itself. We accept that a control bodies' role is akin to licensing. The roles of certification and the power to reduce conversion periods provide the gateway to lawfully marketing a product as organic.
219. To the extent that burden, the history of SA Certification and the use of contractual mechanisms to administer the regulatory scheme to particular Operators are relevant to the cross-check, we do not accept that any of those factors either materially reduce that connection with the state or render it disproportionate or manifestly inappropriate for SA Certification to be classed as a functional public authority. Nor does the fact that there is a 'market' for certification and that a number of other bodies also perform the function of control bodies. In reaching this decision we bear in mind the hierarchy and the purposes of the Directive as set out above.
220. In our view there is a sufficient connection between SA Certification's functions and the powers that are relied on and what entities that are organically part of the administration or the executive of a state do. Standing back, we consider that our decision is consistent with both the words of the Directive and the EIR and their underlying objectives and purposes.

Signed

Sophie Buckley

Date:

20 January 2026