Neutral Citation Number: [2019] EWHC 158 (Admin)

Case No: CO/868/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2019

Before:

MR JUSTICE MORRIS

- -

Between:

THE QUEEN (on the application of **(1) MAS GROUP HOLDINGS LIMITED** **(2) CHANNEL LIVESTOCK LIMITED** **(3) MAS FARMS LIMITED** **(4) FOXHALL ASSEMBLY CENTRE LIMITED** **(5) INTRA AGRA LIMITED** **(T/A TOM LOMAS LIVESTOCK CONSULTANT)** **(6) HEDLEY LOMAS LIMITED)**	**Claimants**
- and -	
(1) THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS **(2) THE ANIMAL AND PLANT HEALTH AGENCY**	**Defendants**
- and -	
(1) BARCO DE VAPOR B.V. **(2) MR JOHANNES ONDERWATER (T/A JOINT CARRIER)** **(3) ONDERWATER AGNEAUX B.V.** **(4) YSTUM COLWYN FARMS LIMTIED**	**Interested Parties**

- -

- -

Conor Quigley QC and Ronnie Dennis (instructed by **New Media Law LLP**)
for the **Claimants**
David Blundell (instructed by **The Government Legal Department**)
for the **Defendants**

Hearing dates: 6, 7 and 19 November 2018

- -

Approved Judgment

Mr Justice Morris:

Introduction

1. By this action, Mas Group Holdings Limited and five other companies within the same group ("the Claimants") seek judicial review of the decision of the Animal and Plant Health Agency ("APHA") dated 17 November 2017 ("the Decision") to refuse to approve a journey log ("JL 1711") for the transport of a single truck of sheep from England to Germany via Rosslare Harbour in Ireland, and of the policy of the Secretary of State for Environment, Food and Rural Affairs ("the Secretary of State") not to approve such journey logs (via Ireland) if a shorter route is available on the date of departure or within 7 days thereafter ("the Policy").

2. The Claimants are companies involved in the export of livestock from Great Britain to Continental Europe for fattening or slaughter. The transport of livestock within the EU is governed by Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations ("the Regulation").

3. The Regulation requires exporters to prepare a "journey log" in advance of any long journey, setting out – among other things – the proposed route. This must be approved by APHA before the journey begins. Before approving any journey log, APHA is required to check that it "indicates compliance" with the Regulation, which includes a requirement that "all necessary arrangements have been made in advance to minimise the length of the journey".

4. There is currently only one vessel willing to carry livestock direct from England to Continental Europe for fattening or slaughter: the MV Joline. This is operated by the First and Second Interested Parties ("BDV" and "Mr Onderwater" respectively). They also export livestock from Great Britain to Europe for fattening or slaughter, and are alleged to be in direct competition with the Claimants. The MV Joline sails from the port of Ramsgate, in the South East of England, to Calais, in Northern France ("the MV Joline route").

5. The alternative option for the Claimants, and other exporters, is to transport livestock from Great Britain to Ireland, and from there to Continental Europe. This is a longer route than via the MV Joline. The Defendants have in the past approved journeys via Ireland as being consistent with the Regulation.

6. The effect of the Policy in practice is that the Claimants and other exporters are required to use the MV Joline, unless its operators say it is unavailable. The Claimants maintain that this has effectively handed these operators a monopoly over exports from Great Britain to Continental Europe. They have exploited that monopoly by maintaining that the vessel is always available, whilst charging excessive prices that would eliminate any profit for their competitors. This, the Claimants contend, has forced them (and other exporters) out of the trade altogether.

7. The Claimants contend that both the Policy and the Decision are unlawful under EU and domestic law, and should therefore be quashed. My conclusion is stated at paragraph 181 below.

The Parties

The Claimants

8. The first claimant, Mas Group Holdings Limited ("Mas Group") is the parent company. Each of the second to sixth claimants is a wholly-owned subsidiary of Mas Group. The second claimant, Channel Livestock Limited ("Channel Livestock") is a company which carries on business in the purchase and sale of livestock and in many cases is the consignor of the shipment of sheep. The third claimant, Mas Farms Limited ("Mas Farms") is a company which operates farms at which livestock is held. The fourth claimant, Foxhall Assembly Centre Limited ("Foxhall") is a company which operates the Foxhall Assembly Centre near King's Lynn. The fifth claimant, Intra Agra Limited (trading as Tom Lomas Livestock Consultant) ("Intra Agra") operates as the organiser for journeys transporting livestock under the Regulation. The sixth claimant, Hedley Lomas Limited, ("Hedley Lomas") is a company carrying on business as a road transport operator and which was responsible for the transport of livestock.

9. Mr Tom Lomas is a director of Intra Agra and also acts as agent for each of the other Claimants. He is a former director of Mas Farms and Hedley Lomas. Mr Peter Ziolkowski is a director of Channel Livestock, Foxhall and Hedley Lomas. He also acts as a shipping agent for the MV Joline. Mr Lomas has given evidence in the proceedings in three witness statements.

10. As regards the involvement of the Claimants in relation to JL 1711, the livestock were owned by Channel Livestock, kept at holding farms by Mas Farms, and were to be transported to the Assembly Centre operated by Foxhall. Intra Agra as journey organiser applied to APHA for approval; and had the journey been approved, the livestock would have been transported from Foxhall to Viernheim, for at least part of the journey, by Hedley Lomas.

The Defendants

11. The first defendant is the Secretary of State (also referred to as "Defra"), and is, in England only, the competent authority under the Regulation. The second defendant is APHA, formerly known as the Animal Health and Veterinary Laboratories Agency ("AHVLA"). APHA is an executive agency within Defra working to safeguard animal and plant health and which works across Great Britain on behalf of Defra, the Scottish Government and the Welsh Government. It performs many of Defra's functions under the Regulation, including issuing authorisations and approving journey logs. Mr Marc Casale, Deputy Director of the Animal Welfare Team at Defra, has provided evidence in three witness statements. The Defendants also rely on a witness statement from Mr Dale McMullen, Head of International Trade and Customer Service Centres for APHA and a witness statement from Ms Lidovina Vecchiarelli, a Veterinary Advisor Welfare Delivery for APHA.

The Interested Parties

12. The First to Third Interested Parties support the position of the Defendants. They are interrelated. The First Interested Party is Barco de Vapor BV (BDV), a Dutch company which owns and operates the MV Joline. The MV Joline is a small roll-

on/roll-off vessel with capacity to take up to six lorries or trucks. The Second Interested Party, Mr Johannes Onderwater, is a Dutch national and owns and operates the First and the Third Interested Parties. He also operates as a sole trader running a business called Joint Carrier which itself offers logistics services, transport of goods and animals trade negotiation and organisation consultancy. The Third Interested Party, Onderwater Agneaux BV, is a Dutch company which trades in livestock, meat and associated products. Mr Onderwater has provided a witness statement on behalf of these three Interested Parties.

13. The Fourth Interested Party, Ystum Colwyn Farms Limited ("Ystum"), is a company carrying on business as a livestock owner and exporter based in North Wales. Ystum supports the position of the Claimants. Mr John Gittins is a director of Ystym and has provided a witness statement in support of its intervention.

Background to the Claim

14. The export of live animals from the UK for slaughter or further fattening or production has been highly controversial, and the object of animal welfare protesters, for many years. That controversy has led, inter alia, to at least two cases in the High Court: *R v. Coventry City Council ex p Phoenix Aviation* [1995] 3 All E R 37 and more recently, *Barco de Vapor BV v Thanet District Council* [2015] Bus LR 593 (a case involving many of the same actors as in the present case). In both these cases, the Court concluded that bans by UK public authorities on the movement or export of live animals were unlawful and in breach of (what is now) Article 35 of the Treaty on the Functioning of the European Union ("TFEU").

15. Following significant protest action in 1994, the three main ferry operators (Stena Line, P & O and Brittany Ferries) took a commercial decision to refuse to carry all live farm animals, other than those going for breeding, on their routes to continental Europe. Thereafter many of the other routes used started to decline either due to protest action or lack of commercial viability. Following the BSE crisis, most of the remaining trade was in sheep. By the 2000s even that trade had reduced significantly from the level seen in the 1990s.

16. In order to provide a service for those exporting live animals to continental Europe, in December 2010 the MV Joline started to operate. It is a vessel which takes only livestock. It is a flat bottomed vessel and as such only able to sail in certain favourable weather conditions. That means that sometimes the service might not be available. BDV has an interest in maintaining the route in order to continue to move their own animals across the Channel. There has been, and continues to be, a long-standing protest against the sailing of the MV Joline. The Port of Ramsgate and the Kent police now have a system in place to allow protest to take place with minimal disruption to the transporters. The Claimants' exports from England to Germany via the MV Joline route take approximately 20 hours in total.

17. The only other available route for exporting live animals currently open is a longer route via Northern Ireland and the Republic of Ireland. That route ("the Irish route") involves a ferry journey from Cairnryan in Scotland to Larne in Northern Ireland and then a drive down to Dublin to catch a 19 hour ferry from Dublin to Cherbourg. The Claimants' exports from England to Germany via the Irish route take approximately

90 hours in total. There is less protest action and the Irish route operates more frequently than the MV Joline.

18. Accordingly the current position is that there are currently only two available routes open to those exporting major farm animal species to continental Europe for purposes other than breeding. It is Defra's opinion that the much shorter route is more desirable from an animal welfare perspective. In that regard, Mr Casale refers to recitals (5) and (18) of the Regulation (set out in paragraph 33 below) and a report from the European Food Safety Authority in 2004, stating that animal welfare tends to become poorer as journey length increases and that journeys should be as short as possible.

19. As a matter of policy the UK government is committed to improving the welfare of all animals. It would prefer to see animals slaughtered as near as possible to their point of production and thus trade in meat is preferable to a trade based on the transport of live animals. Whilst it recognises the United Kingdom's responsibilities whilst remaining a member of the EU, it will be looking to take early steps to control the export of live animals for slaughter as the UK moves towards a new relationship with Europe.

20. Nevertheless, as expressly pointed out by Birss J in *Barco De Vapor, supra,* at §1, the current position is that, despite the ethical controversy, long distance transport of live animals for slaughter is lawful, provided it complies with various Regulations concerning animal welfare.

The Policy

21. The Policy was first set out in a letter dated 26 August 2012 (see paragraph 59 below). Over time, the Policy has been expressed on a number of occasions and in varying terms. Most recently, it has been described in the Defendants' response to the judicial review pre-action protocol letter in the following summary terms:

> *"In respect of animal transportation via long journeys from the UK, Defra's policy has been to refuse authorisation for a journey route other than the shortest route, unless it is shown that the shortest route is not available within a reasonable period of time. As a general rule, Defra considers that the shortest route is available within a reasonable period where it can be taken within 7 days of the proposed commencement of the journey."*

22. Mr Casale's evidence is that the aim of the Policy is to minimise the length of journeys, as required by Article 3(a) of the Regulation, whilst at the same time ensuring that any difficulties caused to operators and transporters by irregular transport services over certain routes are not disproportionate.

23. Mr McMullen explains in his witness statement that for all applications received for the Irish route, APHA compares the time that the journey would take against the time that it would take to make the journey via the MV Joline. Once the comparison timings have been conducted, APHA sends out to the journey organiser a standard form letter, now designated WIT 62 (referred to as a "long journey of farm livestock for fattening/slaughter for intra--union trade letter") and form WIT 61, "service booking request and confirmation form for the MV Joline": see further paragraphs 65

to 66 and 79 to 80 below. He says that WIT 62 advises the organiser that Article 14.1(a)(ii) of the Regulation places an obligation on the competent authority to ensure that the proposed journeys will comply with the provisions of the Regulation, including the minimising of journey times and that evidence that no such route is available must be provided before an Irish route can be approved.

The Claimants' case in outline

24. The Claimants contend that the Decision and the Policy are unlawful, both as a matter of EU law and as a matter of domestic law. They rely on six grounds as follows.

Ground 1: Proportionality

25. The Policy and the Decision are both disproportionate. This is the principal ground of challenge. Under the Regulation, and applying the principles established in Case C-316/10 *Danske Svineproducenter v Justitsministeriet* [2011] ECR 1-13274 ("*Danske No 2"*), both the Policy and the Decision impose a disproportionate restraint on trade and are thus unlawful. This is for two, interrelated, reasons. First, those measures are not "necessary" for the protection of animals during transport. The Irish route is compatible with the Regulation. Secondly, the Policy (and therefore the Decision) do not strike a proportionate, or indeed any, balance between the competing objectives pursued by the Regulation.

Ground 2: Misinterpretation or misapplication of Article 3(a) of the Regulation

26. In adopting the Policy and taking the Decision, the Defendants have misinterpreted and/or misapplied Article 3(a) of the Regulation, by suggesting, first, that it requires the shortest available route to be taken, regardless of commercial viability, and secondly, by requiring, under the 7-day rule, a change in the date of departure for the journey.

Ground 3: Breach of Article 35 TFEU

27. Both the Policy and the Decision are at least capable of hindering intra-Community trade, and have in fact done so. Accordingly, both constitute a breach of Article 35 TFEU. That breach cannot be justified under Article 36 TFEU, because, for the reasons given in Ground 1, the measures are disproportionate under the Regulation.

Ground 4: Failure to have regard to relevant considerations

28. Both when taking the Decision and in respect of the Policy generally, the Defendants have intentionally disregarded "commercial factors". In doing so, they have failed to have regard to a relevant consideration, namely the Regulation's objective of eliminating technical barriers to trade. This alone renders the Decision unlawful under domestic law.

Ground 5: Fettering discretion

29. Further and in any event, the Policy precludes APHA from departing from it or taking into account circumstances that may be relevant to any particular application. Thus the Policy constitutes an unlawful fetter on APHA's discretion whether or not to approve a journey log under the Regulation, contrary to domestic law.

Ground 6: Irrationality

30. Both the Policy and the Decision are also irrational under domestic law. The Defendants have decided to insist that the Claimants (and other exporters) use a particular vessel, which is operated by one of their competitors, whenever that vessel is available and regardless of the cost of doing so. Any rational public authority would have appreciated that it was an inevitable outcome of the Policy that competitors would be forced out of the trade.

31. As a result of the foregoing unlawful conduct, the Claimants also seek damages under the *Francovich* principle.

The Legal Background

Council Regulation (EC) No 1/2005

32. The Regulation is stated to amend earlier Directives 64/432/EC and 93/419/EC and Regulation (EC) No 1255/97. The Regulation is made under the provisions of, in particular, what was then Article 37 of the EC Treaty (now Article 43 TFEU). This is a Treaty provision dealing with agriculture, and not specifically with free movement of goods.

33. The recitals to the Regulation provide, inter alia, as follows:

> *"(1) The Protocol on protection and welfare of animals annexed to the Treaty requires that in formulating and implementing agriculture and transport policies, the Community and the Member States are to pay full regard to the welfare requirements of animals.*
>
> *(2) Under Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport (3), the Council has adopted rules in the field of the transport of animals in order to eliminate technical barriers to trade in live animals and to allow market organisations to operate smoothly, while ensuring a satisfactory level of protection for the animals concerned.*
>
> *…*
>
> *(5) For reasons of animal welfare the transport of animals over long journeys, including animals for slaughter, should be limited as far as possible.*
>
> *…*
>
> *(10) In the light of experience gained under Directive 91/628/EEC in harmonising Community legislation on the transport of animals, and the difficulties encountered due to the differences in transposition of that Directive at national level, it is more appropriate to set out Community rules in this field in a regulation. Pending the adoption of detailed provisions for*

> *certain species having particular needs and representing a very limited part of the Community livestock, it is appropriate to allow Member States to establish or maintain additional national rules applying to transport of animals of such species.*
>
> *(11) In order to ensure a consistent and effective application of this Regulation across the Community in the light of its basic principle according to which animals must not be transported in a way likely to cause injury or undue suffering to them, it is appropriate to set out detailed provisions addressing the specific needs arising in relation to the various types of transport. Such detailed provisions should be interpreted and applied in accordance with the aforesaid principle and should be timely updated whenever, in particular in the light of new scientific advice, they appear no longer to ensure compliance with the above principle for particular species or types of transport.*
>
> *…*
>
> *(18) Long journeys are **likely** to have more detrimental effects on the welfare of animals than short ones. Hence specific procedures should be designed to ensure better **enforcement of the standards**, in particular by increasing the traceability of such transport operations.*
>
> *…*
>
> *(22) Inadequate follow-up of infringements of legislation on animal welfare encourages non-compliance with such legislation and leads to distortion of competition. Therefore, uniform procedures should be established throughout the Community to increase checks and the imposition of penalties for infringements of animal welfare legislation. The Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation and ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive."* (emphasis added)

34. Article 1 of the Regulation, headed "Scope" provides as follows:

> *"1. This Regulation shall apply to the transport of live vertebrate animals carried out within the Community, including the specific checks to be carried out by officials on consignments entering or leaving the customs territory of the Community.*
>
> *…"*

35. Article 2 provides a number of definitions for the purposes of the Regulation, including the following:

"…

(d) 'border inspection post' means any inspection post designated and approved in accordance with Article 6 of Directive 91/496/EEC (2), for carrying out veterinary checks on animals arriving from third countries at the border of the territory of the Community;

…

(f) "competent authority" means the central authority of a Member State competent to carry out checks on animal welfare or any authority to which it has delegated that competence

(i) 'exit point' means a border inspection post or any other place designated by a Member State where animals leave the customs territory of the Community;

(j) 'journey' means the entire transport operation from the place of departure to the place of destination, including any unloading, accommodation and loading occurring at intermediate points in the journey;

…

(l) 'livestock vessel' means a vessel which is used or intended to be used for the carriage of domestic Equidae or domestic animals of bovine, ovine, caprine or porcine species other than a roll-on-roll-off vessel, and other than a vessel carrying animals in moveable containers;…

(m) 'long journey' means a journey that exceeds 8 hours, starting from when the first animal of the consignment is moved;

…

(q) 'organiser' means:

(i) a transporter who has subcontracted to at least one other transporter for a part of a journey; or

(ii) a natural or legal person who has contracted to more than one transporter for a journey; or

(iii) a person who has signed Section 1 of the journey log as set out in Annex II;

(r) 'place of departure' means the place at which the animal is first loaded on to a means of transport provided that

it had been accommodated there for at least 48 hours prior to the time of departure.

However, assembly centres approved in accordance with Community veterinary legislation may be considered as place of departure provided that:

(i) the distance travelled between the first place of loading and the assembly centre is less than 100 km; or

(ii) the animals have been accommodated with sufficient bedding, untied, if possible, and watered for at least six hours prior to the time of departure from the assembly centre;

(s) 'place of destination' means the place at which an animal is unloaded from a means of transport and

(i) accommodated for at least 48 hours prior to the time of departure; or

(ii) slaughtered;

(t) 'place of rest or transfer' means any stop during the journey which is not a place of destination, including a place where animals have changes the means of transport, with or without being unloaded

…

(v) 'roll-on-roll-off vessel' means a sea-going vessel with facilities to enable road or rail vehicles to roll on and roll off the vessel;

(w) 'transport' means the movement of animals effected by one or more means of transport and the related operations, including loading, unloading, transfer and rest, until the unloading of the animals at the place of destination is completed;

(x) 'transporter' means any natural or legal person transporting animals on his own account, or for the account of a third party;

…"

36. Article 3, headed "General conditions for the transport of animals" provides, importantly, as follows:

> *"No person shall transport animals or cause animals to be transported in a way likely to cause injury or undue suffering to them.*
>
> *In addition, the following conditions shall be complied with:*
>
> *(a) all necessary arrangements have been made in advance to minimise the length of the journey and meet animals' needs during the journey;*
>
> *(b) the animals are fit for the journey;*
>
> *(c) the means of transport are designed, constructed, maintained and operated so as to avoid injury and suffering and ensure the safety of the animals;*
>
> *(d) the loading and unloading facilities are adequately designed, constructed, maintained and operated so as to avoid injury and suffering and ensure the safety of the animals;*
>
> *(e) the personnel handling animals are trained or competent as appropriate for this purpose and carry out their tasks without using violence or any method likely to cause unnecessary fear, injury or suffering;*
>
> *(f) the transport is carried out without delay to the place of destination and the welfare conditions of the animals are regularly checked and appropriately maintained;*
>
> *(g) sufficient floor area and height is provided for the animals, appropriate to their size and the intended journey;*
>
> *(h) water, feed and rest are offered to the animals at suitable intervals and are appropriate in quality and quantity to their species and size."* (emphasis added)

The Claimants place particular reliance upon sub-article (a) of Article 3 and contend that it is to be interpreted as reading "*in all the circumstances,* all necessary arrangements have been made in advance to minimise the length of the journey and meet animals' needs during the journey, *subject to the principle of proportionality"*

37. Chapter II addresses obligations upon organisers, transporters, keepers and assembly centres. Within this chapter, Article 4 provides for relevant documentation to be carried in the means of transport. Article 5 imposes planning obligations for the transport of animals. Individuals must be identified as responsible for planning, execution and completion of the journey. Article 5 (4) in particular provides as follows:

> *"For long journeys between Member States and with third countries for domestic Equidae other than registered Equidae, and domestic animals of bovine, ovine, caprine and porcine*

species, transporters and organisers shall comply with the provisions on the journey log set out in Annex II."

38. Article 6 provides for authorisation of persons as a "transporter". For long journeys, the authorisation has to be issued pursuant to Article 11(1). Article 6 goes on to provide that transporters must abide by the detailed technical rules set out in Annex I and II. Article 8 provides that keepers of animals must ensure that the technical rules set out in Annex I in respect of the animals being transported are met, and, in the case of long journeys, shall comply with the provisions of the journey log set out in Annex II. Article 9 provides that operators of assembly centres must ensure the animals are treated in accordance with technical rules set out in Annex I.

39. Chapter III sets out the duties and obligations of the competent authorities. Article 10 sets out the requirements for authorisation of transporters. Article 11, headed "requirements for long journeys transporter authorisations", provides that the competent authority shall grant authorisations to transporters carrying out long journeys upon application, provided that they comply with the provisions of article 10(1) and that applicants have submitted further detailed documents in relation to drivers, vehicles and procedures for tracing and recording movement of vehicles.

40. Article 14 makes further specific provision for long journeys, as follows:

*"**Checks and other measures related to journey log to be carried out by the competent authority before long journeys***

1. In the case of long journeys between Member States and with third countries for domestic Equidae and domestic animals of bovine, ovine, caprine and porcine species, the competent authority of the place of departure shall:

(a) carry out appropriate checks to verify that:

(i) …

(ii) the journey log submitted by the organiser is realistic and indicates compliance with this Regulation;

(b) where the outcome of the checks provided for in point (a) is not satisfactory, require the organiser to change the arrangements for the intended long journey so that it complies with this Regulation;

(c) where the outcome of the checks provided for in point (a) is satisfactory, the competent authority shall stamp the journey log;

(d) send details as soon as possible of the intended long journeys set out in the journey log to the competent authority of the place of destination, of the exit point or of the control post

> *via the information exchange system referred to in Article 20 of Directive 90/425/EEC."* (emphasis added)

Article 15 sets out additional provisions relating to detailed checks to be carried out by the competent authority at any stage of a long journey.

41. Article 22, headed "Delay during transport" provides as follows:

> *"1. The competent authority shall take the necessary measures to prevent or reduce to a minimum any delay during transport or suffering by animals when unforeseeable circumstances impede the application of this Regulation. The competent authority shall ensure that special arrangements are made at the place of transfers, exit points and border inspection posts to give priority to the transport of animals.*
>
> *2. No consignment of animals shall be detained during transport unless it is strictly necessary for the welfare of the animals or reasons of public safety. No undue delay shall occur between the completion of the loading and departure. If any consignment of animals has to be detained during transport for more than two hours, the competent authority shall ensure that appropriate arrangements are made for the care of the animals and, where necessary, their feeding, watering, unloading and accommodation."*

42. Annex I then sets out very detailed technical rules, as referred to in Article 6, 8 and 9, covering fitness for transport, the means of transport, transport practices, both at loading and unloading; and handling during transport (all aimed at preventing injury and suffering to animals and minimising excitement and distress). Chapter I of Annex I deals with the fitness for transport of the animals. Chapter V addresses specifically journey times, watering and feeding intervals and resting periods. In general, for most animal species, there is a maximum journey time of 8 hours. Journey times may be longer if the additional requirements in Chapter VI are met. Chapter VI contains additional, more stringent, provisions on the roof, floor and bedding, feed, water supply, ventilation and temperature monitoring which must be complied with for long journeys (i.e. longer than 8 hours).

43. Annex II applies only to long journeys and addresses specifically the "Journey Log" as provided for in Articles 5(4), 8(2), 14(a) and (c) and 21(2), as follows:

> *"1. A person planning a long journey shall prepare, stamp and sign all pages of the journey log in accordance with the provisions of this Annex.*
>
> *2. The journey log shall comprise the following sections:*
>
> *Section 1 — Planning;*
>
> *Section 2 — Place of departure;*

Section 3 — Place of destination;

Section 4 — Declaration by transporter;

Section 5 — Specimen anomaly report.

The pages of the journey log shall be fastened together.

Models of each section are set out in the Appendix hereto.

3. The organiser shall:

(a) identify each journey log with a distinguishing number;

(b) ensure that a signed copy of Section 1 of the journey log, properly completed except as regards the veterinary-certificate numbers, is received within two working days before the time of departure by the competent authority of the place of departure in a manner defined by such authority;

(c) comply with any instruction given by the competent authority under point (a) of Article 14(1);

(d) ensure that the journey log is stamped as required in Article 14(1);

(e) ensure that the journey log accompanies the animals during the journey until the point of destination or, in case of export to a third country, at least until the exit point.

4. Keepers at the place of departure and, when the place of destination is located within the territory of the Community, keepers at the place of destination, shall complete and sign the relevant sections of the journey log. They shall inform the competent authority of any reservations concerning compliance with the provisions of this Regulation using the specimen form in Section 5 as soon as possible.

5. When the place of destination is located within the territory of the Community, keepers at the place of destination shall keep the journey log, except Section 4, for at least three years from the date of arrival at the place of destination. The journey log shall be made available to the competent authority upon request.

6. When the journey has been completed within the territory of the Community, the transporter shall complete and sign Section 4 of the journey log.

> …
>
> *8. The transporter referred to in Section 3 of the journey log shall keep:*
>
> *(a) a copy of the completed journey log;*
>
> *(b) the corresponding record sheet or print out as referred to in Annex I or Annex IB to Regulation (EEC) No 3821/ 85 if the vehicle is covered by that Regulation.*
>
> *…"* (emphasis added)

Relevant legal principles

(1) Article 35 TFEU: quantitative restrictions on exports

44. Article 35 TFEU provides:

> *"Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States"*

Any rule capable of hindering directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction: Case C-93/92 *CMC Motorradcenter v Pelin Baskiciogullari* [1993] ECR I-5009 at §9, citing the well known judgment in Case 8/74 *Dassonville* [1974] ECR 837. However a national measure which applies without distinction between domestic and non-domestic goods and which does not seek to control trade, and whose restrictive effects may be too uncertain and indirect, will not warrant the conclusion that the measure is liable to hinder trade between Member States: Case C-69/88 *Krantz v. Ontranger der Directe Belastingen* [1990] ECR I-583, at §§11-12; *CMC Motorradcenter*, supra, at §§11 and 12; and Case C-379/92 *Peralta* [1992] ECR I-3453 at §24.

45. Article 36 TFEU provides, by way of exception:

> *"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."*

However, where, as in the present case, a regulation has exhaustively harmonised EU law in a particular field, whether or not a breach of Article 35 TFEU can be justified under Article 36 depends on whether the measure is permitted (or not) in accordance with the regulation in question. No separate issue arises under Article 36 TFEU. Here it is common ground that whether or not a breach (if any) of Article 35 is

justified depends on whether the Policy and the Decision are disproportionate under the Regulation. This is because the Regulation has exhaustively harmonised EU law in the field of the protection, welfare and health of animals during transport: see *Barco De Vapor*, supra, at §§55, 58-59.

(2) Animal welfare, the objectives of the Regulation and proportionality

CJEU case law

46. The Claimants' case on proportionality is based centrally on the *Danske No 2* case. I have also been referred to further authorities, in particular Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW* EU:C:2008:353, [2008] ECR I-04475 ("*Liefhebbers*"); Case C-424/13 *Zuchtvieh-Export GmbH* EU:C:2015:259, [2015] 3 CMLR 30 ("*Zuchtvieh*"); Case C-301/14 *Pfotenhilfe-Ungarn eV* EU:C:2015:793, [2016] 2 CMLR 29, at §34.

Summary of propositions

47. Before considering *Danske No 2* in more detail, I derive the following summary propositions from these authorities:

(1) The protection of animal welfare is a legitimate objective in the public interest *(Liefhebbers §27).*

(2) The importance of that objective was reflected, in particular, in the adoption of Protocol No 33 on the protection and welfare of animals annexed to the EC Treaty, under which the Community and the Member States, in formulating and implementing the Community's policies on, inter alia, agriculture and transport, are to pay "full regard to the welfare requirements of animals". The substance of Protocol No 33 is now found in Article 13 TFEU, a provision of general application (*Liefhebbers §27; Zuchtvieh §35).*

(3) The interests of the Community include the health and protection of animals. The protection of the health and life of animals is a ground of justification under Article 36 TFEU. When applying the principle of proportionality under Article 36 TFEU, it is necessary to take account of these interests and requirements *(Liefhebbers §28).*

(4) The Regulation itself is based on Protocol No 33. *(Zuchtvieh §35).*

(5) By the Regulation, and in particular Recitals (5) and (11), the Council intended to lay down detailed provisions based on the principle that animals must not be transported in a way likely to cause injury or undue suffering and that, for reasons of animal welfare, the transport of animals over long journeys should be limited as far as possible. **(***Zuchtvieh §36).*

Thus, the protection of animal welfare is of central importance to the interpretation and application of the Regulation. It has a firm Treaty-basis and is explicitly recognised in the CJEU's case-law.

Danske No 2

48. On a reference from Denmark, the CJEU considered the compatibility with the Regulation of Danish national legislation imposing, as regards the transport of pigs, standards in relation to three matters: the minimum height of compartments, the minimum inspection height and the maximum loading densities. In an earlier reference, Case C-491/06 *Danske Svineproducenter v Justitsministeriet* [2008] ECR I-3339 ("*Danske No 1*") the CJEU had ruled on the compatibility of the Danish national compartment height standard with Directive 91/268 (the predecessor to the Regulation). It had held that that standard might fall within the Member State's margin of discretion on condition that the rules do not, contrary to the principle of proportionality, prevent the attainment of the objectives of eliminating technical barriers to trade and allowing market organisations to operate smoothly.

49. In *Danske No 2*, the Court first held, in summary:

(1) The fact that the EU legislation was now contained in a regulation did not mean that all national measures are prohibited: §42.

(2) The question is whether the provisions of the Regulation, in the light of its objectives, prohibit, require or allow national measures of application falling within the scope of the Member State's discretion: §43.

(3) As to the objectives of the Regulation, the Court stated at §44:

> *"it must be pointed out that, although it is true that the elimination of technical barriers to trade in live animals and the smooth operation of market organisations, referred to in recital 2 in the preamble to that regulation, form part of the purpose of that regulation in the same way as they formed part of that of Directive 91/628, of which Regulation No 1/2005 constitutes the extension, it is, however, apparent from recitals 2, 6 and 11 in the preamble to that regulation that, like that directive, its main objective is the protection of animals during transport. In that regard, the finding in paragraph 29 of the judgment in Case C-491/06 Danske Svineproducenter as regards the objectives of that directive therefore remains valid in respect of Regulation No 1/2005."*

Thus, whilst elimination of technical barriers to trade and the smooth operation of market organisations form part of its purpose, its *main objective* is the protection of animals during transport. In the following I refer to the former two objectives, compendiously, as "the trade objectives".

50. The Court then applied these principles specifically to the Danish national rules on the internal height of compartments:

(1) The subject was governed by specific provisions in the Regulation (in particular, (Article 3(g) and, Annex I, Chapter II, para 1.2 and Chapter VII,

part D), but in the absence of precise provisions the Member State had some discretion: §48.

(2) The adoption of national rules increased the predictability of the requirements of the Regulation and contributed to compliance with those requirements. Thus the adoption of national measures was not, in itself, contrary to the Regulation. §§49 and 50.

(3) However those measures had to be in accordance with the provisions and the objectives of the Regulation *and* with the principle of proportionality. §51.

(4) Proportionality required that measures had to be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it. Where the EU legislation pursues a number of objectives, one of which is the main objective, a Member State which adopts a standard in the context of the discretion conferred on it by a provision of that legislation must comply with that main objective without hindering the attainment of the other objectives of that legislation. Therefore, in the light of those other objectives, such a national standard must be appropriate for ensuring that that main objective is attained and must not go beyond what is necessary to achieve it. §52.

(5) Applying these principles to the general rule relating to compartment height, that rule was appropriate for attaining the main objective of the protection of animals during transport. However such standards might undermine the attainment of the objectives of eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly. It was therefore necessary to establish that, having regard to those objectives, such standards are necessary and proportionate to the main objective of the protection of animals during transport and that their application does not restrict the free movement of goods in respect of both imports and exports *disproportionately*. Thus numerical standards relating to the minimum internal height of compartments had to be proportionate to the objective of protecting animals during transport and must not go beyond what is necessary to achieve it. §§54-56.

(6) It was important to establish that those standards did not go beyond what is necessary to achieve the objective of safeguarding the welfare of animals during transport as reflected in specific requirements of Regulation No 1/2005. §57.

(7) The Court added, at §58:

> *"Furthermore, it is also necessary to ascertain that those standards do not result in additional costs or technical difficulties which disadvantage either producers in the Member State which adopted them or producers from other Member States who wish to export their goods to or via that Member State (see, by analogy, Case C-491/06 Danske Svineproducenter, paragraph 45)."*

(8) It was for the national court to carry out the investigations necessary in that regard. §59.

(9) As regards the specific rules applicable to long journeys, the Court ruled that they could not be proportionate, since the national legislation had adopted less restrictive standards under the general rule applicable to other journeys. §60.

51. In relation to the other two matters, the Court held that national standards relating to access for inspection which related only to long journeys were not compatible with the Regulation, but that the national standards as to loading density were compatible with standards specifically laid down in the Regulation: §§61-67.

Danske No 1

52. In the context of the reference, in §58 of *Danske No* 2, to "additional costs", in *Danske No 1*, at §§43 to 45, the CJEU pointed out that the national provisions would require conversion of vehicles imposing additional costs of between €10000 and €20000 per vehicle. It could not be ruled out that that possible additional cost would be liable to prevent the attainment of the two trade objectives, thereby restricting the free movement of goods. In the absence of data before the Court on the impact of the national rules on the smooth operation of the common market, it was for the national court to assess two things: first, whether the national rules gave rise to technical difficulties which impacted adversely on the attainment of those trade objectives and, secondly, to the extent that they were liable to have such an adverse impact, whether nevertheless, the rules "remain objectively necessary and proportionate to ensure the attainment of the principal objective of protecting animals during transport". To that end, the national court was to ascertain whether the additional costs and technical difficulties arising from the national rules were "liable to disadvantage" various categories of pig producers.

The EU law principle of proportionality: English authority

53. In *R (Lumsdon) v Legal Services Board* [2016] AC 697 the Supreme Court conducted a general review of the EU law principle of proportionality, in the particular context of the compatibility of a national measure with that principle. The following propositions emerge from the judgment of Lords Reed and Toulson JJSC:

(1) Proportionality is a general principle of EU law. Its application in any particular case is always highly fact-sensitive. §23.

(2) It applies to national measures falling within the scope of EU law. It *only* applies to measures interfering with protected interests, such as the fundamental freedoms guaranteed by the EU Treaties. Those freedoms include free movement of goods. §25 and §37.

(3) Where the issue is the validity of a national measure, it is for the national court to reach its own conclusion on proportionality (and not merely to review the proportionality assessment of the national authority responsible for the measure). §§29, 101, 108(1).

(4) Proportionality involves consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. However, this does not require the selection of the least onerous method; rather the question is whether a less onerous method could have been used without unacceptably compromising the objective pursued. Further there is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. §§33, 105

54. From the foregoing, I draw the following further conclusions on the issue of proportionality under the Regulation:

(1) Where a measure pursues two or more objectives, but where one is the "main objective" and others are secondary, and where those objectives might conflict, the national measure has to be necessary to achieve the main objective and to be the measure which is the least restrictive of the secondary objective(s). If that least restrictive measure does also nevertheless hinder the attainment of the secondary objective(s), it is not thereby unlawfully disproportionate. In my judgment, §52 of *Danske No* 2 cannot be read so as to prohibit such a measure, necessary for the achievement of the main objective, for otherwise the effect would be for the secondary objective to override the main objective. This conclusion is consistent with proposition (4) above derived from *Lumsdon.*

(2) §58 *Dankse No 2* (in conjunction with *Dankse No 1* §§43-45) mean that additional cost incurred by a producer as a result of a national measure is not per se a reason to find that a measure is disproportionate and contrary to the EU legislation. First, there is a need to ascertain whether the additional cost causes a disadvantage and whether that disadvantage restricts free movement of goods. Secondly, even if it does have an effect on free movement, it is necessary to consider whether it remains objectively necessary and proportionate to ensure the attainment of the principal objective of animal protection. The question is whether the same level of protection can be achieved by an alternative measure, less restrictive of trade.

(3) English public law principles

Fettering of discretion and the adoption of a policy

55. As regards fettering of discretion, the following principles, derived from *R v Secretary of State for the Home Department ex parte Venables* [1998] AC 407 at 496G-497A, can be stated.

56. A person upon whom a discretionary power has been conferred:

(1) must exercise it on each occasion in the light of the circumstances at the time;

(2) cannot fetter its exercise in the future by committing himself now as to the way it will be exercised in the future, nor by ruling out of consideration factors which may then be relevant;

(3) may nevertheless develop and apply a policy as to the approach which he will adopt in the generality of cases, as long as it does not preclude departure from the policy or taking into account circumstances which are relevant to the particular case; if such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful.

57. The relationship between fettering discretion and the adoption of policy is further elucidated in *R (West Berkshire DC) v. Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, *per* Laws LJ at §§16-30, where he identified two relevant principles:

(1) The exercise of public discretionary power requires the decision maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy. This is the rule against fettering discretion.

(2) But a policy maker is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of policy must allow for the possibility of exceptions. A general policy that does not, on its face, admit of exceptions will be permitted in most circumstances. The proof of fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself. This is the liberty to express policy without acknowledging exceptions. There is no requirement for a policy to state expressly that it must be applied consistently with the rule against fettering discretion. A policy may, but need not, incorporate exceptions as part of the policy.

Ultimately, a public authority may adopt a policy to guide the exercise of its discretion, provided always that it is prepared to listen to someone with something new to say: *British Oxygen Co Ltd v. Board of Trade* [1971] AC 610. Any policy adopted by a public authority has to be applied as "not a rule but a guide": *R (Sainsbury's Supermarkets Ltd) v. First Secretary of State* [2005] EWCA Civ 520, per Sedley LJ at §16.

The Facts

58. In this section, I set out a chronology of the relevant events. Certain discrete factual matters are addressed in the discussion under Grounds 1 and 4 (paragraphs 117 to 151 below): the numbers of sailings and approved journey logs over the different export routes over time; comparative freight rates on different routes; the comparative costs and profitability of the two routes; the Claimants' other reasons for not using the MV Joline; and the disputed debt.

The Policy: August 2012

59. By letter dated 28 August 2012, from AHVLA (the predecessor to APHA) to Mr Onderwater, the Defendants set out their position "relating to the conditions under

which journey logs identifying routes via Ireland might be considered for approval". This is the Policy:

> *"Journey Logs via Ireland*
>
> *In assessing applications for any journey logs, including those that propose routes via Ireland, AHVLA have a statutory obligation to ensure all proposed journeys comply with the provisions of the Regulation EC 1/2005 (Article 14.1 (a)(ii))*
>
> *The Regulation recognises that long journeys may be necessary, however, the over-arching principle remains that the transport of animals over long journeys must be limited as far as possible (see recital 5). Article 3 (a) specifically requires that all necessary arrangements have been made in advance to minimise the length of the journey and meet animals' needs during the journey.*
>
> *In consideration of this, AHVLA will not approve journey logs for journeys, where a shorter, suitable **and viable** alternative exists.*
>
> *Nevertheless there are circumstances when planned journeys via Ireland may be capable of meeting the requirements of the Regulation. However, and in order to ensure that the provisions of Article 3 (a) are met, AHVLA will only approve journey logs for routes via Ireland, provided that they meet one of the following criteria:*
>
> *1. The total journey times for the route via Ireland must either be comparable to, or shorter than, any other suitable or viable alternative (which at this time is limited to the route via Ramsgate) or;*
>
> *2. The route via Ramsgate being the only current alternative, the journey must commence no later than seven days prior to the next scheduled sailing of the MV Joline.*
>
> *…*
>
> *In relation to point 2. and in consideration of whether or not the route via Ramsgate does provide a **viable** alternative, it has been determined that a journey must commence no later than seven days prior to the next scheduled sailing of the mv Joline. The basis for this is the limitation placed on assembly centres to hold an assembly of animals for no longer than six days.*
>
> *If one or the other, of the above conditions cannot be met, then AHVLA will not approve a journey log indicating a route via Ireland.*

> ***However, this remains subject to continued monitoring and possible adaptation in the future.***
>
> …
>
> …*"* (**emphasis** added)

The Defendants' evidence about the Policy

60. In his witness statement Mr Casale expressly states that the Policy, which he refers to as the "7-Day Policy" has the aim of *"striking a balance between welfare of animals and commercial interests i.e. by not unduly restricting trade"*. He goes on to explain that the Policy was developed because the number of sailings of the MV Joline reduced. This was due to a number of factors, including the vessel's limited ability to sail in the winter and also the seasonality of the trade. His evidence continues:

> *"To ensure that welfare was maintained and in an attempt not to be a barrier to trade a policy was developed to ensure that prior planning of journeys ensured that the shortest available route was taken."* (emphasis added)

He goes on to state that the aim of the policy

> *"is to minimise the length of journeys, as required by [the Regulation], … whilst at the same time ensuring that any difficulties caused to operators and transporters by irregular transport services over certain routes are not disproportionate."*

He states that it had become more difficult for animal exporters to take the shortest route across the Channel:

> *"Decision-makers must, therefore, attempt to strike a balance between animal welfare needs and the commercial interests of the exporters"***.**

He goes on to state, however, that because the primary aim is protecting animal welfare:

> *"commercial impact has not been a key factor when considering journey logs. The 7 day policy itself strikes the appropriate balance between animal welfare and commercial concerns. Commercial impact has, however, been considered when requested. Our view was that a much longer journey should be avoided when a shorter route is available. The route via Ireland does increase the potential welfare risks."*

Finally, he points to Mr Lomas accepting in the letter of 19 December 2016 (see paragraph 69 below), that the route via Ireland was far from ideal but that there is no alternative shorter route.

March to August 2016: the Harwich to Hook of Holland alternative route

61. A further alternative route (other than the MV Joline and the Irish routes) was, until August 2016, to export on the ferry route from Harwich to the Hook of Holland operated by Stena Lines. As explained by Mr Casale in his witness statement, between March 2016 and August 2016 APHA approved 45 journey logs on that route submitted by the Claimants, of which 35 journeys went ahead, all taking fattening/production stock. In August 2016 Stena stopped taking live animals on the Harwich route due to pressure from protesters. The Harwich route is longer than the Ramsgate to Calais route. It is noteworthy that, despite being shorter, APHA did not insist that the organiser/the Claimants seek first to go via the MV Joline route. At that time there was no equivalent to the WIT 61 form: see paragraphs 79 and 80 below.

62. In the course of the hearing Mr Casale provided a third witness statement in which he gave more information about journeys via the Harwich route in 2016. In general, the journey time stated was around 20 hours, with a range of 17-24 hours, whereas the comparable MV Joline journey was around 19 hours, with a few taking around 12-13 hours. Of the 33 approved journey logs for the Harwich route, in 16 cases the approved journey time was shorter than, or no more than 2 hours longer than the estimated journey time using the MV Joline. In 11 cases, the journey time was between 2 and 5 hours longer, and in 6 cases the journey time was more than 5 hours longer, than that for the MV Joline route. In all cases the journey organiser was either Mr Lomas or Mr Ziolkowski, but it was not clear whether the latter was acting for any of the Claimants. Mr Casale was unable, in the time available, to establish why the journey logs were approved for those journeys which were more than 5 hours longer than the route using the MV Joline. However even in those cases the Harwich route was no more than 50% longer.

26 August 2016: revised Policy letter and "commercial factors"

63. By email dated 25 August 2016 to APHA, Mr Lomas, in the context of a journey log application for the Irish route, complained that his group of companies were priced out of using the privately operated MV Joline "which has proven not to offer a regular and reliable service to ensure satisfaction to the transporters, drivers, customers or suppliers and not least the welfare of the animals as a result of interference by protesters at Ramsgate". He continued that the conditions which APHA continued to placed on the livestock trade "is a downright restriction contrary to law whilst the bigoted and comparatively small number of protesters are treated with more attention than is justified". Throughout the subsequent correspondence the Claimants pointed out to the Defendants their belief that the Policy was an unlawful barrier to their trade (and that of others) and that it was causing them loss.

64. In response, by email dated 26 August 2016, from Nicola Hirst to Mr Lomas, APHA set out the Policy, in somewhat different terms, as follows:

> *"As you are aware APHA takes its responsibilities seriously and takes steps to ensure the welfare of the animals being transported are in compliance with EC Regulation 1/2005 on the protection of animals during transport and related operations.*

> *Under the Article 3(a) of the Regulation you are required to ensure that all necessary arrangements have been made in advance to minimise the length of the journey. While the MV Joline is operating regularly this is the shortest route for the transport of animals exiting GB.*
>
> *You may use an alternative route but you need to demonstrate why you cannot meet the requirements under Article 3 and minimise the length of the journey by using the MV Joline.*
>
> *This means:*
>
> *(a) You will need to provide an explanation as to why you cannot use the MV Joline sailing on 26th August, as this is the most direct route and it appears the vessel would be able to accommodate your vehicles.*
>
> *(b) APHA will need you to demonstrate that there is no alternative viable shorter route available to you as the journey organiser. A written statement from the operators of the MV Joline will be required confirming that the MV Joline will not be sailing from Ramsgate during the 7 day period from 26th August or that there is no available bookings on that vessel.*
>
> *(c) Confirmation will be required from the ferry operator (in line with the normal procedures) to demonstrate that the livestock booking will be accepted to ensure the animals reach their destination.*
>
> *Commercial factors (including the fact that alternative routes are more cost effective) should not have any detrimental effect in the application of EC Regulation 1/2005.*
>
> *APHA has approved journey logs for the transport of animals using alternate routes other than the MV Joline. However, this approval has only taken place when APHA were aware the MV Joline was not in operation or that the vessel could not accommodate the additional vehicles.*
>
> *Unless you are able to provide the information above APHA will not be able to process your paperwork."* (Emphasis added)

The above underlined sentence was the Defendants' first reference, in its explanation of the Policy, to "commercial factors". There is a dispute as to its meaning. The reference to "commercial factors" was to be repeated on a number of further occasions (in varying terms); in particular in letters dated 1 September 2016, 15 December 2016, 19 January 2017 (in expanded terms), 8 February 2017 and 23 May 2017 (a letter to Mr Onderwater): see paragraphs 66, 68, 69, 70 and 73 below.

Standard form letter WIT 48

65. In September 2016 APHA produced a standard form letter, form WIT 48, which it sent out in response to any application by an exporter or journey organiser for approval of a journey log via the Irish route. (Subsequently, at some point, Form WIT 48 became Form WIT 62).

66. However as has been clarified in a post hearing note, in practice there has been no consistently standard form of such a letter. Each "long journey" letter appears to have been in somewhat different terms. The September letter was in somewhat different terms from those of the August 2012 and 26 August 2016 letters, and from those of subsequent letters. Amongst the differences in the September letter are the following. First, it added in a reference to the requirement, under Annex II paragraph 3 (b) of the Regulation, to lodge part 1 of the journey log 2 days before the time of departure. Secondly, it included the statement that APHA considers that "the current service via Ramsgate is the shortest viable route for most journeys to mainland Europe". Thirdly, most particularly, as regards the relevance of "commercial factors", the letter stated: "Commercial factors (including the fact that the alternative routes are more cost effective) do not affect the application of EC Regulation 1/2005". There is no reference to such factors not having "any detrimental effect".

67. Between 27 August 2016 and 24 September 2016 APHA approved three distinct journey logs using the Irish route. It appears that, for some of these applications, whilst the consignor was Channel Livestock, the journey organiser is stated to have been Mr Ziolkowski (although it is not clear on whose behalf he was acting). On 22 September 2016 Mr Onderwater wrote to Mr Lomas setting out the freight rates for shipment of trucks on the MV Joline: see further paragraph 130 below.

December 2016 and January 2017

68. On 15 December 2016 APHA wrote to Mr Lomas concerning an application for approval of a journey log via the Irish route. The letter is neither in standard form WIT 48 nor in precisely the same terms as the earlier "Policy" letters of August 2012 or August 2016. The wording in relation to "commercial factors" reverted to that of "detrimental effect" in the 26 August 2016 letter.

69. Mr Lomas, on behalf of Intra Agra, responded on 19 December 2016 complaining that the Government were, and remained, instrumental in restricting EU trade and requesting the instruction to use the MV Joline in the form of a monopoly to be removed forthwith. He questioned the 7-day policy and stated that the MV Joline did not offer a scheduled service. On 19 January 2017 Mr Rego, Senior Veterinary Inspector at APHA responded, repeating APHA's approach to commercial factors in the following, somewhat different, terms:

> "Commercial factors (including the fact that alternative routes are more cost-effective and the customer "demands" a delivery within a certain period) should not have any detrimental effect upon the application of EC Regulation 1/2005"

February/March 2017

70. In February 2017, APHA approved a journey log submitted by Intra Agra, as journey organiser, for a route via Ireland, once it was confirmed that the MV Joline was not going to sail. In this context, by email dated 8 February 2017, in response to the planned export, APHA wrote to Mr Lomas, stating that there was no intention to prevent this export occurring, but requiring evidence that the crossing of the MV Joline on 13 February was not going ahead:

> *"If you are able to provide this evidence that a viable route on 13th is not available then the 3 day route via Ireland will be accepted as the only route available to you. Please note that we will not take commercial factors into consideration, welfare of the animals through minimising the journey length as far as possible is our responsibility."* (emphasis added)

Thus, the reference here to "commercial factors" is in different terms from that set out in the 26 August 2016 letter.

71. By letter dated 21 March 2017, Mr Onderwater confirmed to APHA that the MV Joline would be available at all times, weather depending, stating "I have confirmed many times that we are available 24/24 and 7/7".

72. Mr Casale explains that, due to concerns raised by Mr Lomas as to the availability of the MV Joline, and following an internal meeting on 30 March 2017 to discuss how to apply the Policy, on 31 March 2017 he wrote internally that, following a review, as to whether they should be applying a 7-day rule or a different number of days and also the discretion which might be applied in relation to any rule:

> *"We would expect all live exports starting in England to use the Joline when it is available rather than take a longer route and it should usually be available within 7 days. If it is not available within 7 days, then we would wish the transporter to provide proper confirmation of this from the Joline i.e. that they would have requested a booking and this was not provided. In these circumstances we would not hold up the proposed exports any further and would approve an alternative longer route. We consider that this more arms-length rules-based approach is desirable for the sake of providing certainty for the transporter, and also to avoid case-by-case interactions with transporters and boat operators with the associated resource implications and also with implications for potential legal challenge in the face of alleged inconsistencies or discrimination."*

Mr Casale states that, because the MV Joline was offering a more tailored service on request, "it should have been even more beneficial to those wishing to use the vessel as they could sail when they wished, similar to using a taxi rather than a bus on a timetable". In argument, Mr Quigley suggested that this was an apt metaphor; as a taxi is inevitably significantly more expensive than a bus.

April 2017 onwards

73. In the period between April 2017 and November 2017, Mr Lomas submitted a number of journey log applications for the Irish route. According to Mr Casale, most of these were refused as there was a lack of evidence that the MV Joline route was unavailable. It appears that one application by Intra Agra as organiser for a third party exporter was approved in early May. On 23 May 2017 in a letter to Mr Onderwater concerning the distinct Scottish policy relating to a journey starting in Scotland, APHA repeated its statement concerning "commercial factors", in exactly the same terms as in the earlier letters. That letter also stated, in two places "we do not take cost into consideration". However the precise context of those statements is not known, as they were made in response to a letter not before the Court and on a different subject matter.

Discussions between Mr Lomas and APHA/Defra: July to September 2017

July 2017

74. In July 2017, in response to a journey log application, Mr Casale commissioned and received veterinary advice on the welfare impact of the two routes. That advice was that, in order to minimise stress responses, only the shortest routes should be approved.

75. On 20 July 2017 APHA sent a "WIT 48" letter to Mr Lomas in practically the same terms as those of the 15 December 2016 letter, including the same wording concerning commercial factors.

76. In July 2017 the Claimants' solicitors wrote to Defra suggesting that the Policy was creating a barrier to legal trade. Defra responded by suggesting a meeting. That was arranged for 20 September 2017. In the period between July and September 2017, Mr Lomas sent to Defra further correspondence in which the issue of cost was raised.

77. At the meeting on 20 September 2017 Defra undertook to review the Policy, whilst maintaining it in force. Mr Casale's evidence is that during that meeting the Claimants raised concerns over the transparency of the availability of the MV Joline. It was to tackle that issue that Defra together with APHA introduced Form WIT 61, as explained in paragraphs 79 and 80 below. The Defendants' notes of the meeting include reference to the costs of the MV Joline being "6250€-8500€ + port costs, 4500€ in 2016. Irish route £2k". (These figures do not coincide precisely with the figures actually quoted by BDV for 2016 and 2017: see further paragraph 130 below.)

The review of the Policy

78. Mr Casale explains in his evidence that the review which Defra then undertook aimed to consider both impact on animal welfare of both routes and the economics to the transporter in order to establish whether the Policy needed to be altered. As regards animal welfare, the veterinary advice, based on scientific evidence and their opinion, was that journeys via Ireland had a negative impact on the welfare of sheep and in order to minimise the stress only the shortest routes should be approved. Moreover Defra consulted Mr Lomas about his costs. Defra's economists then undertook an

analysis of the costs information provided by Mr Lomas. The result of this analysis is set out in paragraphs 133 to 135 below. Defra was unable to establish if there was a barrier to trade.

Service Booking Request and Confirmation: standard form WIT 61

79. Following the meeting, on 29 September 2017 Nichola Clark wrote to the Claimants' solicitor indicating that APHA and Defra would be implementing a new process to ensure that any booking requests made on the Ramsgate route were approached in a consistent and transparent way by organisers and the operator of the route and introducing a formal booking request form, standard form document WIT 61. Form WIT 61, entitled Service Booking Request and Confirmation, deals specifically, and only, with availability of the MV Joline. In his witness statement Mr McMullen explains that Form WIT 61 enables the organiser to demonstrate that they have attempted to obtain a booking on the shorter route using the MV Joline. That process was introduced due to conflicting information that was being provided to APHA by Mr Lomas and by Mr Onderwater as to the availability of the shortest route.

80. Form WIT 61 is in two parts. Part 1, to be completed by the Journey organiser, is a request directed to the representative of MV Joline, to confirm availability of a service on the Ramsgate to Calais route on a specified date and setting out the number of vehicles and animals. The form completed as to part 1 is then sent to the representative of the MV Joline with copy to APHA. Part 2 of the form is then to be filled in by the representative of MV Joline, confirming whether or not the service requested is available and setting out "any terms and conditions of service". The MV Joline representative is then required to indicate that, if the service is not available on the date and time requested, the earliest the service will be available after the date requested, which date had to be within 7 days.

The European Commission

81. In July 2017 Mr Lomas had also complained to the European Commission that he was unable to trade sheep from Great Britain. After obtaining information from APHA/Defra in August, in September 2017 the European Commission wrote to Mr Lomas, stating, first, that the implementation of Regulation 1/2005 is primarily the responsibility of the Members States' competent authorities. It went on to state that, on the basis of the information provided by Mr Lomas, and contrary to his claim, trade from Great Britain to other Member States is possible when the requirements of Regulation 1/2005 are met.

October 2017

82. By October 2017 the Claimants had clearly raised financial factors relevant to exporting live sheep. By email dated 21 October 2017, Mr Lomas provided APHA with invoices relating to the two routes and enclosed a copy of Mr Onderwater's email dated 22 September 2016 (see paragraph 67 above) and other, more recent information about comparative costs, including a one-page comparative cost analysis document.

83. In response, by email at 1537 on 24 October 2017, David Coles, Policy Advisor at Defra requested additional financial information from Mr Lomas. Defra was in the

process of reviewing the policy. The further information would help Defra "in our review to weigh up the welfare and financial impact of our policy".

84. At 1608, in an email drafted before Mr Coles' email of 1537, Mr Lomas wrote to Defra and APHA noting that "APHA have previously stated that they are unconcerned about commercial factors such as the cost of sea freight. Would you please now clearly spell out, for the record without further delay, the policy of Defra in relation to commercial considerations such as the price of transport". Then at 1657 Mr Lomas sent a further mail to Defra, this time replying to the 1537 email, expressing pleasure that Defra was taking notice of the costings of the Ramsgate route compared with the Irish route and asserting that it is the overly high seafreight cost of the MV Joline only that makes the route completely unviable. He added that at the appropriate time they would be setting out the costings and losses regarding the means of transport owned by the Mas Group. He asserted that Defra's policy "had decimated the trade".

85. By email dated 26 October 2017 to Mr Lomas, Mr Coles replied:

> *"The Government is committed to ensuring that the welfare of animals is considered for all long journeys. Council Regulation (EC) 1/2005 relating to the transport of live animals sets out strict requirements on how animals should be transported. The Regulation under Article 3 requires that all steps have been taken in advance to minimise the length of the journey…. <u>It is our view that to be in compliance with the Regulation and to minimise the total journey time, the shortest available route should be taken.</u> This is to ensure that animals are transported for the least amount of time.*
>
> *In line with our obligations… the shortest available route continues to be on the MV Joline without an alternative for slaughter and fattening stock….*
>
> *We have no issue with ferry operators taking livestock to the continent from ports on the East Coast and Southern England. APHA regularly issue journey logs to those transporting animals for breeding purposes who have obtained a booking with a ferry operator, this includes the vehicles which went from Harwich last year. All the journeys using the route via Harwich were issued with journey logs, APHA at the time did not insist on the use of the MV Joline for these journeys.*
>
> *Your email suggests that it is our policy on insisting the shortest route has reduced the trade, our policy in this regard has not changed for a number of years and it is not a new policy. Following the representations made by yourself and Mr Green, we are reviewing our policy and trying to understand <u>the financial factors</u> bearing in mind our obligations under Council Regulation (EC) 1/2005 in relation to minimising the overall journey time. To be able to effectively review the policy and to justify a change we would need to fully understand the*

> *overall impact. If you wish for us to consider any further information we will be grateful if you could please supply this information for our consideration."* (emphasis added)

86. By email dated 27 October 2017 Mr Lomas replied stating that Defra had already received the comparative costings of the two routes and "it is not rocket science to know that using the MV Joline will result in bankruptcy for all users other than Onderwater". He attached further evidence of the cost of the Irish route and concluded by stating that "if you should have further queries then please do not delay in contacting me further".

Late October 2017: Journey Log 1710

87. On 29 October 2017, Intra Agra sent to APHA for approval journey log 1710 – for a journey on 2 November 2017 from Foxhall Assembly Centre to Netherlands via Rosslare-Cherbourg. Intra Agra had sent a booking request to MV Joline on 28 October 2017. On 30 October 2017, BDV responded to Mr Lomas, saying that the vessel was available "at any time you like", but subject to certain conditions: payment had to be upfront, prices and terms were non-negotiable and all outstanding invoices from Channel had to be paid first, before honouring any booking request. The freight rates remained as they were in 2016.

88. By email dated 30 October 2017 at 1221 Mr Onderwater informed Ms Clark at APHA that the vessel was available, that Mr Lomas was offering to pay a much lower price than their rate, and was not ready to meet their terms nor to pay his outstanding invoices. Therefore BDV could not provide Mr Lomas with a service. He went on to explain that he could not fill out the WIT 61 form because they had a problem with their scanner. He added that provided their conditions were met, the vessel was available. They were not being unreasonable and were simply giving Mr Lomas the same conditions as anyone else.

89. That email was then circulated internally within Defra and APHA, and in an internal email of the same date a policy adviser from Defra advised that, from the information provided by Mr Onderwater:

> *"the MV Joline is commercially available on the specified date subject to Mr Onderwater's commercial conditions being satisfied.*
>
> *We are not going to form an assessment of whether those commercial conditions are reasonable. This is in line with the current policy."*

90. Following further complaints by Mr Lomas about the effect of the Policy on his trade, by email dated 3 November 2017 Ms Clark replied, by repeating the Policy and that, pending the outcome of the review, the 7-day policy would continue to be in place.

> *"Defra have been informed of the concerns and issues you have raised ...but neither Defra or APHA are able to comment on commercial factors that limit ability to secure bookings."*

91. On 14 November 2017 Ms Clark informed Mr Lomas that Mr Onderwater had not been able to return the booking form due to technical issues, but that he had explained the position on availability. Mr Lomas responded that the competent authority had conspired or colluded with Mr Onderwater in the use of "available" and that in fact the MV Joline was rarely available, unless it was for the benefit of sheep for Onderwater Agneaux. He complained that APHA should not rely on availability but rather on scheduled sailings. Channel Livestock had fallen out with Mr Onderwater in September 2016 when it was made known that Mr Onderwater intended to maintain to the competent authority that the vessel was always available, irrespective of whether in fact it was true or not. It was not the responsibility of the journey organiser to be arranging a ferry service, knowing that it would not take place. The organiser could only rely on a pre-advice service for the planned date of shipment.

92. Subsequently by email dated 15 November 2017 at 1132 Ms Clark forwarded to Mr Lomas the contents of Mr Onderwater's email of 30 October (see paragraph 88 above).

November 2017: Journey Log 1711: The Decision

93. In the meantime on 14 November 2017, Mr Lomas, on behalf of Intra Agra, submitted to APHA for approval journey log 1711 for departure on 17 November 2017. In his covering letter, he stated that he was advised that the MV Joline was not expected to sail during the next 7 days. The Journey Log on standard form indicated that the organiser was Intra Agra, the place of departure was the Foxhall Assembly Centre and the place of destination was Viernheim in Germany. The proposed route from Foxhall Assembly Centre was, first, Cairnryan to Larne, and, secondly, via Rosslare to Cherbourg. The transporter from Foxhall to Larne was to be Hedley Lomas; thereafter it was to be a different transporter by the name of Wilson McCurdy Jnr. At paragraphs 137 to 140 below, I set out the evidence about the costs and profitability of JL 1711 and of the comparative journey using the MV Joline at that time.

94. By letter dated 14 November 2017, sent by email at 1416, APHA sent the draft form WIT 61 and a letter in standard form, now designated "WIT 62 (in revised form 10/17)" setting out the policy in relation to journeys via Ramsgate and journeys via Ireland. That letter contained also the same statement about commercial factors not being detrimental (see paragraph 64 above). This Form WIT 62 is in terms very similar to the letter of 20 July 2017, but adds in a reference to the new booking form WIT 61.

95. By email on the same day at 1517, to APHA, Mr Lomas acknowledged receipt of the two standard forms, expressing incredulity that APHA could maintain that they were not involved in commercial arrangements given the content of WIT 61. He repeated his earlier statement that he had received confirmation that in respect of JL 1711 the MV Joline was not expected to be sailing and thus pressed for approval of that journey log.

15 November 2017

96. By email dated 15 November 2017 at 1152, Ms Clark asked Mr Lomas to complete his section of the WIT 61 form and send it to the operators of the MV Joline. Mr Lomas replied at 1253 indicating that he would complete and send the form "under

protest and duress". He also made further allegations of conspiracy between APHA and Mr Onderwater.

97. A few moments later Mr Lomas sent the form WIT 61 to Mr Onderwater for him to complete part 2, protesting that this was being unlawfully enforced upon organisers. He continued to make allegations of collusion between Mr Onderwater and APHA/Defra. The form itself requested a journey on the MV Joline on 18 November at 930pm for one vehicle carrying 450 animals.

98. By email at 1347 Mr Onderwater wrote to Mr Lomas stating that, upon payment of the outstanding and payment upfront of the rate, they would and could deal with his request. Despite the fact that the form WIT 61 had stated the number of vehicles, Mr Onderwater asked Mr Lomas to indicate the number of trucks. He added that it was pointless to request bookings without making payment and pointed out that the Irish ferries insist on payment with booking. He added that he believed that Mr Lomas had no intention to ship, but nevertheless he confirmed that the vessel was available on the usual conditions.

99. By email at 1507, Mr Lomas replied to Mr Onderwater with copy to APHA, in strong and colourful terms. In that email he said that he owed Mr Onderwater nothing, alleged that he, in conjunction with APHA, were determined to block his trade by maintaining that the MV Joline is always available and reminded him of a conversation they had had in September 2016 where Mr Onderwater had stated that in order to get all the trade he would never say that the vessel was not available again.

The Decision: 17 November 2017

100. By email on 17 November 2017 at 1749, Ms Clark wrote to Mr Lomas stating that APHA had received the completed booking form (WIT 61) from the operator of the MV Joline and attached a copy for his information. Mr Onderwater had stated in part 2 of the form that the vessel was available, that because payment was not received the booking request was not accepted. He added that as soon as payment is received the "vessel is ready to go/weather conditions apply". Ms Clark's email continued:

> *"On the basis of the response of the operator that the vessel is available on receipt of payment for the service we are unable to approve your application."*

101. On 22 November 2017 Mr Coles at Defra wrote to Mr Lomas stating that the review of the Policy was ongoing. Mr Casale concludes, as at the date of his first witness statement 12 July 2018, that a number of options had been put forward to Ministers which they were still in the process of considering.

Following the hearing

102. Following the first two days of the hearing, on 8 November 2018 Mr Lomas applied to APHA for approval of JL 1801 to export one truck of sheep from Wales to France via Ireland. By email on 9 November 2018, APHA attached a letter reiterating the Policy, including the statement that commercial factors should not have a "detrimental effect". On 12 November 2018 APHA emailed form WIT 61 to Mr Lomas and continued that, in respect of that application, APHA was acting on behalf of the

Welsh Government. This application is not the subject of this judicial review and in any event relates to the Welsh authority.

The Grounds of Challenge

103. In this section I deal with each ground of challenge, setting out the parties' contentions and then my analysis and conclusions. In line with the order in which the parties addressed the grounds, and because they are closely interlinked, I address Ground 1 and Ground 4 together, and then deal with the remaining grounds in numerical order.

Grounds 1 and 4: Proportionality, relevant considerations and "commercial factors"

The Claimants' submissions

Ground 1: Proportionality

104. The Claimants contend as follows. As a matter of law, under the Regulation, national standards or measures must strike a proportionate balance between its two objectives: elimination of technical barriers to trade and the protection of animals during transport. Recital (2) requires protection for animals to a "satisfactory level" only. The Policy, encompassing an obligation to use a specific route, and thus a rule as to the place of export, is a "technical barrier to trade". Moreover the Policy and the Decision impose a disproportionate restraint of trade.

105. As to the restrictive effect of the Decision and the Policy upon "trade", the Claimants' case, on the facts, is that the Policy has forced them *and others* out of the trade of exporting livestock to continental Europe and they have been, or are being, forced out of business.

106. As a result of the Policy, in circumstances where BDV maintain that the MV Joline is always available, the Claimants are forced to export using the MV Joline. However using this route is unprofitable and unviable. Whilst the Claimants can make profit on an export transaction using the Irish route, on the same transaction using the MV Joline, they make a loss. The difference is due to the much higher freight costs charged by BDV than the costs charged by the Irish ferry operators. This submission is based on the statement of Mr Lomas in his evidence:

> *"The prices charged by [BDV] to use the MV Joline would eliminate any profit the Claimants could otherwise make on the export of the animals, and the Defendants' Policy has therefore effectively driven the Claimants out of the trade altogether"*

107. There are two other reasons why the MV Joline is unviable. First, because of the lack of a fixed price per truck, it is impossible to know in advance the cost of export. Secondly, the MV Joline does not provide a scheduled service and so it is difficult to plan shipments for customers.

108. This restraint of trade is disproportionate because it does not balance the competing interests of the Claimants.

(1) The measures are not necessary for the protection of animals during transport. The Defendants accept that the Irish route is compatible with the Regulation, at least when the MV Joline is unavailable. This is evidenced by the fact that APHA has approved journey logs for the Irish route on a number of occasions between August 2016 and May 2017. However because Mr Onderwater claims that he will always maintain that the MV Joline is available, the Claimants are forced to use that route. The Regulation does not prohibit long journeys or subject them to restrictions. At most they are subject to specific detailed additional requirements of supervision, control and enforcement. Minimising the length of the journey is an element of animal protection, but it is not an overriding factor to be taken into account. Animal welfare is equally protected on longer routes, because of the other provisions in the Regulation. The true objective of animal protection can be achieved by allowing a longer route which is less restrictive of trade.

(2) Secondly, the Policy and the Decision do not strike a proportionate balance between the competing objectives of the Regulation. It is inherent in the nature of the Policy that it is likely to constitute a complete barrier to trade for any exporter other than BDV; and indeed that has been the impact of the Policy in practice. The failure to balance is borne out by the Defendants' consistently stated approach that "Commercial factors should not have any detrimental effect in the application of the Regulation"; which means that commercial considerations are not to be "taken into account" at all. The Defendants have failed to take account of commercial considerations (specifically the subject of Ground 4); and this demonstrates that they have not struck a proportionate balance.

109. Moreover the Claimants have demonstrated the disadvantage arising from these additional costs, which establishes disproportionate restraint in accordance with *Danske No 2* at §58.

Ground 4: relevant considerations

110. Turning specifically to Ground 4, the Claimants contend as follows:

(1) There is an English public law duty upon the Defendants to have regard to relevant matters when exercising discretion.

(2) In exercising their discretion to take national measures under the Regulation, the Defendants are bound to have regard to its two objectives. The Defendants have failed to have regard to one of those objectives, namely the trade objectives. In fact, they have adopted a positive stance of intentionally disregarding those objectives, as evidenced by their repeated statements concerning "commercial factors". "Commercial factors" include cost and profitability, and not just the 7-day rule.

(3) In doing so, the Defendants have failed to have regard to a relevant consideration, namely the Regulation's objective of eliminating technical barriers to trade.

(4) Accordingly the Decision and the Policy are unlawful as a matter of domestic law.

(5) The fact that the Defendants have belatedly undertaken an economic analysis as part of the review does not affect the unlawful nature of the Decision and of the operation of the Policy, prior to the review.

The Defendants' submissions

111. The Defendants make the following overriding submissions:

(1) The Policy has a primary main purpose, namely protection of animals in transport.

(2) The text of the Regulation and the case law demonstrate that the trade objectives are of considerably less importance than the primary animal welfare objective.

(3) The Policy uses the 7-day rule to strike the balance the Regulation requires between the primary objective and the secondary objective.

(4) The core of the Claimants' challenge is that the Policy is operated to exclude any consideration of commercial factors. Neither the wording of the Policy nor the application of it in practice (as explained by Mr Casale) operated in this absolutist fashion. It is capable of allowing consideration of such factors and has always operated in that way.

(5) The real problem is that the Claimants have never produced evidence of such an impact upon trade that would enable them to displace the presumption that the shorter route is available. Even now the evidence comes nowhere near to showing the sort of impact it is necessary to show.

Ground 1: Proportionality

112. First, the proportionality principle is not engaged in this case. Secondly, even if it is engaged, the Policy is proportionate.

113. As to the first submission, the principle would be engaged only if the Policy interfered with the fundamental freedom of movement of goods. In the present case the alleged restrictive effects on trade of the Policy are too uncertain and indirect to be capable of engaging the protection of Article 35 TFEU. There is no sufficient evidence of any impact of the Defendants' actions. At the time of JL 1711, there was no such evidence. The evidence which the Claimants have now produced, belatedly, relating to the costs of using the MV Joline and the pattern of use of the MV Joline does not establish either that JL 1711 was unprofitable, nor, more generally, that the Policy has rendered export via the MV Joline to be unprofitable nor prevented the Claimants or others from exporting livestock via this route.

114. It is not the Policy which has brought an end to the Claimants' trade. The Policy has not determined the price set by BDV. The market, created by the independent decisions of commercial ferry operators to withdraw their services, has done that. Moreover, it is not the purpose of the Policy to exercise any control over what Mr

Onderwater does in terms of availability; and there is no evidence to suggest that, when Mr Onderwater says that the MV Joline is always available, he is presenting anything other than a fair picture of its availability. Furthermore, the Policy has not enabled BDV to stop other exporters from trading at all. Other operators still continue to use the MV Joline.

115. As to the second submission, national authorities may adopt measures governing the application of the Regulation, and so, the Defendants are entitled to adopt a policy dealing with journey times. In accordance with *Danske No 2* §51, that policy is both in accordance with the provisions and objectives of the Regulation and with the principle of proportionality. The Policy is proportionate:

(1) The *main* objective pursued by the Regulation is the protection of animals during transport. It is of central importance to the interpretation and application of the Regulation.

(2) Contrary to the effect of the Claimants' position, the trade objectives are not of equal importance. Commercial interests are relevant, but only as a secondary purpose.

(3) No "disadvantage" within §58 of *Danske No 2* has been shown; and in any event that paragraph cannot be interpreted as meaning that absolutely anything which imposes an additional cost on the transporter falls foul of the principle of proportionality. If it were otherwise, there would be no balance and additional cost would, in all cases, override the main objective.

(4) The Policy itself is an appropriate and proportionate means of safeguarding the welfare of animals. It is calculated to minimise the length of journeys by requiring exporters to take the shortest route where possible. The Regulation recognises that long journeys are likely to have a more detrimental effect on the welfare of animals (see Recital (18)) and limiting the length of journeys is liable to improve protection of animals during transport.

(5) The Defendants' statements that commercial factors should not detrimentally affect the application of the Regulation do not amount to an error of law. They are a correct appreciation of the importance of animal welfare and the balance with commercial interests.

(6) The 7-day rule strikes an appropriate balance between the primary objective and the legitimate commercial interests of exporters reflected in the trade objectives. The Policy recognises that there will be circumstances where the shortest route is not available and that exporters should not have to wait indefinitely until the route becomes available again. The Defendants accept that the Irish route is compatible with the Regulation when a shorter route is not available within 7 days. But where it is available, the Policy expects the exporter to take the route which is best for the welfare of the animals.

(7) In fact the Policy has enabled exporters to continue to use, where necessary, the Irish route and others still use the MV Joline.

Ground 4: relevant considerations

116. As regards Ground 4 specifically, the Defendants contend as follows:

(1) The Defendants' statements that "commercial factors (including the fact that alternative routes are more cost-effective) should not have any detrimental effect in the application of EC Regulation 1/2005" do not mean that commercial factors cannot be taken into account. Rather they mean that "commercial factors must not harm the primary objective of protection of animal welfare". These factors are not excluded by the Policy; otherwise the Policy would not make reference to the effect of commercial factors.

(2) The Defendants have in fact taken account of commercial interests. In particular, first, by the use of the 7-day rule, which strikes an appropriate balance between objectives; and secondly, in fact by undertaking a review, and by considering in detail Mr Lomas' evidence of commercial detriment. This is clear from Mr Casale's witness statement and from what has happened in fact.

Analysis

(A) Issues of Fact

117. These submissions have given rise to the following important issues of fact:

(1) What use has been made by the Claimants and other exporters of alternative routes for export?

(2) Is use of the MV Joline unprofitable or otherwise unviable?

(3) Under the Policy what, over time, has been the Defendants' approach to "commercial considerations"?

Before addressing these, I make the following observations about the evidence before the Court.

Evidence in judicial review proceedings

118. By the close of the hearing, the Court had received a substantial amount of evidence by way of witness statements, some of it served late in the day, and in further notes provided by the parties. As is usual in judicial review proceedings, none of this material has been tested by oral evidence. The guiding principle is that, where in judicial review proceedings, and in the absence of cross-examination of witnesses, a relevant dispute of fact cannot be resolved on the written material alone, the facts must be assumed to be those which favour the respondent public authority: *R v Camden LBC ex parte Cran* (1995) 94 LGR 8 at p12.

119. As regards Mr Lomas' evidence before this court, as explained further below, there have been a number of inconsistencies and gaps in his witness evidence: for example, the failure to take account of internal transfer prices; the lack of clear explanation of the different companies within the group and their differing roles in the export transactions, including the role of Hedley Lomas (and his involvement with them) and of the position where Channel Livestock was the consignor, but there was a third

party journey organiser or transporter; the change of road transport cost from £3300 to £2700; and, perhaps, most significantly, the failure to make clear, when setting out his costs, that on each sailing on the MV Joline there was more than one truck, and indeed likely to be up to 4 trucks (thus affecting the likely freight cost, as explained in paragraph 130 below). I note too from the tone and content of his correspondence that Mr Lomas has strong feelings of grievance in relation to the export of live animals and of having been improperly treated by the Defendants and others. My task is to assess the evidence objectively.

(1) Use of alternative routes over time

120. The Court has been provided with an array of evidence, of different kinds, relating to the number of journey log applications, sailings and trucks carried on the three different routes in the period 2010 to 2018. The parties have attempted to reconcile these different strands of evidence, but it is not all agreed, nor necessarily consistent. In some cases, this is because different measures are used; in other cases, there is a lack of clarity as to which of the Claimant companies are involved and in what capacity.

The Defendants' evidence

121. Mr Casale and Mr McMullen, principally, provided the Defendants' evidence on this aspect.

(i) The Irish route: Journey log applications: non-Claimants

122. First, on the Irish route, *as regards applications made by organisers other than any of the Claimants*, in 2017 there were 7 journey log applications from 3 different organisers. Of those applications 5 were approved. In 2018 there were no such applications at all. In a further note to the Court, the Claimants assert that, between 1 September and 31 December 2016, the Defendant approved 4 journey logs where Channel Livestock was the consignor, although they do not explain whether the journey organiser was one of the Claimants. In fact it appears from the applications that the journey organiser was Mr Ziolkowski.

(ii) The MV Joline: Sailings and Journey log applications: Claimants and Others

123. Mr Casale, in his first witness statement, points out that APHA had continued to issue journey logs for the MV Joline submitted by other transport companies. It is not the case that the MV Joline was operating only for Mr Onderwater's own trade. Mr McMullen's evidence as regards the MV Joline, in relation to organisers other than the operator of the MV Joline itself (i.e. including the Claimants) is as follows:

	Number of Organisers	Number of Sailings (Number of journey logs)
2015	5	11 (59)
2016	7	16 (70)
2017	5	10 (31)
2018	2	3 (5)

Of those journey logs, 25 were submitted by Dutch, Irish or Belgian transporters. The number of journey logs is not the same as the number of trucks (as set out in paragraph 126 below), because there may be more than one journey log in respect of a single truck of livestock. The Claimants agree the above figures for the number of sailings for 2015-2017 and for the number of organisers for 2018. They are not in a position to agree the other figures.

(iii) All three routes: the Claimants' journey log applications

124. Thirdly, as regards the Claimants (Intra Agra and Hedley Lomas), journey log applications for departures from England in which they were either organiser or transporter have been as follows:

	Joline	Harwich to Hook of Holland	Irish Route: approved by APHA, journey went ahead	Irish Route: cancelled[1] by organiser, journey did not go ahead	Irish Route: not approved by APHA, journey did not go ahead
2015	0	0	0	0	0
2016	8	12	0	0	0
2017	0	0	2	8	
2018	0	0	0	0	0

These figures do not include journeys in which any of the other Claimants were involved in some other capacity; for example, where Channel Livestock was the consignor, but the journey organiser and transporter were third parties; nor journeys where the point of departure was outside England. As regards the Harwich route, Mr Casale has produced a schedule showing a (non-exhaustive) total of 33 applications. In all cases the journey organiser was either Mr Lomas or Mr Ziolkowski. It is not clear whether Mr Ziolkowski was working for the Claimants. It thus appears that the figure of 12 in the above table may be an underestimate.

125. In its further note, the Claimants dispute the claim that for 2016 they made no applications for the Irish route. They refer to 5 journey logs approved for the Irish route in 2016 – which appear to include the 4 referred to in paragraph 122 above. They were for journeys departing from Scotland. It appears that for these journey logs, the Claimants' involvement was as consignor (Channel Livestock) and the journey organiser was Mr Ziolkowski.

The Claimants' evidence: The MV Joline's sailings from 2010 to 2017

126. Mr Lomas has provided information. The following table sets out, for each year, the number of trips made by the MV Joline from Dover/Ramsgate to Calais ("sailings") and the number of trucks carried on the vessel where the consignor of the livestock is

[1] A "cancelled journey" is one where the application was either withdrawn by the organiser or superseded by a new application by the same organiser. The Defendants have been unable to confirm in the time available which journey logs in 2017 were cancelled and which were not approved.

Onderwater Agneaux, Channel Livestock (i.e. the Claimants) or "others" and breaking down the number of trucks as between calves and sheep.

Year	Total Number of sailings	Onderwater	Lomas	Others	Calves	Sheep
2010	2	2	0	7	0	9
2011	42	55	25	130	46	164
2012	30	41	6	68	17	98
2013	26	37	6	67	1	109
2014	17	28	0	41	1	68
2015	11	23	0	30	0	53
2016	16	27	22	20	0	69
2017	10	22	0	12	0	34

In his second witness statement, Mr Casale provides information about 2018. As at 2 November 2018, there had been 8 sailings with a total of 29 vehicles, of which five were trucks of other exporters. In addition there was one further sailing scheduled for 5 November 2018 which carried two trucks, not associated with Mr Onderwater.

127. The Defendants are not in a position to agree the figures for 2010-2014, as they no longer have the relevant records. As regards 2015 to 2017, the Defendants agree the total number of sailings and agree the total number of trucks carried on those sailings. They do not agree the breakdown of trucks as between Onderwater, Claimants and "others".

128. More generally, as regards the use by the Claimants overall of the MV Joline, particularly in 2016, the discrepancy between Mr Lomas's figures and those of Mr McMullen comes about because the former figures include export transactions where a Claimant company is the consignor, but not the journey organiser or transporter. As pointed out, the Claimants have provided no further explanation of those cases where the consignor is a Claimant company, but no Claimant is involved as journey organiser or transporter.

Findings

129. On the basis of the foregoing figures, I make the following findings.

(1) There is no doubt that the volume of trade via the MV Joline has declined over time. However, even once transport of calves effectively stopped, since 2013 the number of sailings has been more than minimal. There has been a decline in the numbers of sheep carried from 2013 to 2017, but nonetheless the export of sheep by other exporters via the MV Joline has continued over time. Moreover, significantly, there has also been a significant decline in the number of "Onderwater" trucks being carried. This supports the proposition that there has been a decline in the overall trade rather than a concern over the availability or viability, for others, of the MV Joline.

(2) On each sailing multiple trucks were carried - on average each year between 3 and 5 trucks per sailing. The overall average is 4 trucks per sailing. This suggests that the freight rate likely to be charged by BDV would not be the top

rate based on no other trucks being carried, but would be a lower rate based on multiple trucks. As explained in paragraph 130 below, the rate where 4 trucks are carried is about half of the top rate upon which the Claimants' calculations are based.

(3) In 2016 the Claimants were able to export sheep via the MV Joline on a number of occasions and for a substantial number of trucks (and regardless of the capacity in which a Claimant was acting). The Policy did not prevent trade in that year. Moreover, in that year, even where the Harwich-Hook of Holland route was also available and used by the Claimants, nevertheless Intra Agra and/or Hedley Lomas were journey organiser for 8 consignments using the MV Joline, and a total of 22 "Claimant" trucks were carried.

(4) Significantly, throughout the period, and right up to the present time, there has been a steady flow of trucks carried on behalf of *other* exporters/consignors/journey organisers on the MV Joline. Companies, other than the Claimants and other than Mr Onderwater's own trade, have continued to use the MV Joline. In view of the findings above, I do not accept that the decline in the number of trucks exported by *other*s from 130 in 2011 to 12 in 2017 is simply because of the uncommercial prices charged by Mr Onderwater.

(2) Is the use of the MV Joline unprofitable or otherwise unviable?

130. First, as for freight rates, on 22 September 2016 Mr Onderwater discussed freight rates for the MV Joline for the future: if the customer agreed to commit to a number of sailings then the rate would be agreed. Alternatively he quoted differential rates depending on the total number of trucks (independent from the customer) on any particular sailing, ranging from €6500 for 1 truck sailing down to €3500 for 4 trucks and €3250 for 5+ trucks sailing. These rates were maintained and were quoted again by BDV on 30 October 2017. In a series of invoices from BDV to Channel Livestock in respect of crossings on the MV Joline in October 2016 the freight rate per truck was in the region of €3500. Mr Onderwater in his witness statement, provides a detailed breakdown of BDV's *fixed* costs incurred on each sailing, and thus explaining why the freight rate is reduced, where more trucks are carried.

131. As regards the Irish route, on 1 August 2017, Stena Line charged Hedley Lomas a total of £2191.11 for a voyage from Rosslare-Cherbourg, On 19 September 2017 Irish Ferries informed Hedley Lomas that the price for Dublin-Cherbourg was a total of £1713.30.

132. Secondly, there are three main sources of evidence of comparative costs and profitability of the Irish route and the MV Joline route. I address them in chronological order.

(i) Between September and early December 2017: the Defendants' analysis

133. In a document entitled "economic analysis for 7 day rule", Defra set out an analysis of the relative costs of the two main routes for exporting animals for slaughter, namely via the MV Joline and via the Irish route.

134. The main findings of the analysis at that time were as follows. First, the main cost of exporting sheep by either route was the costs of the ferry and the control post. Based on evidence of these costs *provided by Mr Lomas*, the figures suggested that it cost an additional £3495 to export a lorry load of sheep via the MV Joline than via Ireland (this was based on the most expensive of the freight rates offered by the MV Joline). Based on an average number of 402 sheep per journey, this converted to an additional cost of £8.69 per sheep for travelling via the MV Joline. Secondly, the document then sought to assess the relevant impact of that cost increase by reference to the potential revenue from selling a sheep. Defra estimated that the additional £8.69 per sheep represented 9.2% of the sale price. Thirdly, the analysis took account of road travel costs and suggested that the fuel costs of exporting via the MV Joline would be lower than via the Irish route and that would therefore reduce the overall additional cost of travel via the MV Joline to £8.03 per sheep equivalent to 8.5% of the estimated revenue. (The Claimants do not broadly take issue with the analysis thus far.) Fourthly, the analysis suggested that the additional cost burden of the MV Joline might be lower than that figure, for two reasons. It was possible that the exporter would pay lower vehicle rental costs, lower driver hire costs and lower costs for feeding animals during the journey. There was no sufficient evidence to calculate those costs. It was also possible that sale prices for the sheep would be higher as the journey was shorter and the sheep were likely to arrive in a better condition. (The Claimants dispute this suggestion).

135. Finally, the analysis concluded that it was not possible to infer whether the additional export costs would mean that it was no longer profitable to export live sheep. Whilst Defra had estimated that up to £8.03 per sheep is added to the export costs as a result of having to travel via the MV Joline, there was no evidence about the general profitability or expected margins of the live export trade to assess whether that additional cost is greater than the profit available and would render the trade unviable for exporters. Defra did not have information on the full economic costs of the export trade.

136. In his first witness statement, Mr Casale explains that, on the information then available to them, they were unable to establish the profitability of either route as there were too many unknown variables. He concludes:

> *"on the information Mr Lomas provided, we were unable to establish if there was a true barrier to trade or not, just that one route was more costly than the other."*

(ii) The Claimants' evidence about costs of JL 1711

137. Then, in the Detailed Statement of Grounds, the Claimants set out the costs of proposed JL 1711 and of a comparative journey at that time, using the MV Joline. They estimated the cost of JL1711 to be £5,716. They estimated the cost using the MV Joline to be £9,200. That included £5,900 for the cost of transport by the MV Joline, based on the highest of the rates offered by Mr Onderwater (€6500) and the cost of road transport from Foxhall to Germany of £3,300. The latter figure was stated to be based on a price charged by *Mr Onderwater* for road transport from *Daventry* to Viernheim. Subsequently, in his witness statement, not served until 14 September 2018, Mr Lomas explains that the sum of £3,300 was for the road transport as a whole from Foxhall to Germany and accepted that the Claimants could reduce

this costs to around £2,700 by using *their own* vehicle. On a careful reading of the Statement of Grounds, the £3,300 was not the cost of actually using Onderwater, but was an estimated price based on a similar, but not the same, journey operated by Onderwater. It is thus not clear why the figure of £3,300 was put forward in the first place. If initially not using their own vehicle, whose vehicle was to be used in the original estimate? He explains that the difference in cost between the two routes is principally because of the "excessive price" charged by BDV.

138. In that statement, Mr Lomas then goes on to give, for the first time, more financial information which shows, he says, that for journey JL 1711 using the MV Joline would have eliminated any profit, whilst the Claimant could have made a profit using the Irish route. He gives information on the purchase price and sale price of the 420 sheep (which he maintains would be the same, regardless of which route was taken). Costs incurred before leaving Foxhall Assembly Centre (which would be the same, regardless of route) would total £3,343.20. Significantly, within that figure, Mr Lomas includes the sum of £714 for transport from Wales to Foxhall Assembly Centre, which he says Channel Livestock would pay to *Hedley Lomas.* The latter company is one of the Claimants, and since the Claimants are putting forward a figure for the overall profitability for the group, in argument Mr Quigley fairly accepted that any profit margin earned by Hedley Lomas on that transport, in excess of its costs, falls properly to be added to the overall profit or deducted from the overall loss on the transaction. As regards the overall comparative costs of the Irish route and the MV Joline, Mr Lomas gives a figure of £8.30 per animal, which corresponds with the figure reached by the Defendants. (Although of course the latter figure is based on the highest "one truck" freight rate offered by Mr Onderwater).

139. Putting his figures together, Mr Lomas' conclusion is that only the Irish route would have enabled the Claimants to make any profit on JL 1711. On that route, the profit would be £3,149.56. On the MV Joline route, the Claimants would make a loss of £334.44.

(iii) Mr Casale's second witness statement

140. In his witness statement of 2 November 2018 responding to Mr Lomas's evidence, Mr Casale accepts that the route using the MV Joline is more expensive than the route via Ireland. However he does not agree with Mr Lomas's analysis as to its profitability. First he points out that many of Mr Lomas's figures are unsupported by any evidence, such as invoices. In any event they offer no more than a view of one particular journey. He then attaches an analysis conducted on 30 October 2018 by the Defendants' economists which highlights issues with the information provided by Mr Lomas. He points out, with justification, that the attribution of costs between the various Claimants, interested parties and himself is unclear. Secondly, he points out that if the figure of £2,700 was used for road transport (as suggested by Mr Lomas) instead of £3,300, such a saving of £600 would overtop the claimed £334.44 loss on the MV Joline. He points to confusion about who was acting on behalf of whom, and in particular the suggestion that Intra Agra was exporting on behalf of Ystum and not on behalf of Channel Livestock. There are no documents to establish the agreed purchase price or sale price. Next he questions why there was any need to move the animals from the farm in Wales to the Foxhall Assembly Centre, when the intention was to take a route via Ireland. The cost of preparing the sheep for export could be reduced by just under £700 by a departure direct from the farm (due to reductions in

costs of feed and re-tagging). Next he points to the fact that it appears that various elements of cost involved one company within the Claimant group charging another company within the group. In summary, he highlights the following savings:

(1) £600, if the Claimants used their own truck;

(2) £697.20 if the animals went directly from the isolation facility without the need for re-tagging;

(3) the claimed cost of the MV Joline is based on the cost where only a single truck is travelling and if more than a single truck was on board Channel livestock would be saving an additional £2,250 - £3,250.

Apart from contesting, in part, the Defendants' point about re-tagging, the Claimants did not seek to contest these points, whether by evidence or otherwise. Mr Quigley submitted that it did not help to conduct a detailed analysis: "£200 here or there" should not matter.

Findings on profitability

141. On the basis of this evidence, which is far from complete, I am not satisfied that export via the MV Joline was or would have been unprofitable (or indeed only marginally profitable) for the Claimants (and in particular the exporter Channel Livestock). This conclusion applies both to such a journey in November 2017, at the time of JL 1711 and more generally at any time between 2016 and 2018.

142. First, the Claimants accept both the £600 reduction in transport costs from Foxhall and the deduction of a profit element of the £714 of the transport costs to Foxhall. Even assuming as little as £100 for that profit element, that turns an overall loss of 334.44 into a profit of more than £350. Secondly, and most importantly, I am not satisfied that the Claimants would have paid anything remotely as high as €6500 for freight on the MV Joline. The evidence, uncontradicted by the Claimants, is that on average the MV Joline has carried 4 trucks on each sailing, giving a freight cost of €3500 per single truck. This would reduce the freight cost (at the suggested exchange rate of €1.18 to £1) from £5,508.47 to £2,966.10, and thus resulting in an overall profit of in excess of £3,350. Indeed I note that in an email as long ago as 3 May 2017, Mr Lomas expressly accepted that if there are 4 trucks the MV Joline "might be viable". This email was not expressly referred to in Mr Lomas' evidence. (That the Defendants in 2017 reached a similar £8 per sheep cost differential is due to the fact that their estimate was also based on the Claimants' suggested top freight rate of €6500). I take no account of the Defendants' points about departure direct from the farm, rather than via Foxhall – although Mr Casale's point here was directed to use of the Irish route and is less convincing in the case of the MV Joline.

143. That the MV Joline route is not unprofitable is further borne out by two facts. First, in 2016, when the MV Joline freight costs were the same as in 2017, the Claimants themselves exported via that route on at least 8 occasions and for 22 truck loads. At paragraph 47 of their Detailed Statement of Grounds the Claimants accept that those exports generated profit. No explanation has been proffered as to why the MV Joline was profitable or at least viable in 2016, but not in 2017. Nor is there any evidence to support the allegations that BDV "increased their prices" over time. Furthermore, in

view of Mr Onderwater's evidence, I am not satisfied that BDV's prices were or are "excessive". Secondly other exporters have throughout the relevant period exported on the MV Joline. They have not been driven out of business. The reduced number of sailings of the MV Joline over time appears to have been due to the general decline in the export of live animals: see paragraph 129(1) and 129(4) above.

The Claimants' other reasons for not using the MV Joline

Predictability of cost

144. Mr Lomas asserts that the Claimants and others do not know in advance what the cost of export via the MV Joline will be, because BDV's price varies depending upon the number of trucks on each sailing. As to this, as set out in paragraph 142 above, even on the worst case of a single truck, I am not satisfied that the MV Joline is unprofitable. However, the overwhelming evidence before the Court is that on each sailing of the MV Joline there has been at least three trucks, and so the route would be profitable by some considerable margin. Mr Lomas has had the opportunity to produce evidence of specific, unprofitable, "one truck" sailings, but has not done so.

"Scheduling"

145. Mr Lomas states that the MV Joline does not operate according to a timetable published in advance. WIT 61 requires the exporter to be prepared to use the MV Joline on any day within a 7 day period. But customers require sheep to be delivered on a particular day and not just within a particular 7-day period. Mr Lomas says that during 2017 a number of customers decided not to place orders because the Claimants could not commit to deliver the sheep on a particular day. Nor, unlike in the case of the Irish ferry operators who have a published schedule of service, can the Claimant commit to deliver sheep on a regular weekly basis. For these reasons sailing on request is not beneficial.

146. Mr Casale in his second witness statement responds that, as regards regularity, the Irish ferry companies only sail on three specific days a week whereas the MV Joline will sail on any day if a booking is made. If a client wished to have his sheep delivered on other days, the Irish route could not facilitate this. Mr Onderwater in his witness statement states that the MV Joline operates as and when bookings are made, not on a regular scheduled basis. The vessel is on standby for when a booking is made so this is, in his view, better than a regular scheduled service.

147. I do not accept the Claimants' contention that the absence of a schedule makes the MV Joline commercially unviable. Not only is the vessel available "on standby", crucially the MV Joline can make the crossing from Ramsgate to Calais and back in a single day. This means that it is, in practice, available 7 days a week. I thus accept Mr Onderwater's evidence and his statement that it is available "24/24 and 7/7".

The Disputed debt

148. Mr Casale suggests in his evidence that the disputed debt between the Claimant and Mr Onderwater was the main reason why the Claimants were keen to pursue an alternative route.

149. The relevant commercial dispute was between BDV and Channel Livestock over a number of invoices for transport and ferry crossings in the sum of €22,607.29. Mr Onderwater's evidence is that the MV Joline was available to book, provided that the debt was settled before travel. He also requested payment for the crossing upfront to avoid future problems with late payment. Similarly, Mr Onderwater referred to outstanding debts from Ystum, and in that case he took the same attitude that he could not accept bookings before the debt was settled. His view is that it is not unreasonable to refuse bookings from a person who owes him money until he has settled his debts.

150. Mr Lomas in his evidence accepts that there is a disputed debt between Channel Livestock and BDV, but states that that is *not* the main reason why the Claimants do not use the MV Joline. The main reason he says is that the route is not commercially viable. The Claimants could not use the MV Joline even if the disputed debt was resolved.

151. In oral argument, and somewhat inconsistently with Mr Lomas' evidence, Mr Quigley suggested that the disputed debt is itself a basis of unlawfulness. The Policy was and is disproportionate, as it enables Mr Onderwater to put pressure on the Claimants to pay the, or indeed any, disputed debt, by forcing payment as a condition of agreeing to further trade. However this depends upon whether the pressure is unfair, and in turn whether the debt is fairly claimed or not. Without greater explanation as to the nature of the dispute, there is no basis upon which the Court or the Defendants could conclude that Mr Onderwater was behaving improperly or concocting a dispute to put unfair pressure on Claimants. On the material before me, there is no reason to think that the claim by Mr Onderwater was not bona fide. The Claimants could have but did not explain why the debt was disputed. I do not accept that the Defendants are enabling Mr Onderwater to hold the Claimants to ransom, as suggested.

(3) "Commercial considerations": the Policy over time and what it has meant

152. In my judgment, the Defendants' stated position as to the relevance of "commercial considerations" or "commercial factors" has not been consistent over time and has been far from clear. It is not easy to divine from published statements and from the correspondence precisely what the Defendant's stated policy in relation to commercial considerations was. The lack of consistency in the Defendants' position can fairly be criticised.

153. I accept that the Defendants' most frequently stated approach - that commercial factors should not have a "detrimental effect" - is not a statement that they will not consider, or take into account, commercial factors at all. It can legitimately be interpreted as meaning that "commercial factors will not override" the other objectives of the Regulation. Nevertheless the phrase itself is somewhat opaque, and, what is more, the Defendants have not consistently expressed the Policy in this way. At various times the Defendants have used other words. Originally the Defendants indicated that the shorter route i.e. via the MV Joline had to be "viable". In my judgment, "viable" here could only mean viable from an exporter's point of view and suggests that commercial factors *are* taken into account. In the WIT 48 letter of September 2016, the Defendant's state that commercial factors "do not affect" the application of the Regulation. In specific correspondence in February and May 2017, APHA made express statements that commercial factors or "cost" would not be "taken into consideration". As late as 3 November 2017, APHA told Mr Lomas that

the Defendants were not "able to comment on commercial factors". At the same time, nevertheless the Defendants were inviting the Claimants to submit financial and cost information in relation to profitability. The Claimants' frustration at the lack of clarity in the Defendants' stated approach is understandable. Moreover the Policy which favours the shortest route does not appear to have been strictly applied in 2016 when the (slightly longer) Harwich-Hook of Holland route was available and operating.

154. I find, therefore, that the Defendants' *expression* of their policy in relation to commercial factors has been unclear and inconsistent and thus unsatisfactory.

155. However in his witness statement Mr Casale has said expressly that commercial factors have been taken into account: see paragraph 60 above. First, the 7-day rule is in place as a result of commercial considerations. Secondly the Defendants have in fact been prepared to consider whether the MV Joline route is commercially profitable and/or viable.

(B) Conclusions on Ground 1 and 4

156. In the light of these findings, my conclusions are as follows.

Ground 1: Proportionality

157. First, as regards the Regulation, the protection of animal welfare is the main and primary objective. The trade objectives are secondary. Contrary to the effect of the Claimants' submission, they are not of equal importance and cannot trump or override the achievement of the primary objective. Furthermore, the Regulation imposes a distinct obligation to minimise length of journeys. The veterinary evidence establishes that the length of the journey may have a substantially adverse effect on animal welfare. Article 3(a) specifically adds to the protection of animal welfare. It is distinct from the other obligations in Article 3. (See also *Zuchtvieh* and paragraph 47(5) above.) Animal welfare is not protected merely by the technical rules (found largely in the Annexes) applicable to long journeys.

158. Secondly, in the light of my conclusions at paragraphs 141 et seq above, the Claimants have not established that the MV Joline route is unprofitable or unviable, whether for reasons of cost or otherwise. On the evidence before the Court, I find that the Policy (or the Decision) has not in fact hindered trade in the export of livestock. I do not accept that the Claimants' ability to export sheep (nor, importantly, the ability of others) has been restricted by the Policy. In particular the Policy has not prevented the Claimants from being able to export via the MV Joline. They have not established that using the MV Joline route is unprofitable, nor that predictability of cost or scheduling is a problem. Even if there is additional cost, this is not "disadvantage" within the meaning of §58 of *Danske No 2*. There is therefore no relevant restriction of trade, whether under Article 35 TFEU or by way of "technical barrier to trade" under the Regulation. Accordingly I accept the Defendants' submissions at paragraph 113 above, and the proportionality principle is not engaged.

159. Thirdly, even if, contrary to the foregoing, the absence of actual effect on trade is not such as to take the Policy outwith the application of the proportionality principle (on a wider *Dassonville* approach), neither the Policy nor the way in which it has been

implemented is disproportionate, such that it is prohibited by the Regulation as interpreted in *Danske No 2:*

(1) Proportionality requires a balancing to be carried out. Where an operator applies for a journey that is not significantly longer than the shortest route, but the commercial balance for the operator is in favour of that slightly longer route, the balance might shift in favour of allowing the slightly longer route. This is the case in relation to the Harwich-Hook of Holland route. On the other hand, where the route applied for is significantly longer than the shorter route (with commensurately greater risks for animal welfare) and the shorter route is more expensive, but not unprofitable, the balance falls firmly in favour of the shorter journey. That is the position in relation to the Irish route, which is up to four times longer and where any additional cost of the MV Joline is not prohibitive. Where there is a very substantial difference in the length of the journey, it is not disproportionate to insist on the shorter route, where, as here, that route is merely less profitable or only marginally profitable.

(2) The facts that there is no established actual effect on trade and that any potential effect appears to be slight means that, on the "trade" side of the balance, the adverse effect is slight, at most. In the present case, the balance comes down clearly in favour of the protection of animal welfare sought to be promoted by the Policy.

(3) For the reasons given in my conclusions on Ground 4 below, the Defendants did not disregard, intentionally or otherwise commercial factors and thus did not fail to balance the trade objectives of the Regulation.

(4) Moreover, any failure to take account of commercial factors sufficiently had no effect on the proportionality balance, since, on the facts those commercial factors would not have established any relevant restriction of trade, since the Claimants cannot establish that the MV Joline route is or has been unprofitable or unviable. At the time of the Decision and JL 1711, there was no sufficient evidence that the MV Joline route was unprofitable and in relation to the Policy as a whole, the evidence available now does not show that it is unprofitable.

(5) Finally the Claimants have not been able to suggest a specific alternative policy which is less restrictive of trade; they suggest merely a policy that takes account of commercial factors. As to that, first, as explained below, I conclude that the Defendants have taken into account such factors, and, secondly, in any event, on the facts, taking account of such factors, would not have been less restrictive of trade.

160. For these reasons, Ground 1 is not made out.

Ground 4: relevant considerations

161. In relation to Ground 4, I conclude that, despite the inconsistency in the expression of the Policy, it is clear that in fact the Defendants have taken into account commercial factors (including not just the 7-day rule, but also issues of comparative cost and profitability of the two routes) and have shown themselves willing to do so. Mr

Casale's witness evidence is that the Defendants have all along taken into account commercial interests and/or impact. More specifically, first, the 7-day rule itself is a manifestation of taking account of the commercial interests of the exporter. Secondly, as regards profitability/viability of the MV Joline route and in response to the Claimants' complaints and concerns, the Defendants embarked upon a review of the Policy following the meeting in July 2017. They asked for evidence on profitability. They undertook their own economic analysis between July and December 2017: see emails dated 24 and 26 October 2017 (paragraphs 83 and 85 above). At that time, whilst fairly recognising that using the MV Joline might impose additional costs (of course only on the basis of the Claimants' assertion of MV Joline freight costs), they did not have sufficient information to establish whether use of the route was unprofitable. Eventually, in the course of these proceedings, the Claimants have provided further information on costs and profits. This has been considered by Mr Casale in his further witness statement. In my judgment, the Defendants have been willing to consider the commercial impact of the Policy. The fact remains that they have not been provided with cogent evidence supporting the alleged effect of the Policy in preventing exports and driving the Claimants out of the export trade, let alone out of business. On this basis, Ground 4 is not well founded.

162. Further, if I had concluded that the Defendants had not adequately taken commercial factors into account, it seems to me any failure to do so would not have made any difference to the outcome for the Claimants on the facts, for the reasons given in paragraph 159(4) above. In these circumstances, whilst I heard no argument specifically on the point, I would have been minded to refuse relief in any event pursuant to section 31(2A) Senior Courts Act 1981 on the basis that it "appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred." In particular, given my conclusions on the principal ground of challenge, Ground 1, I would not have been readily persuaded that s.31(2B) ("exceptional public interest") should apply.

Ground 2: Misinterpretation of Article 3(a) of the Regulation

The Claimants' submissions

163. The Claimants contend that the Defendants have misinterpreted and/or misapplied the Regulation in two ways:

(1) The Defendants have interpreted Article 3(a) to mean that the "shortest available route" must be taken, regardless of whether it is commercially viable for the exporter. Article 3(a) does not impose a requirement that "the shortest available route should be taken": rather the requirement is only that "all necessary arrangements have been made in advance to minimise the length of the journey …" "All necessary arrangements" cannot include any that would prevent the journey from going ahead at all because, as here, it would no longer be commercially viable. Long journeys are an inherent part of the Regulation. There is no obligation to use the shortest route. The objective in the Regulation is not simply "that the shortest route should be taken".

(2) Secondly and in any event, Article 3(a) requires the organiser to make "all necessary arrangements … in advance to minimise the length of the journey". "The journey" is defined by reference, not merely to a particular point of departure, but also by reference to it beginning on a particular date. This is to be implied from the requirement (in Annex II paragraph 3(b)) to submit a journey log within two days before the time of departure and from the provision in the journey log form itself requiring a date and time of departure to be specified. Accordingly the "journey" is defined by the date of departure specified in the journey log. However the Policy requires APHA to refuse a journey log if the MV Joline is available either on the date of departure, or within 7 days thereafter. Properly interpreted, that Article requires all necessary arrangements to be made to minimise the length of the journey beginning on the date of departure. Those arrangements cannot include abandoning the journey altogether and departing on a different date.

The Defendants' submissions

164. The Defendants contend as follows:

(1) The Defendants have correctly interpreted and applied Article 3(a), by making clear that "all necessary arrangements [must] be made in advance to minimise the length of the journey". Where the Defendants have referred to using the shortest route available that has been expressly stated as being for the purpose of achieving the overriding requirement of minimising journey length.

(2) The concept of "journey" in the Regulation is not defined by reference to a specific departure *date*. If correct, it would mean that an applicant could allege that a competent authority is in breach of the Regulation by declining to approve a journey log at a time when there were no sailings.

Analysis and Conclusions

165. In my judgment, neither of the Claimants' points here are well-founded.

166. As to the first point, the factual premise that the Policy requires the Claimants to enter into arrangements which are not commercially viable is not established on the evidence. Further Article 3(a) of the Regulation does impose a distinct obligation to minimise the length (duration) of the journey and gives the competent authority power to take measures to ensure the compliance with that obligation. Whilst there is no distinct express obligation to authorise only the shortest journey, where the Defendants indicated that in general the shortest available route should to be taken, that was consistent, and furthered compliance, with the obligation to take steps to minimise journey length. At all times the Policy has been based expressly upon the obligation to minimise journey length.

167. As to the second point, "journey" is expressly defined in Art 2(j) of the Regulation. It is defined by reference to a "place of departure"; there is no reference to a date or time of departure. That definition applies to all journeys – long or short. There is no warrant for defining a journey additionally by reference to the date of departure. It is not possible to read into the general definition in Article 2(j), administrative

provisions concerning the journey log in Annex II which apply only to "long journeys". The Claimants' supposed analysis does not and could not apply to "non-long" journeys. Thus the general Regulation in Article 3(a) cannot be interpreted as meaning "minimis[ing] the length of the journey *beginning on the date of departure"* It follows that, in the case of a long journey, Article 14(1)(b) enables the competent authority to require a change to the date of the intended long journey.

Ground 3: Article 35 TFEU

The Claimants' submissions

168. The Claimants contend as follows:

(1) The Policy and the Decision are at least capable of hindering intra-Community trade, and have in fact done so. They thus constitute a breach of Article 35 TFEU as being a measure having an equivalent effect to a quantitative restriction on exports.

(2) Both measures are disproportionate under the Regulation (as established under Ground 1). As the Regulation exhaustively harmonises EU law in the field, the measures cannot be justified under Article 36 TFEU.

(3) It follows that the Policy and the Decision are also contrary to Article 35 TFEU.

The Defendants' submissions

169. The Defendants contend that this ground adds nothing to Ground 1. Because of the harmonising effect of the Regulation, the Defendants are required to demonstrate compliance with the Regulation. That is established in response to Ground 1.

Analysis and Conclusions

170. No separate issue arises here. First there is no breach of Article 35 at all because the Claimants have not established that the Decision and the Policy have had an effect on trade. Secondly, even if there is such an effect on trade as is required by *Dassonville*, it is justified because the Policy and the Decision are proportionate to the objectives of the Regulation on the basis of my conclusions on Ground 1.

Ground 5: Fettering discretion

The Claimants' submissions

171. The Claimants contend as follows:

(1) The Policy constitutes an unlawful fetter on APHA's discretion whether or not to approve a journey log under the Regulation, under the principles established in *ex parte Venables*, supra.

(2) The Policy commits APHA as to the way in which it will exercise its discretion over journey log applications in the future. APHA will only approve a journey log for a route other than the MV Joline if BDV say it is

unavailable on the date of departure and for 7 days thereafter. APHA does not permit, and has not in practice permitted, any exception or derogation to the Policy. The use of standard form WIT 61 specifically for the MV Joline indicates a rigid approach.

(3) The Defendants have ruled out factors that may be relevant in respect of future applications for journey logs, and in particular whether the service offered by the MV Joline is commercially viable on any particular occasion.

(4) The Policy goes beyond a policy applicable to the "generality of cases". Rather it precludes APHA from departing from it or taking into account circumstances relevant to any particular application.

(5) For these reasons the Policy and the Decision taken under it are both unlawful as a matter of domestic law.

The Defendants' submissions

172. The Defendants contend as follows:

(1) The Policy, like any policy, is no more than a guide to the future exercise of discretion.

(2) The Policy does not rule out factors that may be relevant in the future. The Policy, on its face, does allow other factors, including commercial factors, to be taken into account.

(3) The need for a policy has to be seen in the specific context of the 48-hour rule in Annex II, paragraph 3(b) of the Regulations, providing the competent authority with very limited time in which to examine the details of the journey log and/or to examine allegations of adverse commercial impact.

(4) Alternatively, even if, on its face, the Policy does not allow commercial factors to be taken into account, then the *West Berkshire* principle applies: there is no need for the Policy to set out expressly exceptions, and it is necessary to look at whether, in fact, there has been a willingness to entertain exceptions. The Defendants were considering commercial factors, but did not receive any detailed analysis. As a matter of fact, the Defendants have applied the Policy flexibly. They have indicated a willingness to review the Policy and have conducted an analysis of the evidence concerning costs. They remain unsatisfied that the MV Joline route is unprofitable.

Analysis and Conclusions

173. There is necessarily a tension between a public authority having a policy as to the application of discretion and the rule against fettering the exercise of that discretion. Whether or not the Policy was expressed in terms which precluded consideration of commercial factors, as a matter of law such an exception existed. The true question therefore is whether in practice the Defendants had shown themselves willing to consider exceptions from the Policy for commercial considerations.

174. On the evidence I find that the Defendants were so willing. I refer to my conclusions under Ground 4 at paragraph 161 above.

175. Moreover, I accept that the short time scale in which APHA must determine any journey log application (see Annex II paragraph 3 (b)) makes it necessary to have a general approach set out in a policy. APHA cannot be expected, in such a short time frame, to consider in detail the relative profitability of a specific journey on a particular day.

Ground 6: Irrationality

The Claimants' submissions

176. The Claimants contend as follows:

(1) The Policy and the Decision are also irrational under domestic law. The Defendants have decided to insist on the use of a particular vessel, operated by a competitor, whenever that vessel is available and regardless of the cost to the exporter. This has led to BDV having been able to force their competitors out of the trade by increasing prices to a level that renders the trade unviable.

(2) Any rational public authority would appreciate that this was the inevitable outcome of the Policy and no rational public authority would have adopted the Policy on that basis.

The Defendants' submissions

177. The Defendants contend that the Policy is a rational response to the main purpose of the Regulation, to protect animals during transport. It does not preclude the exporter from making the journey concerned. There is no basis for the suggestion that the Policy is perverse or irrational.

Analysis and Conclusions

178. This ground was not pressed in oral argument. In any event I accept the Defendants' contentions here. Again, in the light of my findings of fact above, the premise for the ground is not established. The Policy does not preclude exports by the Claimants nor by others. BDV's alleged "monopoly" has not been caused by the Defendants. There is no evidence that BDV has increased their prices for anti-competitive purposes or indeed otherwise; no evidence that BDV is not bona fide when it states that the MV Joline is available and no evidence that BDV has forced its competitors out of the trade.

Remedy – Damages

179. The Claimants contend that they are entitled to damages under the *Francovich* principles for the Defendants' breach of Article 35 TFEU, arguing, in particular, that the breach in this case is "sufficiently serious" and that there is sufficient evidence of a "direct causal link" between the breach and the damage sustained, at least to the standard required at this stage to justify a further inquiry. The relevant principles are summarised in *Barco de Vapor*, supra, at §§61 to 70.

Analysis and Conclusions

180. In the light of my conclusions that no breach of EU law has been established, no claim for damages arises and I do not consider the matter in any detail. Nevertheless, even if I had found a relevant breach, I observe that I would have entertained substantial doubts as to whether, in particular, the Claimants could establish either that any breach was "sufficiently serious" or the necessary "causal link" between breach and loss. As to the former, the interpretation of the Regulation is not clear; the Defendants did give consideration to the Claimants' position and did take account of commercial considerations and the Claimants did not provide evidence until very late in the day; any damage caused was not intentional; and the EC Commission had no concerns about the Policy. As to the latter, a much more detailed inquiry as to the reasons why each journey did not take place, and whether that was due to Policy, would have been required.

Conclusions

181. In the light of my conclusions at paragraphs 160, 161, 165 to 167, 170, 173 to 174 and 178 above, the Claimants have not established any of their grounds of challenge. Accordingly this claim for judicial review is dismissed.

182. In due course I will hear submissions as to the appropriate orders to be made consequential upon these conclusions. Finally I am grateful to all counsel for the assistance they have provided to the Court in the presentation of oral and written arguments in this matter.