



Neutral Citation Number: [2021] EWHC 1763 (QB)

Case No: QB-2020-001912

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

Between :

JOHN WEST FOODS LIMITED	<u>Claimant</u>
- and -	
MARINE MANAGEMENT ORGANISATION	<u>Defendant</u>

Thomas de la Mare QC and Dominic Howells (instructed by **Grosvenor Law**) for the
Claimant
Fergus Randolph QC (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 23-24 June 2021

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 2 July 2021 at 9:30 am

Mr Justice Calver :

(1) Nature of the hearing

1. On 24 March 2021 Master Gidden ordered that certain questions set out in the Schedule to his order should be tried by way of Preliminary Issues as follows:

(1) Preliminary Issue 1:

“Whether on their true interpretation, articles 17 and 18 of the Council Regulation require a verification to be completed or otherwise determined within 15 days (or up to 30 days where an extension of time under article 17(6)(b) is granted), alternatively within a reasonable time, after which the competent authorities of a member state must make decision whether to refuse importation of the products, thus triggering the right of appeal in article 18(4), either:

a. in all cases where verifications are carried out pursuant to article 17; or

b. in cases where the competent authorities of a Member State request the assistance of the competent authorities of the flag state or of a third country.”

(2) Preliminary Issue 2:

“Whether on its true interpretation, the power provided by article 5 of the 2009 Order permits an authorised officer to prohibit the movement of a consignment:

a. only for so long as is required for a verification to take place in accordance with article 17 of the Council Regulation; or

b. for so long as the authorised officer is not (yet) satisfied that a relevant breach of the Council Regulation or the Commission Regulation has not taken place.”

(3) Preliminary Issue 3:

“Whether on their true interpretation, articles 5-7 of the 2009 Order correctly implement the Council Regulation.”

(4) Preliminary Issue 4:

“Whether the admitted facts disclose a breach of the Council Regulation and/or the 2009 Order by the Defendant.”

2. Although this is a trial of Preliminary Issues rather than a trial of liability, the Court is also asked to determine Preliminary Issue 4 which is whether the Defendant (“the MMO”) acted unlawfully on the basis of admitted facts. In any event, the Court was

told that the determination of the Preliminary Issues is likely to be dispositive of liability given the relatively limited nature of the factual dispute.

3. The parties have argued their respective cases as to how these Preliminary Issues should be decided in a very efficient and helpful manner, over the course of just a day and a half. The Claimant was represented by Thomas de la Mare QC and Dominic Howells; the MMO was represented by Fergus Randolph QC.
4. Whilst the relevant legislative provisions are somewhat convoluted, ultimately the answers to the questions posed are relatively straightforward.

(2) The Factual Background

5. Illegal, unreported and unregulated (“IUU”) fishing constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources and jeopardises the very foundation of the common fisheries policy of the European Union, as well as international efforts to promote better ocean governance. IUU fishing also represents a major threat to marine biodiversity. The European Union has a specific responsibility in making sure that fishery products imported into its territory do not originate from IUU fishing and it has made both Council and Commission Regulations to seek to ensure that that is so, which Regulations have to the extent necessary been given legislative effect in this country.
6. The Claimant is an importer of fish products, including packaged tuna. The MMO is a non-departmental public body responsible for the enforcement of certain laws concerning sea fishing and the importation of fish and fish products into the United Kingdom. The relevant legislative provisions for present purposes are (i) Council Regulation (EC) No 1005/2008 (the “IUU Regulation”); (ii) the Marine and Coastal Access Act 2009 (the “2009 Act”) and (iii) the Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009 (the “2009 Order”). The 2009 Act and the 2009 Order purport to give effect to the directly applicable IUU Regulation.
7. Between February and October 2013, a series of Notices under Article 5 of the 2009 Order were issued on the MMO’s behalf, the effect of which was to prohibit the movement of numerous specified shipments of packaged tuna imported by the Claimant at Felixstowe. A specimen Notice is attached as Annex 1 to this judgment. It is common ground that between January and December 2013 ongoing requests for assistance were sent by the MMO to the Ghanaian authorities pursuant to Article 17(6) of the IUU Regulation, and undisclosed replies to those requests were received from the Ghanaian authorities.
8. It can be seen that the reason given for the issuing of each Notice was stated to be that “*Verifications are being requested to ensure that the consignment complies with the provisions of [the IUU] Regulation. The consignment has been identified as a high risk due to presumed deficiencies in the control system of the flag state – Ghana.*”
9. However, the Notices failed to identify the provision of the IUU Regulation which it was said that the Claimant had breached and it did not identify any steps which it required the Claimant to take to remedy any such breach, nor the timeframe in which it was obliged to do so.

10. The shipments which were the subject of the various Article 5 Notices, save for some which were released by the MMO relatively shortly after arrival, are referred to by the parties as the “Suspended Products”. The prohibitions on movement of the Suspended Products were kept in place by the MMO for such a length of time that the tuna eventually lost its merchantable quality and commercial value owing to the shortness of the period which remained prior to its “best before” date. By reason of this fact and the fact that the Claimant was continuing to pay for the storage of the Suspended Products, the Claimant decided with the MMO’s encouragement to dispose of the tuna by various means between November 2014 and October 2016, in particular to charity (provided that the recipients were outside the EU), by composting and in some cases by outright destruction.
11. Long after the Suspended Products were effectively impounded, and more than a year after the date of the last disposal, on 22 December 2017 the CPS started criminal proceedings against the Claimant. Those proceedings collapsed before trial for evidential reasons and without resolving the ambit of importation offences. By that stage it was, of course, too late to return any of the Suspended Products to the Claimant.
12. The Claimant’s case in a nutshell is that the MMO’s right under Article 5 of the 2009 Order to suspend the release of the tuna into the marketplace only lawfully continued for a limited time in order to allow the MMO to conduct certain speedy verifications with the authorities of the relevant third country state (Ghana) in relation to the imported products, as provided by the IUU Regulation: see its Particulars of Claim, paragraphs 5-10 and 12-14. The Claimant alleges that under Article 17 of the IUU Regulation such third country verifications are expressly time limited to a maximum of 30 days, following which a Refusal Decision under Article 18 must be made in specified circumstances, one or more of which must have applied to the Suspended Products.
13. It is common ground, and important to appreciate, that the MMO never took a decision to refuse importation of the Suspended Products under Article 18 of the IUU Regulation (a “Refusal Decision”), and in particular failed to do so in the year or more during which movement of the products was “suspended”, prior to the disposal of the same: see Response 1 of the MMO’s Further Information dated 19 February 2021.
14. Because no Refusal Decision was ever taken, the Suspended Products languished in a state of prolonged suspension (which the Claimant maintains was in consequence of the unlawful actions of the MMO), rather than being released on bond or sold by the MMO at auction (as might have occurred had the MMO exercised its powers of seizure under s. 268 of the 2009 Act, as explained below).
15. In consequence, the Claimant claims to have lost (i) the value of the Suspended Products totalling £3,245,339.82 (which it says is the best estimate of their market value); (ii) the storage costs which it paid of £321,568 (being the costs of storing the Suspended Products for up to nearly 2 years); and (iii) the disposal costs which it incurred (to mitigate the ongoing storage costs) of around £75,000. It claims these sums from the MMO.
16. The MMO denies that it is guilty of any unlawful behaviour. It contends as follows.

17. The importation of the Suspended Products was subject to Article 5 Notices: it was suspended because the fish had been caught by Ghanaian-flagged vessels, and there were presumed deficiencies in the control system of that country.
18. As part of the verification process, rolling requests for assistance from the Ghanaian authorities were made pursuant to Article 17(6) IUU Regulation as new consignments of the tuna arrived at Felixstowe.
19. The Ghanaian authorities tended to seek an extension of the time period in which to respond, thereby allowing a 30-day period for the completion of the (initial) verification procedure.
20. Following their rolling responses, the MMO was obliged to verify and substantiate those responses, pursuant to Title IV of the Commission Regulation 1010/2009, and in particular Article 41 of Chapter II (which provides for notification by it to other Member States and the Commission of any potential IUU fishing activity or serious infringements, or if it reasonably suspects that such an activity or infringement may occur).
21. By 22 August 2013, the MMO had identified the tuna as *potentially* having been obtained in breach of the IUU legislation. It follows that, it is said, pursuant to Article 5(5) of the 2009 Order, the Article 5 control movement Notices *could not* lawfully be lifted because the authorised officer was not satisfied that a breach of the IUU regulations had not taken place, not least because there were concerns about relevant fishing vessels not having licences for the waters in which they were fishing.
22. By 4 November 2013, the MMO confirmed that it had been established that there *were* reasonable grounds to suspect that the Claimant had acted in breach of Article 9(7) 2009 Order, which breach constituted a serious infringement under the IUU Regulation. However, it did not seize the Suspended Products using any of its enforcement powers under the 2009 Act.
23. On 12 June 2014, the MMO put the Claimant on notice that it could face criminal prosecution. As explained above, just over 2 weeks later, the Claimant confirmed that it would no longer be seeking to import the tuna into the UK and instead agreed for its disposal, as by now the Suspended Products were fast approaching the end of their commercial lifespan.

(3) The relevant regulatory and statutory provisions

24. The regulatory and statutory framework is somewhat complex, but the relevant provisions for present purposes are as follows (emphases added):

(1) The IUU Regulation

CHAPTER I
GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Regulation establishes a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing.

Article 2 Definitions

For the purposes of this Regulation:

1. 'illegal, unreported and unregulated fishing' or 'IUU fishing' means fishing activities which are illegal, unreported or unregulated;

2. 'illegal fishing' means fishing activities:

(a) conducted by national or foreign fishing vessels in maritime waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

(b) conducted by fishing vessels flying the flag of States that are contracting parties to a relevant regional fisheries management organisation, but which operate in contravention of the conservation and management measures adopted by that organisation and by which those States are bound, or of relevant provisions of the applicable international law; or

(c) conducted by fishing vessels in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organisation;

3. 'unreported fishing' means fishing activities:

(a) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

(b) which have been undertaken in the area of competence of a relevant regional fisheries management organisation and have not been reported, or have been misreported, in contravention of the reporting procedures of that organisation;

4. 'unregulated fishing' means fishing activities:

(a) conducted in the area of application of a relevant regional fisheries management organisation by fishing vessels without nationality, by fishing vessels flying the flag of a State not party to that organisation or by any other fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation; or

(b) conducted in areas or for fish stocks in relation to which there are no applicable conservation or management measures by fishing vessels in a manner that is not consistent with State responsibilities for the conservation of living marine resources under international law...

11. 'importation' means the introduction of fishery products into the territory of the Community, including for transshipment purposes at ports in its territory;

Article 3 Fishing vessels engaged in IUU fishing

1. A fishing vessel shall be presumed to be engaged in IUU fishing if it is shown that, contrary to the conservation and management measures applicable in the fishing area concerned, it has:

(a) fished without a valid licence, authorisation or permit issued by the flag State or the relevant coastal State; or...

2. The activities set out in paragraph 1 shall be considered as serious infringements in accordance with Article 42 depending on the gravity of the infringement in question which shall be determined by the competent authority of the Member State, taking into account the criteria such as the damage done, its value, the extent of the infringement or its repetition.

CHAPTER II
INSPECTIONS OF THIRD COUNTRY
FISHING VESSELS IN MEMBER STATES PORTS
SECTION 1

Conditions for access to port by third country fishing vessels

Article 4

Inspection in port schemes

1. With a view to prevent, deter and eliminate IUU fishing, an effective scheme of inspections in port for third country fishing vessels calling at the ports of Member States shall be maintained.

2. Access to ports of Member States, the provision of port services, and the conduct of landing or transshipment operations in such ports shall be prohibited for third country fishing vessels unless they meet the requirements laid down in this Regulation, except in cases of *force majeure* or distress within the meaning of Article 18 of the Unclos (*force majeure* or distress) for services strictly necessary to remedy those situations...

SECTION 2

Port inspections

Article 9

General principles

1. Member States shall carry out inspections in their designated ports of at least 5 % of landing and transshipment operations by third country fishing vessels each year, in accordance with the benchmarks determined by the procedure referred to in Article 54(2) on the basis of risk management, without prejudice to the higher thresholds adopted by regional fisheries management organisations...

Article 10

Inspection procedure

1. Officials in charge of inspections (officials) shall be able to examine all relevant areas, decks and rooms of the fishing vessel, catches processed or not, nets or other gear, equipment and any relevant documents which officials deem it necessary to verify in compliance with applicable laws, regulations or international management and conservation measures. Officials may also question persons deemed to have information on the matter subject to inspection.

2. Inspections shall involve the monitoring of the entire landing or transshipment operations and include a cross-check between the quantities by species recorded in the prior notice of landing and the quantities by species landed or transhipped.
3. Officials shall sign their inspection report in the presence of the master of the fishing vessel, who shall have the right to add or cause to be added any information that he considers relevant. Officials shall indicate in the logbook that an inspection has been made.
4. A copy of the inspection report shall be handed over to the master of the fishing vessel, who may forward it to the owner.
5. The master shall cooperate with and assist in the inspections of the fishing vessel and shall not obstruct, intimidate or interfere with the officials in the performance of their duties.

Article 11

Procedure in the event of infringements

1. If the information collected during the inspection provides evidence to the official to believe that a fishing vessel has engaged in IUU fishing in accordance with the criteria set out in Article 3, the official shall: (a) record the suspected infringement in the inspection report; (b) take all necessary action to ensure safekeeping of the evidence pertaining to such suspected infringement; (c) immediately forward the inspection report to the competent authority.
2. If the results of the inspection provide evidence that a third country fishing vessel has engaged in IUU fishing in accordance with the criteria set out in Article 3, the competent authority of the port Member State shall not authorise such vessels to land or tranship their catch...

CHAPTER III CATCH CERTIFICATION SCHEME FOR IMPORTATION AND EXPORTATION OF FISHERY PRODUCTS

Article 12

Catch certificates

1. The importation into the Community of fishery products obtained from IUU fishing shall be prohibited.
2. To ensure the effectiveness of the prohibition established in paragraph 1, fishery products shall only be imported into the Community when accompanied by a catch certificate in conformity with this Regulation...

Article 17

Verifications

1. The competent authorities of the Member States may carry out all of the verifications they deem necessary to ensure that the provisions of this Regulation are correctly applied.

2. Verifications may, in particular, consist in examining the products, verifying declaration data and the existence and authenticity of documents, examining the accounts of operators and other records, inspecting means of transport, including containers and storage places of the products and carrying out official enquiries and other similar acts, in addition to the inspection of fishing vessels at port under Chapter II.

3. Verifications shall be focused towards risk identified on the basis of criteria developed at national or Community level under risk management. Member States shall notify to the Commission their national criteria within 30 working days after 29 October 2008 and update this information. The Community criteria shall be determined in accordance with the procedure referred to in Article 54(2).

4. Verifications shall be carried out, in any case, where: (a) the verifying authority of the Member State has grounds to question the authenticity of the catch certificate itself, of the validation seal or of the signature of the relevant authority of the flag State; or (b) the verifying authority of the Member State is in possession of information that questions the compliance by the fishing vessel with applicable laws, regulations or conservation and management measures, or the fulfilment of other requirements of this Regulation; or (c) fishing vessels, fishing companies or any other operators have been reported in connection with presumed IUU fishing, including those fishing vessels which have been reported to a regional fisheries management organisation under the terms of an instrument adopted by that organisation to establish lists of vessels presumed to have carried out illegal, unreported and unregulated fishing; or (d) flag States or re-exporting countries have been reported to a regional fisheries management organisation under the terms of an instrument adopted by that organisation to implement trade measures vis-à-vis flag States; or (e) an alert notice has been published pursuant to Article 23(1).

5. Member States may decide to carry out verifications at random, in addition to the verifications referred to in paragraphs 3 and 4.

6. For the purpose of a verification, the competent authorities of a Member State may request the assistance of the competent authorities of the flag State or of a third country other than the flag State as referred to in Article 14, in which case:

(a) the request for assistance shall state the reasons why the competent authorities of the Member State in question have well-founded doubts as to the validity of the certificate, of the statements contained therein and/or the compliance of the products with conservation and management measures. A copy of the catch certificate and any information or documents suggesting that the information on the certificate is inaccurate shall be forwarded in support of the request for assistance. The request shall be sent without delay to the competent authorities of the flag State or of a third country other than the flag State as referred to in Article 14;

(b) the procedure for verification shall be completed within 15 days of the date of the verification request. In the event that the competent authorities of the flag State concerned cannot meet the deadline, the verifying authorities in the Member

State may, on request by the flag State or by a third country other than the flag State as referred to in Article 14 grant an extension of the deadline to reply, which shall not exceed a further 15 days.

7. The release of the products onto the market shall be suspended while awaiting the results of the verification procedures referred to in paragraphs (1) to (6). The cost of storage shall be borne by the operator.

8. Member States shall notify to the Commission their competent authorities for the checks and verifications of the catch certificates in accordance with Article 16 and paragraphs (1) to (6) of this Article.

Article 18

Refusal of importation

1. The competent authorities of the Member States shall, where appropriate, refuse the importation into the Community of fishery products without having to request any additional evidence or send a request for assistance to the flag State where they become aware that:

(a) the importer has not been able to submit a catch certificate for the products concerned or to fulfil his obligations under Article 16(1) or (2);

(b) the products intended for importation are not the same as those mentioned in the catch certificate;

(c) the catch certificate is not validated by the public authority of the flag State referred to in Article 12(3);

(d) the catch certificate does not indicate all the required information;

(e) the importer is not in a position to prove that the fishery products comply with the conditions of Article 14(1) or (2);

(f) a fishing vessel figuring on the catch certificate as vessel of origin of the catches is included in the Community IUU vessel list or in the IUU vessel lists referred to in Article 30;

(g) the catch certificate has been validated by the authorities of a flag State identified as a non-cooperating State in accordance with Article 31.

2. The competent authorities of the Member States shall, where appropriate, refuse the importation of any fishery products into the Community, following a request for assistance pursuant to Article 17(6), where:

(a) they have received a reply according to which the exporter was not entitled to request the validation of a catch certificate; or

(b) they have received a reply according to which the products do not comply with the conservation and management measures, or other conditions under this Chapter are not met; or

- (c) they have not received a reply within the stipulated deadline; or
- (d) they have received a reply which does not provide pertinent answers to the questions raised in the request.

3. In the event that the importation of fishery products is refused pursuant to paragraphs 1 or 2, Member States may confiscate and destroy, dispose of or sell such fishery products in accordance with national law. The profits from the sale may be used for charitable purposes.

4. Any person shall have the right to appeal against decisions taken by the competent authorities pursuant to paragraphs 1, 2 or 3 which concern him. The right of appeal shall be exercised according to the provisions in force in the Member State concerned.

CHAPTER IX
IMMEDIATE ENFORCEMENT MEASURES,
SANCTIONS AND ACCOMPANYING SANCTIONS

Article 41
Scope

This Chapter shall apply in relation to:

1. serious infringements committed within the territory of Member States to which the Treaty applies, or within maritime waters under the sovereignty or jurisdiction of the Member States, with the exception of waters adjacent to the territories and countries mentioned in Annex II of the Treaty;
2. serious infringements committed by Community fishing vessels or nationals of Member States;
3. serious infringements detected within the territory or within waters as referred to in point 1 of this Article but which have been committed on the high seas or within the jurisdiction of a third country and are being sanctioned pursuant to Article 11(4).

Article 42
Serious infringements

1. For the purpose of this Regulation, serious infringement means:
 - (a) the activities considered to constitute IUU fishing in accordance with the criteria set out in Article 3;
 - (b) the conduct of business directly connected to IUU fishing, including the trade in/or the importation of fishery products;
 - (c) the falsification of documents referred to in this Regulation or the use of such false or invalid documents.

2. The serious character of the infringement shall be determined by the competent authority of a Member State taking into account the criteria set out in Article 3(2).

Article 43

Immediate enforcement measures

1. Where a natural person is suspected of having committed or is caught in the act while committing a serious infringement or a legal person is suspected of being held liable for such an infringement, Member States shall start a full investigation of the infringement and, in conformity with their national law and depending on the gravity of the infringement, take immediate enforcement measures such as in particular:

- (a) the immediate cessation of fishing activities;
- (b) the rerouting to port of the fishing vessel;
- (c) the rerouting of the transport vehicle to another location for inspection;
- (d) the ordering of a bond;
- (e) the seizure of fishing gear, catches or fisheries products;
- (f) the temporary immobilisation of the fishing vessel or transport vehicle concerned;
- (g) the suspension of the authorisation to fish.

2. The enforcement measures shall be of such nature as to prevent the continuation of the serious infringement concerned and to allow the competent authorities to complete its investigation.

Article 44

Sanctions for serious infringements

1. Member States shall ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by effective, proportionate and dissuasive administrative sanctions.

2. The Member States shall impose a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement. In case of a repeated serious infringement within a five-year period, the Member States shall impose a maximum sanction of at least eight times the value of the fishery products obtained by committing the serious infringement. In applying these sanctions the Member States shall also take into account the value of the prejudice to the fishing resources and the marine environment concerned.

3. Member States may also, or alternatively, use effective, proportionate and dissuasive criminal sanctions.

Article 45

Accompanying sanctions

The sanctions provided for in this Chapter may be accompanied by other sanctions or measures, in particular:

1. the sequestration of the fishing vessel involved in the infringement;
2. the temporary immobilisation of the fishing vessel;
3. the confiscation of prohibited fishing gear, catches or fishery products;
4. the suspension or withdrawal of authorisation to fish;
5. the reduction or withdrawal of fishing rights;
6. the temporary or permanent exclusion from the right to obtain new fishing rights;
7. the temporary or permanent ban on access to public assistance or subsidies;
8. the suspension or withdrawal of the status of approved economic operator granted pursuant to Article 16(3).

Article 46

Overall level of sanctions and accompanying sanctions

The overall level of sanctions and accompanying sanctions shall be calculated in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements without prejudice to the legitimate right to exercise a profession. For this purpose, account shall be also taken of immediate enforcement measures taken pursuant to Article 43.

(2) Commission Regulation 1010/2009

Chapter II

Information without prior request

Article 41

Information without prior request

1. When a Member State becomes aware of any potential IUU fishing activity or serious infringements referred to in Article 42(1)(b) and (c) of Regulation (EC) No 1005/2008 or reasonably suspects that such an activity or infringement may occur, it shall notify the other Member States concerned and the Commission, without delay. That notification shall supply all necessary information and shall be made via the single authority as referred to in Article 39.

2. 2. When a Member State takes enforcement measures in relation to an IUU fishing activity or infringement referred to in paragraph 1, it shall notify the other Member States concerned and the Commission via the single authority as referred to in Article 39.

(3) 2009 Sea Fishing (IUU Fishing) Order

5.— Control on movement

(1) An authorised officer may prohibit the movement of a consignment of fish or fishery products from the place of import while a verification takes place pursuant to Article 17 of the Council Regulation or Article 20 of the Commission Regulation.

(2) An authorised officer who has prohibited the movement of a consignment must, as soon as possible, give written notice to the importer or the person who appears to the officer to be in charge of the consignment.

(3) The notice must— (a) specify the controlled consignment; (b) state that it may not be moved without the written consent of an authorised officer under article 6; (c) specify the relevant provision of the Council Regulation or Commission Regulation in respect of which the authorised officer has reason to believe that there has been a failure to comply; and (d) specify what steps, if any, must be taken to demonstrate compliance with that provision, and within what time such steps must be taken.

(4) If the person to whom the authorised officer gives the notice does not appear to the officer to be the importer or an agent, contractor or employee of the importer, the authorised officer must take reasonable steps to bring the contents of the notice to the attention of such a person as soon as possible.

(5) Where— (a) a verification has been completed, and (b) any steps specified under paragraph (3)(d) have been fulfilled within the specified time frame, the authorised officer must remove the prohibition on movement if satisfied that a breach of the Council Regulation or Commission Regulation has not taken place.

7.— Refusal of importation

(1) For the purposes of exercising functions in relation to Article 18(3) of the Council Regulation, an authorised officer may exercise the powers in sections 268 and 270 to 278 of, and Schedule 18 to, the Marine and Coastal Access Act 2009, save that any reference in those provisions— (a) to an ‘enforcement officer’ is to be read as an ‘authorised officer’; and (b) to ‘fish’ is to be read as ‘fish or fishery products’.

(2) The competent authority must refuse importation or permission to use transshipment facilities where a declaration has not been submitted in accordance

with Article 8 of the Council Regulation and Article 3 of the Commission Regulation.

(3) Where the competent authority has refused importation pursuant to Article 18(1) or (2) of the Council Regulation or paragraph (2) above, the importer may appeal to a magistrates' court within 28 days of the refusal.

(4) The procedure in a magistrates' court under this Order is by way of complaint, and the Magistrates' Courts Act 1980 applies to the proceedings.

9.— Offences under the Council Regulation

...

(7) It is an offence for a person to conduct business directly connected to IUU fishing, within the meaning of Article 42(1)(b) of the Council Regulation

(4) Marine and Coastal Access Act 2009

Chapter 4 Fisheries enforcement powers

Seizure for purposes of forfeiture

268 Power to seize fish for purposes of forfeiture

(1) An enforcement officer who has the power conferred by this section may seize and detain or remove any fish in respect of which the officer reasonably believes a relevant offence has been committed.

(2) The power conferred by this section may only be exercised for the purposes of securing that, in the event of a conviction for a relevant offence, the court may exercise any relevant power of forfeiture in relation to fish in respect of which the offence was committed.

269 Power to seize fishing gear for the purposes of forfeiture

(1) An enforcement officer who has the power conferred by this section may seize and detain or remove any fishing gear which the officer reasonably believes has been used in the commission of a relevant offence.

(2) The power conferred by this section may only be exercised for the purposes of securing that, in the event of a conviction for a relevant offence, the court may exercise any relevant power of forfeiture in relation to fishing gear used in the commission of the offence.

270 Procedure in relation to seizure under section 268 or 269

(1) An enforcement officer who seizes any property under section 268 or 269 must, if it is reasonably practicable to do so, serve a notice on each of the following persons—

- (a) every person who appears to the officer to have been the owner, or one of the owners, of the property at the time of its seizure;
- (b) in the case of property seized from a vessel, the master, owner and charterer (if any) of the vessel at that time;
- (c) in the case of property seized from premises, every person who appears to the officer to have been an occupier of the premises at that time;
- (d) in any other case, the person (if any) from whom the property was seized.

(2) The notice must state—

- (a) what has been seized;
- (b) the reason for its seizure;
- (c) the offence which the officer believes has been committed;
- (d) any further action that it is proposed will be taken;
- (e) that, unless the property is liable to forfeiture under section 275 or 276, it is to be detained until such time as it is released or its forfeiture is ordered by the court.

(3) Subsections (4) and (5) apply in a case where the property was seized following an inspection carried out in exercise of the power conferred by section 264...

272 Bonds for release of seized fish or gear

(1) This section applies to any property which is being retained by the relevant authority under section 271.

(2) The relevant authority may enter into an agreement with any person falling within subsection (3) for security for the property to be given to the relevant authority by way of bond in return for the release of the property. (3) The persons referred to in subsection (2) are—

- (a) the owner, or any of the owners, of the property;
- (b) in the case of property seized from a vessel, the owner or charterer, or any of the owners or charterers, of the vessel.

(4) Any bond given under this section is to be—

- (a) for such amount as may be agreed, or
- (b) in the event of a failure to agree an amount, for such amount as may be determined by the court. “The court” means a magistrates' court in England and Wales.

(5) A person who gives a bond under this section must comply with such conditions as to the giving of the bond as the relevant authority may determine.

(6) If either of the grounds for release mentioned in subsection (7) applies, then any bond given under this section must be returned as soon as possible.

(7) The grounds for release referred to in subsection (6) are—

- (a) that the relevant authority has decided not to take proceedings in respect of any offence in relation to which the property was seized;
- (b) that any proceedings taken in respect of such an offence have concluded without any order for forfeiture having been made...

273 Power of relevant authority to sell seized fish in its possession

- (1) Any fish which are being retained by the relevant authority under section 271 may be sold by the authority.
- (2) Any power which a court has to order the forfeiture of any fish may instead be exercised in relation to the proceeds of any sale of the fish under this section.
- (3) Subject to subsection (6), the proceeds of any sale under this section may be retained by the relevant authority until such time as—
 - (a) a court exercises any power it has to order the forfeiture of the proceeds, or
 - (b) either of the grounds for release mentioned in subsection (4) applies.
- (4) The grounds for release referred to in subsection (3) are—
 - (a) that the relevant authority has decided not to take proceedings in respect of any offence in relation to which the fish were seized;
 - (b) that any proceedings taken in respect of such an offence have concluded without any order for forfeiture having been made.
- (5) If either of the grounds for release mentioned in subsection (4) applies, the relevant authority must, as soon as is reasonably practicable, release the proceeds of sale to any person who appears to the authority to have been the owner, or one of the owners, of the fish at the time of the seizure of the fish.
- (6) If the proceeds of sale are still in the relevant authority's possession after the end of the period of six months beginning with the date on which the fish were sold, the relevant authority may retain the proceeds and apply them in any manner it thinks fit. The relevant authority may exercise its power under this subsection to retain and apply the proceeds of sale only if it is not practicable at the time when the power is exercised to dispose of the proceeds by releasing them immediately to the person to whom they are required to be released.
- (7) Subject to subsection (9), any fish sold under this section must be sold at auction.
- (8) Before selling the fish, the relevant authority must give the owner of the fish a reasonable opportunity to make representations as to the manner in which the fish are sold...

(4) The contemporaneous correspondence between the parties

25. By letter dated 21 May 2013, the MMO wrote to the Claimant in the following terms:

“As you are aware, under powers conferred upon the MMO in relation to Illegal, Unreported or Unregulated fishing, some of your consignments of tuna are being suspended from import. I am now writing to you by way of an update as to this situation.

Risk and Verification

We remain on the view that this is a high risk situation which has not yet been mitigated and all imports of Ghanaian caught tuna continue to be subject to official verification procedures under Article 17(6) of Council Regulation (EC) 1005/2008 (“The IUU regulation”). The Marine Management Organisation Single Liaison Office are responsible for conducting these official verifications with third country authorities as identified to the European Commission under the IUU regulations. Since mid February 2013 sequences of Article 17(6) verifications have been sent to Ghana and continue to be sent as new

consignments arrive at the UK border. Whilst any Article 17 checks and verifications are carried out by either Port Health or the MMO, import of the goods will be suspended.

Results

We understand that the Ghanaian authorities have experienced a high volume of verification requests from several EU Member States. The Ghanaian authorities have regularly requested official 15 day extensions to the original 15 deadlines which were granted. We remain under an obligation to verify and substantiate any responses received from the Ghanaian authorities after this 30 days period in order to satisfy ourselves as to the status of these imports. This necessitates further independent enquiries; for example, liaison between Member States under the Mutual Assistance provisions contained in Commission Regulation (EC) 1010/2020 ...

Next steps

Our enquires with Ghana, and independent enquiries and investigations will continue for as long as necessary to establish the IUU status of the products. You will, of course, understand that due to the ongoing nature of these enquiries we are unable to provide specific comments about the status or details of investigations, however, we will write to you again as necessary in pursuit of these enquiries and investigations. ...” (emphasis added)

26. By letter dated 22 August 2013, the MMO gave the Claimant a further update in relation *inter alia* to those products obtained as a result of what appeared to be illegal fishing activity carried out by Ghanaian vessels:

“... we are now in a position to confirm that goods owned by your company and subject to the aforementioned notice(s) have been identified as potentially being obtained in breach of IUU legislation. In consequence of this potential breach it has now been deemed necessary to conduct a formal investigation in order to determine the level of culpability (if any) of your business and or any responsible individual(s) before making a final determination as to the status of the goods or considering any further enforcement action. ...”
27. It is common ground that this was a reference to an investigation by the MMO under Article 43 of the IUU Regulation and that no Refusal Decision under Article 18 of the IUU had been taken by the MMO.
28. By letter dated 2 October 2013 the Claimant’s solicitors wrote to the MMO and asked it to explain what enquiries it was making of the Ghanaian authorities and to identify the provision of the IUU Regulation which it was said that the Claimant had breached and the steps which it required the Claimant to take to remedy any such breach. It did not obtain an answer to these questions.
29. By letter dated 4 November 2013, the MMO gave a further update to the Claimant and stated that:

“You will no doubt recall that in my original letter dated 22nd August 2013 I advised John West Foods Ltd that where the goods owned by them had failed verification then we have established a potential breach of IUU legislation. In consequence of this failure we commenced a formal investigation in order to determine the level of culpability (if any) of your client and any responsible individual(s).

In recent weeks MMO investigators have, and continue to be, busy collating information/evidence in order to identify whether any illegal activity has occurred. As a result of these enquiries it has been established that there are now reasonable grounds to suspect that John West Foods Ltd has committed an offence under S9(7) Sea Fish IUU Order 2009. ...”

30. It is clear from this letter, therefore that:

- (1) The Suspended Products had failed verification no later than 4 November 2013;
- (2) The MMO had started an investigation under Article 43 of the IUU Regulation, without taking any decision to refuse importation of the Suspended Products;
- (3) The MMO stated that it had reasonable grounds to suspect that the Claimant had conducted business directly connected to IUU fishing within the meaning of Article 42(1)(b) of the IUU Regulation which would trigger its enforcement powers (including the power of seizure) under Chapter 4 of the 2009 Act, but with the safeguards for the Claimant (including rights of appeal) contained within that Chapter. Despite this, it is common ground that the MMO did not in fact exercise its powers of seizure under the 2009 Act.

31. By letter dated 12 June 2014, the MMO gave another update to the Claimant, for the first time purporting to rely upon Article 5(5) of the 2009 Order to justify its continued seizure of the goods:

“The restriction on the movement of the goods under the IUU Order may only be lifted if both the verification process pursuant to article 17 of ... the IUU regulation has concluded and an authorised officer is satisfied that the goods are not in breach of IUU regulations.

As you know, we are currently conducting a detailed investigation into both the origin and subsequent passage of the suspended consignments and, as such, we are not yet in a position to determine what action, if any, may be taken against your company. However it remains possible (subject to the conclusion of the investigation and a referral to a prosecutor for a decision in accordance with the Code for Crown Prosecutors) that the MMO may decide to pursue a criminal prosecution in respect of this matter.

Regardless of the outcome of the investigation, if the MMO is of the view that the goods have been obtained through IUU fishing or otherwise are in breach of the IUU regulations then the power of the authorised officer to refuse importation of the goods under regulation 7 is likely to be engaged. In the event of a prosecution being taken and a conviction being secured then the MMO would be likely to apply to the Court for an order that the goods be subject to forfeiture.

Practically, it is extremely unlikely that any decision regarding this case will be taken in the near future ...” (emphasis added)

32. It follows from this letter that:

- (1) The only basis upon which the MMO was purporting to prohibit the movement of the Suspended Products was under Article 5(5) of the 2009 Order; and
- (2) The MMO considered that it had power to refuse importation under Article 7 of the 2009 Order (which carries with it the safeguards under sections 268 and 270 to 278 of, and Schedule 18 to the 2009 Act) but stated that “*practically, it is extremely unlikely that any decision regarding this case will be taken in the near future.*” In fact, as will be seen, the requirement to refuse importation arises under Article 18 of the IUU Regulation. Article 7 of the 2009 Order is the national law implementation of Articles 18(3) and (4) of the IUU Regulation, and those enforcement powers under national law only arise consequent upon a decision to refuse importation pursuant to Article 18(1) or (2) of that Regulation.

33. On 22 July 2014 the MMO wrote to the Claimant’s solicitors and set out its position:

“You will of course appreciate that MMO’s position is somewhat untenable in respect of the current suspension of the goods, as it cannot be seen to allow onto the consumer market goods which may have been tarnished by Illegal, Unreported or Unregulated Fishing, but equally must ensure that the matter is fully investigated in order that all parties are dealt with fairly.”

34. As the MMO stated here, and as Mr. Randolph QC urged upon the Court, it is undoubtedly the case that the MMO had an obligation to seek to ensure that it did not allow onto the consumer market goods which may have been tarnished by IUU fishing. However as explained below, in order legitimately to maintain the seizure of the Suspended Products after completing its verification checks within the time limits set out in Article 17, the MMO was required to exercise its powers under Article 18 and the 2009 Act. It had no power to continue to seize the products by relying upon its temporary power of seizure under Article 17(7).

(5) Discussion

35. It is apparent that the legislative scheme consists of a mixture of directly applicable provisions in the IUU Regulation, in particular Articles 17 and 18, with national implementing measures contained in the 2009 Order and 2009 Act. The scheme operates as follows.

36. The purpose of the IUU Regulation is to prevent and deter IUU fishing.

37. A fishing vessel is presumed to be engaged in illegal IUU fishing if, in particular, it has fished without a valid licence issued by the relevant flag State.

38. The importation into the EU of fishery products obtained from IUU fishing is prohibited.

39. Fishery products shall only be imported into the EU when accompanied by a certified catch certificate under Article 12 of the IUU Regulation.
40. A Member State may carry out verifications to ensure that the IUU Regulation is enforced and verifications shall be carried out in any of the cases set out in Article 17(4)(a)-(e) thereof. It can be seen that each of those cases is likely to be readily verifiable because the verifying authority already “*has grounds to question*” the certificate etc; or “*is [already] in possession of information*” that questions compliance by the fishing vessel with applicable laws etc; or there have *already been reports* of presumed IUU fishing; or the flag State has *already been* reported; or an alert has *already been* published.
41. However, in the case of any verification, the Member State may *without delay*¹, request the assistance of the flag State in respect of doubts about the validity of the certificate, the statements therein or the compliance of the products with conservation and management measures, with such verification procedure being completed within 15 days of the date of the request, with up to a further 15 days’ extension (making a maximum of 30 days).
42. It follows that under Article 17.6 – which is the relevant Article for the purposes of this case – the procedure for verification must be completed by the MMO within 15 days or, if the flag State requests an extension, within at most 30 days. Beyond that period there is no lawful power to suspend the release of the products onto the market under Article 17(7) which expressly states that: “*the release of the products onto the market shall be suspended while awaiting the results of the verification procedure referred to in paragraphs (1) to (6)*” (emphasis added).
43. It is perfectly plain that verification of the relevant consignment which forms the subject matter of the relevant certificate is intended to be a swift process, with the release of the products onto the market only suspended for a short interim period (at the operator’s cost, *pro tem*) of, at most, 30 days after the date the request is made of a flag State, which request must itself be made without delay once the verification procedure is initially embarked upon.
44. Once this swift process of verification is complete, then either the products must be released back onto the market (if the verification is satisfactory) or if the Member State wishes to continue to prevent the importation of the Suspended Products, then it must then make a decision refusing the importation under Article 18.
45. In a case such as the present (where a verification request was made of the flag State under Article 17(6)), the correctness of this analysis is made abundantly clear by Article 18(2) which expressly provides that a Member State must refuse the importation of any fishery product into the Community, following a request for assistance pursuant to Article 17(6), which has resulted in a negative reply or no reply/no reply within the stated timeframe. Article 18(1) adopts the same approach and mandates a Refusal Decision after a negative finding in consequence of verifications carried out under Article 17(4).

¹ Again, emphasising that this is to be a speedy procedure.

46. I do not consider that, as was submitted by Mr. Randolph QC, the correctness of this analysis is undermined by the words “*where appropriate*” in Article 18(1) and 18(2) of the IUU Regulation. I reject the suggestion that this wording allows the Member State a discretion as to whether to refuse importation despite one of the factual conditions set out in Articles 18(1) or 18(2) having been established. That would rob the mandatory nature of Article 18 of all effect and would also allow a member state, as happened in this case, indefinitely to suspend the movement of perishable fish products at the operator’s cost until the products eventually become unfit for human consumption without the importer having any right to challenge that continued suspension before a national court, because Articles 18(3) and (4) of the IUU Regulation would not have been triggered. The wording “*where appropriate*” is, in my judgment, simply referring to the conditions which are then set out in the subparagraphs of Article 18(1) and 18(2) respectively which follow. It might also cover a situation where, for example, it is not appropriate actually to *refuse* importation into the Community because the operator no longer wishes to do so in the light of the evidence obtained, or for his own reasons. Absent such a reason, it is *mandatory* for the Member State to refuse importation if they become aware of the relevant facts referred to in Articles 18(1) and/or (2).
47. It follows that once the speedy verification procedure is complete, the Member State must decide whether to remove the suspension on movement or proceed to an Article 18 refusal of importation. Crucially, if there is a refusal of importation under Article 18, the person affected by the Refusal Decision has the right to appeal against it under Article 18(4).
48. Article 18(3) provides that “*In the event that the importation of fishery products is refused pursuant to paragraphs 1 or 2, Member States may confiscate and destroy, dispose of or sell such fishery products in accordance with national law*” (emphasis added). In other words, national law only has a role to play – in terms of enforcement powers – once a Refusal Decision under Article 18 has been taken.
49. The way in which these enforcement powers have been provided for under English law is through the 2009 Act and the 2009 Order. In this way, Parliament chose to enact a criminal, not a civil enforcement regime.
50. First, it can be seen that Article 5(1) of the 2009 Order gives effect to Article 17(7) of the IUU Regulation. Articles 5(2) and (4) of the 2009 Order once again emphasise the urgency of the verification process by the use of the words “as soon as possible”.
51. Article 5(5) of the 2009 Order makes clear that the suspension of movement of a product cannot continue beyond the completion of the verification procedure. Thus, it specifies that if after the verification is completed it is apparent that no breach of the IUU Regulation has taken place, then the prohibition on movement must be released, because Article 17(7) of the IUU Regulation no longer applies. But this does not mean that, by the back door, the authorised officer can continue to detain the Suspended Products under the Article 17 procedure if he is not satisfied that a breach of the IUU Regulation has not taken place, as the MMO submits. That interpretation of Article 5(5) would entirely undermine the statutory scheme.
52. If the officer is not satisfied that a breach has not taken place he must make up his mind as to whether to refuse importation under Article 18(1) or 18(2) and furthermore

whether to exercise his powers (of seizure) under Article 18(3) of the IUU Regulation (which he can only do in the context of alleging a criminal offence²): that is what Article 7 of the 2009 Order addresses: “*Refusal of Importation*” (which cross refers to the enforcement powers under sections 268 and 270-278 of the 2009 Act). Article 7(3) of the 2009 Order then gives the importer the right to appeal to the magistrates’ court against that refusal; and the relevant provisions of the 2009 Act allow the importer to give security for the release of the Suspended Products, and also to allow the Suspended Products to be sold with the proceeds of sale taking their place by way of security. In this way both parties’ positions are protected.

53. It follows that, in the present case, after the Suspended Products had failed the verification checks, the MMO was then able to refuse (and should have refused) importation of them under Article 18 of the IUU Regulation. That would have triggered the power of sale of the fishery product, and the proceeds of sale could then have been retained by the MMO until such time as a court exercised any power to forfeit those proceeds or one of the grounds for release of those proceeds applied (e.g. the proceedings concluded without an order for forfeiture).
54. I add (for what it is worth) that it is obviously not an answer to this point to assert that, whilst the importer loses his swift and simple right of appeal on the facts to the magistrates’ court by reason of no Refusal Decision ever having been taken by the MMO, that does not matter because he can nonetheless bring the much less effective remedy of an application for judicial review against the competent authority concerned for its ongoing failure to take a Refusal Decision.
55. Mr. Randolph QC submitted that if the Claimant were right about the operation of Articles 17 and 18 of the IUU Regulation, then there would be an unfortunate gap in the MMO’s enforcement powers, as it may only have identified (as here) a *potential* breach of the IUU legislation (such that it cannot yet say that it reasonably believed an offence to have been committed) such that its enforcement powers under section 268(1) of the 2009 Act (such as the power of forfeiture) could not yet be exercised. The simple answer to that submission is that if it does not yet reasonably believe an offence to have been committed, the MMO has no entitlement to seize the importer’s fishery products.
56. That is because whilst Articles 5-7 of the 2009 Order correctly implement the IUU Regulation (to the extent that they do so), it is also correct to observe that Article 7 of the 2009 Order does not address the eventuality that a Refusal Decision may be considered desirable even without the commission of a criminal offence by the importer (or a reasonable suspicion that such an offence has been committed). As such it provides no powers to deal with the situation where: (a) the verification procedure is completed such that a Refusal Decision is required (e.g. because the flag State has not responded in 30 days); but (b) there is no reasonable basis (yet) to suspect that a criminal offence has been committed. But the consequence of this is that in such a situation the MMO no longer has no power to continue to suspend the movement of the Suspended Products under Article 5 of the 2009 Order; and it has no power to seize them under s.268 of the 2009 Act. This is because:

² Under the IUU Regulation as implemented in the UK, the MMO has no power to seize, confiscate or detain fishery products whose importation has been refused where it does not reasonably suspect the importer of a criminal offence (see section 268(1) of the 2009 Act).

- i) The Article 5 power to prohibit movement is, as Article 5(1) expressly provides, available only “*while a verification takes place pursuant to Article 17 of the IUU Regulation*” (and therefore subject to the time limits of Article 17 verifications); and
 - ii) As and when a Refusal Decision is taken, the only powers to seize the Suspended Products are those conferred by s.268(1) and (2) which are conditional upon the enforcement officer having a reasonable belief that a relevant offence has been committed in respect of the Suspended Products.
57. In short, as the Claimant correctly states, all that Article 5(5) is saying is that if no Refusal Decision is warranted (within the timeline for such a decision) the Article 5(1) suspension must then be lifted.
58. The MMO’s position on Article 5(5) – that the authorised officer may retain the prohibition on movement of the Suspended Products if he is not satisfied that a breach of the IUU Regulation has not taken place – would mean that the importing authority could indefinitely suspend the movement of perishable goods whilst it chooses to investigate a suspected criminal offence which could, on conviction, lead to a judicial order for forfeiture. As already explained, the importing authority would thereby evade the operation of the importer’s right of appeal, and the interim scheme of bonds, powers of sale etc., provided by the applicable legislative scheme (which are expressly applied to this situation by Article 7 of the 2009 Order) until the operator could satisfy it that no offence had been committed. If that were its effect, why would the MMO *ever* need/want to take a Refusal Decision? And why would it ever need to or be able to exercise its powers under Article 7(1) of the Order, since the goods would remain suspended?
59. In criminal investigations of any complexity (as in this case), if the MMO’s interpretation were correct, this would inevitably mean that the regime of judicial supervision would be avoided and that the seized fish would spoil and the importer would be subject a regime of *de facto* forfeiture without any of the tailored statutory safeguards Parliament has provided in respect of perishable goods under the 2009 Act; by the time the court came to decide whether to exercise its power of forfeiture (if such ever occurred, as the goods would be destroyed), the point would be moot.
60. It follows from this that whilst I consider the proper construction of the relevant provisions to be clear, if I had been in any doubt I would have construed the relevant provisions in the light of the *Marleasing* duty³ to construe implementing legislation consistently with EU law (i.e. consistently with the IUU Regulation itself and with general principles of EU law, including respect for fundamental rights as embodied in the European Convention on Human Rights (“ECHR”) and the Charter of Fundamental Rights of the European Union (“CFREU”)); and the requirement in s. 3 of the Human Rights Act 1998 to construe secondary legislation compatibly with ECHR rights. That would lead to the same conclusion as to the proper meaning of the relevant provisions.
61. Article 17 of the CFREU provides as follows:

³ *Marleasing SA v La Comercial Internacional de Alimentación SA* (1990) C-106/89.

“Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss.”

62. Article 1 Protocol 1 (“A1P1”) of the ECHR provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

63. These provisions protect against a *de facto* deprivation of property in the form of the inevitable perishing of goods through long detention. Article 17 of the CFREU is, by Article 51, expressly addressed to the Member States when they are implementing EU law. A1P1 imposes substantive requirements on the legal framework for the forfeiture of property, including sufficient certainty, compatibility with the rule of law and freedom from or guarantees against arbitrariness: see the *Guide on Article 1 of Protocol No. 1 – Protection of Property* (published by the Council of Europe and dated 31 August 2020), in the section entitled ‘*Principle of lawfulness*’, at paragraphs 111-124.
64. Thus, where property is detained for the purposes of an investigation, in assessing compatibility with A1P1 (and in particular the question of whether any interference is proportionate) it will be necessary to consider whether the scheme of national law requires, as it must, the investigation to be concluded timeously and whether the person affected has recourse to the national courts to challenge the continuing detention of his property: see *Benet Czech v the Czech Republic* (21.10.10), paragraphs 42-49. See also *Forminster Enterprises v the Czech Republic* (9.10.09), paragraphs 69-71.
65. In his realistic submissions, Mr. Randolph QC did not take issue with these legal principles. Rather, he submitted that the Claimant’s construction of Articles 17 and 18 would render Article 43 inoperative as no full investigation could be started, thereby causing the MMO to breach its obligations thereunder and under Article 41 of Chapter II of the Commission Regulation 1010/2009. I reject that submission.
66. Depending on the gravity of the infringement of the IUU Regulation by the operator, the competent authority of the relevant Member State may also designate it as a *serious* infringement and start a full investigation which gives rise to immediate enforcement measures under Article 43, including the seizure of fisheries products.
67. But Chapter IX of the IUU Regulation, and Article 43 in particular, consists of a separate procedure from Articles 17 and 18 of the IUU Regulation. Chapter IX deals with serious infringements (as defined). Under Articles 17 and 18, the importing authority has to decide whether or not to allow or refuse the importation of the particular consignment. That must take place within a short time frame. Separately, if the Member State suspects the importer of having committed a *serious infringement* as defined – such as conducting business generally which is directly connected to IUU fishing – then it shall start a full investigation and depending on the gravity of the

infringement take immediate enforcement measures, which may include seizing the fishery product.

68. In this case, it is common ground that the MMO did not seize the Suspended Products under any of its statutory enforcement powers under the 2009 Order and the 2009 Act. That is despite the fact that, by letter to the Claimant's solicitors dated 5 March 2021, the Government Legal Department stated on behalf of the MMO that the MMO *did* have a reasonable belief when the verifications were being carried out that the Claimant was conducting business directly connected to IUU fishing contrary to Article 9(7) of the 2009 Order. The MMO nonetheless failed to utilise its power of forfeiture under section 268 of the 2009 Act and its ancillary enforcement powers thereunder. That may have been – although the court does not know – because any enforcement measures which a Member State wishes to take under Article 43 must be “*of such a nature as to prevent the continuation of the serious infringement concerned and to allow the competent authorities to complete [their] investigation*” and that it was considered that neither justification would apply were the Suspended Products to be forfeited/destroyed. But the reason does not matter: the procedure was not invoked.
69. In reality, what happened was that the MMO impermissibly used the verification procedure (for a particular importation) under Article 17 of the IUU Regulation for a purpose for which it was never designed. The MMO used it to conduct a lengthy investigation into the control system of a (flag) State, Ghana, impounding the goods for years at the importer's expense. Indeed in consequence of it adopting this approach, as described in paragraph 9 above, the MMO was unable to specify in the Article 5 Notice the relevant provision of the IUU Regulation in respect of which the authorised officer had reason to believe that there had been a failure to comply, in accordance with Article 5(3)(c) of the 2009 Order.
70. Contrary to the submission of the MMO, it is not legitimate to prevent the movement of a consignment of fishery products under Article 17(7) by making a series of “*rolling requests*” for assistance from the flag State under Article 17(6) and in that way to avoid the protections to the importer which are built into Article 18 or Article 43. The verification for each separate consignment in this case was made under Article 17(6). This concerns a request for assistance as to the accuracy or validity of the catch certificate; or the compliance of the products, which are the subject of the certificate, with conservation and management measures. That is why the verification procedure under Article 17(6) is a relatively speedy process. It is not designed to allow for the continued suspension of the Suspended Products, without any right of appeal against the same, whilst a full and lengthy investigation into the control systems of another State is undertaken by the importing authority.

(6) Answers to Preliminary Issues

71. It follows in my judgment that the answers to the Preliminary Issues are as follows.
72. Preliminary Issue 1:

Articles 17 and 18 require the verification procedure to be concluded and a decision taken whether to refuse importation within 15 or a maximum of 30 days, as the case may be, after the date a request is made of the competent authorities

of the flag State or third country,⁴ which request must itself be made without delay once the verification procedure is begun.

At the conclusion of the verification procedure the Defendant must thereafter immediately make a Refusal Decision in any case falling within Article 18(1) or Article 18(2) or otherwise allow the products to be released onto the market.

73. Preliminary Issue 2:

The power provided by Article 5 of the 2009 Order permits an authorised officer to prohibit the movement of a consignment only for so long as is required for verification to take place in accordance with Article 17 and only for the period before a Refusal Decision required by Article 18 of the IUU Regulation. Following the completion of the verification procedure (or the expiry of the time for the verification procedure), the power in Article 5 falls away and the authorised officer must decide whether to refuse importation and, if appropriate, whether then to exercise any of the powers of seizure, etc. provided in the 2009 Act, either as applied by Article 7 of the 2009 Order or in its own right.

74. Preliminary Issue 3:

On their true interpretation, Articles 5-7 of the 2009 Order correctly implement the Council Regulation.

75. Preliminary issue 4:

The Defendant's continuing detention of the Suspended Products after the verification procedure had completed in accordance with Article 17(6)(b) of the IUU Regulation was unlawful. After that date, the Defendant had no power to prohibit the movement of the Suspended Products under the 2009 Order, in particular Article 5 thereof.

⁴ It is an agreed fact that in all cases giving rise to the instant claim, such a request was made of the Ghanaian authorities: see paragraph 14 of the Defence.

Annex 1 – Specimen Article 5 Notice

SUFFOLK COASTAL PORT HEALTH AUTHORITY

The Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009

Notice under Regulation 5 - Control on Movement

To: John West Foods Limited
Address: Tithebarn Street, 1st Floor Lancaster House, Mercury Court, Liverpool L2 2GA

I, the undersigned, being an Authorised Officer of Suffolk Coastal Port Health Authority, hereby give you notice, as the importer, that the consignment specified in the Schedule below must not be moved beyond the confines of the port or shed it currently resides in without the written consent from an authorised officer.

The consignment described in the schedule fails to comply with the provisions of * Council Regulation (EC) No 1005/2008 / Commission Regulation (EC) No 1010/2009 in that:

Verifications are being requested to ensure that the consignment complies with the provisions of Regulation 1005/2008. The consignment has been identified as a high risk due to presumed deficiencies in the control system of the flag state – Ghana.

Verifications will be conducted in accordance with Article 17(6) of the Council Regulation 1005/2008.

SCHEDULE

Description of consignment:	Canned Tuna		
Certificate number:	BZ/BFD-2012/03	BZ/BFD-2012/051	BZ/BFD-R-2013/005
	BZ/BFD-2012/039	BZ/BFD-2012/062	BZ-BFD-2012/031
	BZ/BFD-2012/045	BZ/BFD-2012/067	ESP/SGAORP/2012/528
	BZ/BFD-2012/049	BZ/BFD-2012/070	GH/DPF-FC/2013/ECY13-013
Gross weight:	231846	No of packages:	21294
Vessel	MSC SOPHIE	Date of arrival:	19/02/2013
Container no:	CXDU1166023	MEDU3862001	TCKU3872224
	CXDU1451421	MEDU3898133	TCKU3921231
	DRYU2431421	MEDU6362057	TRHU2224122
	MEDU1890869		
Location:	Port of Felixstowe	Job Reference:	316282

You have the right to appeal against my decision under this notice by way of complaint to a senior officer of Port Health Authority

ANY PERSON WHO, KNOWING A CONSIGNMENT TO BE A CONTROLLED CONSIGNMENT, MOVES IT OR CAUSES IT TO BE MOVED SHALL BE LIABLE, ON SUMMARY CONVICTION, TO A FINE NOT EXCEEDING £50,000.

Signed
Kirsty Dawes

Name: Kirsty Dawes

Date: 25/02/2013

Designation: Port Health Officer

OFFICIAL ADDRESS: Suffolk Coastal Port Health Authority, Avocet House, Trinity Terminal, The Dock, Felixstowe, Suffolk, IP11 4SH.

Copies to 1. Importer 2. Agent, 3. MMO. 4. File Copy