Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2013*

(Reference for a preliminary ruling — Aarhus Convention — Directive 2003/4/EC — Public access to environmental information — Scope — Concept of 'public authority' — Water and sewerage undertakers — Privatisation of the water industry in England and Wales)

In Case C-279/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom), made by decision of 21 May 2012, received at the Court on 4 June 2012, in the proceedings

Fish Legal,

Emily Shirley

v

Information Commissioner,

United Utilities Water plc,

Yorkshire Water Services Ltd,

Southern Water Services Ltd,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz, E. Juhász, A. Borg Barthet and J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas, G. Arestis, A. Arabadjiev, C. Toader, A. Prechal (Rapporteur), E. Jarašiūnas and C. Vajda, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 16 April 2013,

after considering the observations submitted on behalf of:

— Fish Legal, by W. Rundle, Solicitor, and D. Wolfe QC,

— Mrs Shirley, by R. McCracken QC and M. Lewis, Barrister,

* Language of the case: English.

— the Information Commissioner, by R. Kamm and A. Proops, Barristers, instructed by R. Bailey, Solicitor,

— United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, by T. de la Mare QC, instructed by J. Mullock, Solicitor,

— the United Kingdom Government, by J. Beeko, acting as Agent, J. Eadie QC and J. Maurici and C. Callaghan, Barristers,

— the Danish Government, by V. Pasternak Jørgensen and M. Wolff, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— the European Commission, by P. Oliver, K. Mifsud-Bonicci and L. Pignataro-Nolin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

2 The request has been made in proceedings between, on the one hand, Fish Legal and Mrs Shirley and, on the other, the Information Commissioner and United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd ('the water companies concerned') relating to the refusal by those companies of requests made by Fish Legal and Mrs Shirley for access to certain information relating to sewerage and water supply.

Legal context

International law

3 The Convention on access to information, public participation in decision-making and access to justice in environmental matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), defines 'public authority' as follows in Article 2(2):

'…

(a) government at national, regional and other level;

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

(c) any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) the institutions of any regional economic integration organisation referred to in Article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity.'

4 Article 4(1) of the Aarhus Convention provides that, subject to a number of reservations and conditions, each party is to ensure that public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation.

European Union law

5 Recitals 1, 5, 8, 9 and 11 in the preamble to Directive 2003/4 state:

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

...

(5) ... Provisions of Community law must be consistent with [the Aarhus] Convention with a view to its conclusion by the European Community.

...

(8) It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest.

(9) It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies. The future development of these technologies should be taken into account in the reporting on, and reviewing of, this Directive.

...

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

6 Article 1 of Directive 2003/4 defines its objectives as follows:

'The objectives of this Directive are:

(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.'

7 Article 2(2) of Directive 2003/4 defines 'public authority' as follows:

'...

(a) government or other public administration, including public advisory bodies, at national, regional or local level;

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

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.'

8 Article 3(1) of Directive 2003/4 provides:

'Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.'

United Kingdom law

Legislation relating to access to environmental information

9 The Environmental Information Regulations 2004 ('the EIR 2004') are designed to transpose Directive 2003/4 into national law.

10 Regulation 2(2) of the EIR 2004 states:

'… "public authority" means–

(a) government departments;

(b) any other public authority as defined in section 3(1) of the [Freedom of Information Act 2000] …;

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

(d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and–

(i) has public responsibilities relating to the environment;

(ii) exercises functions of a public nature relating to the environment; or

(iii) provides public services relating to the environment.'

11 Under regulations 5 and 7 of the EIR 2004, the environmental information requested must be made available within 20 working days, a period which the authority concerned may extend to 40 days in certain circumstances.

12 Under section 50(1) of the Freedom of Information Act 2000, as modified by regulation 18 of the EIR 2004, any person concerned may apply to the Information Commissioner for a decision whether the public authority in question has dealt with his request for information in accordance with the requirements of the EIR 2004.

Legislation relating to the current allocation of statutory powers in the water supply and sewerage sector in England and Wales

13 By the enactment of the Water Act 1989, which privatised the water supply and sewerage sector in England and Wales with effect from 1 September 1989, the functions, powers, property and other assets of the water authorities were divided between, first, the National Rivers Authority, now, since the entry into force of the Environment Act 1995, the Environment Agency, and second, water companies providing water supply and sewerage services as commercial undertakings.

14 Under the legislation in force, in particular the Water Industry Act 1991 ('the WIA 1991'), as amended, the current allocation of statutory powers in the water supply and sewerage sector can be summarised as follows:

— water companies are appointed as sewerage undertaker and/or water undertaker for a given area of England and Wales by the Water Services Regulatory Authority (OFWAT). That authority is also, by itself or, in certain circumstances, jointly with the Secretary of State (the minister with responsibility for environmental matters), the authority with primary responsibility for supervising those companies;

— currently, 10 companies have been appointed as water and sewerage companies (WASCs) and 12 have been appointed solely as 'water only companies' (WOCs), so that, in each area of England and Wales, either a single company provides both water supply and sewerage services, or one company is responsible for water supply whilst another company deals with sewerage in the area concerned in addition to its water supply and sewerage activities in another area;

— the water companies are set up as a public limited company or a limited company. They are run by a board of directors responsible to shareholders and are operated on normal commercial principles, as set out in their memorandum and articles of association, with the aim of generating profits for distribution to shareholders as dividends and for reinvestment in the business;

— the companies must comply with a number of statutory duties relating to maintenance and improvement of infrastructure and to water supply and/or sewage treatment in their respective areas;

— they also hold certain statutory powers, which include powers of compulsory purchase, the right to make byelaws relating to waterways and land in their ownership, the power to discharge water, including into private watercourses, the right to impose temporary hosepipe bans and the power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water;

— these duties and powers are set out in the instrument of appointment ('licence') of each company. The licence may also include other conditions, such as a condition requiring payment of a fee to the Secretary of State. The Secretary of State and/or OFWAT ensure that the terms of the licence are complied with. The companies may be required to carry out specific actions or measures. The licence can be terminated only on 25 years' notice, with reasons. It may be modified by OFWAT with the company's consent or after a Competition Commission report;

— the legal regime to which the water companies are subject also provides for the possibility of financial penalties being imposed upon them and partly takes them outside the ordinary provisions for the dissolution of companies;

— every five years, the water companies submit a draft asset management plan, also known as a 'business plan', in which they set out details, for a five-year period, of their desired outputs, in particular investment programmes. In the course of a consultation process those plans are finalised and OFWAT determines, taking into consideration the elements of the investment programmes that it considers appropriate, the maximum amounts that the companies will be allowed to charge their customers in order to finance the business plans and, in particular, the investment that they envisage. The current plans cover the years 2010 to 2015.

The actions in the main proceedings and the questions referred for a preliminary ruling

15 Fish Legal, the legal arm of the Angling Trust, that is to say, the English anglers' federation, is a non-profit-making organisation whose object is to combat, by all legal means, pollution and other damage to the aquatic environment and to protect angling and anglers. By letter of 12 August 2009, Fish Legal asked two water companies, namely United Utilities Water plc and Yorkshire Water Services Ltd, for information concerning discharges, clean-up operations and emergency overflow.

16 Mrs Shirley wrote in August 2009 to another water company, namely Southern Water Services Ltd, in order to ask for information relating to sewerage capacity for a planning proposal in her village in the county of Kent.

17 Since Fish Legal and Mrs Shirley had not received the requested information from the water companies concerned within the periods prescribed by the EIR 2004, they both complained to the Information Commissioner. By decisions of which they were notified in March 2010, the Information Commissioner held that the water companies concerned were not public authorities for the purposes of the EIR 2004 and that he therefore could not adjudicate on their respective complaints.

18 Fish Legal and Mrs Shirley then appealed against those decisions to the First-tier Tribunal (General Regulatory Chambers, Information Rights), which stayed the cases pending guidance from the decision to be given by the Upper Tribunal (Administrative Appeals Chamber) in *Smartsource* v *Information Commissioner*.

19 After the decision in *Smartsource* v *Information Commissioner* ('the decision in *Smartsource*') was given on 23 November 2010, the First-tier Tribunal (General Regulatory Chamber, Information Rights) dismissed the appeals of Fish Legal and Mrs Shirley, principally on the ground that the water companies concerned could not be classified as 'public authorities' within the meaning of the EIR 2004.

20 The referring tribunal, to which Fish Legal and Mrs Shirley appealed, observes that the latter accept that, by various communications of which the last was in April 2011, the water companies concerned did eventually grant access to all the information requested.

21 The referring tribunal considers, however, that the question raised, in law, by the cases in the main proceedings, namely whether those companies were obliged to provide that information, has not thereby been decided. It states that an answer to that question is necessary in order to be able to determine whether the water companies concerned were in breach of their duty to provide the information in accordance with the domestic legislation and in particular within the time-limits set. It adds that that question is also relevant to other cases concerning water companies that are stayed at first instance and to cases relating to industries other than the water industry.

22 The referring tribunal states that, according to Fish Legal and Mrs Shirley, the water companies concerned must be classified as 'public authorities' within the meaning of Article 2(2)(b) or (c) of Directive 2003/4 since they perform public administrative functions and are, in any event, closely controlled by a State body.

23 The referring tribunal observes that the Information Commissioner takes an opposing view, relying essentially on the grounds of the decision in *Smartsource*. First, applying the multi-factorial approach which that decision advocates, the water companies do not carry out functions of public administration. Second, the control to which the water companies are subject is insufficient since it concerns only the functions associated with regulation. The concept of 'control' concerns command or even compulsion, and the power to determine not just ends but the means to achieve those ends.

24 If the approach in the decision in *Smartsource* were not adopted, the Information Commissioner submits, in the alternative, that at most a 'hybrid' interpretation of Article 2(2) of Directive 2003/4 should be adopted. Under that interpretation, the water companies should be classified as 'public authorities' only when discharging the functions allotted to them that are themselves capable of being classified as 'public administrative functions' within the meaning of Article 2(2)(b) of Directive 2003/4.

25 The referring tribunal adds that the water companies concerned submitted, in essence, that it was correctly decided in the decision in *Smartsource* that they were not 'public authorities'. In reaching that conclusion, the national tribunal in question considered a range of relevant material, including the document published in 2000 by the United Nations Economic Commission for Europe entitled 'The Aarhus Convention: an Implementation Guide' ('the Aarhus Convention Implementation Guide') and factors relevant to the status of water companies and the regulation of the water industry in England and Wales.

26 It was in those circumstances that the Upper Tribunal (Administrative Appeals Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. In considering whether a natural or legal person is one "performing public administrative functions under national law" [for the purposes of Article 2(2)(b) of Directive 2003/4], is the applicable law and analysis purely a national one?

2. If it is not, what EU law criteria may or may not be used to determine whether:

   (i) the function in question is in substance a "public administrative" one;

   (ii) national law has in substance vested such function in that person?

3. What is meant by a person being "under the control of a body or person falling within Article 2(2)(a) or (b)" [for the purposes of Article 2(2)(c) of Directive 2003/4]? In particular, what is the nature, form and degree of control required and what criteria may or may not be used to identify such control?

4. Is an "emanation of the State" (under paragraph 20 of the judgment in [Case C-188/89 *Foster and Others* [1990] ECR I-3313]) necessarily a person caught by Article 2(2)(c)?

5. Where a person falls within [Article 2(2)(b) or (c) of Directive 2003/4] in respect of some of its functions, responsibilities or services, are its obligations to provide environmental information confined to the information relevant to those functions, responsibilities or services or do they extend to all environmental information held for any purpose?'

Consideration of the questions referred

Admissibility

27 The water companies concerned contend, in their principal submission, that the request for a preliminary ruling is inadmissible.

28 They assert that, since it is common ground that they provided on a voluntary basis all the environmental information requested by Fish Legal and Mrs Shirley, there is no longer any dispute pending before the referring tribunal. Therefore, the Court is being asked to rule on questions that have become purely hypothetical, which removes justification for the reference for a preliminary ruling.

29 It should be borne in mind in that regard that it has consistently been held that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-648/11 *MA and Others* [2013] ECR, paragraph 36 and the case-law cited).

30 Questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *MA and Others*, paragraph 37 and the case-law cited).

31 In the present instance, it is clear from the order for reference that the dispute before the referring tribunal concerns challenges by Fish Legal and Mrs Shirley to decisions of the Information Commissioner by which he held that, since the water companies concerned could not be classified as public authorities for the purposes of the national legislation designed to transpose Directive 2003/4, he could not adjudicate on their complaints seeking a determination that the environmental information requested had not been provided within the periods prescribed by that legislation.

32 The questions referred relate essentially to whether and, if so, in what circumstances the water companies concerned must be classified as 'public authorities' for the purposes of Article 2(2)(b) or (c) of Directive 2003/4.

33 It must therefore be held, as the Advocate General has also stated in points 55 to 63 of his Opinion, that an answer to those questions is objectively needed in order to resolve the dispute before the referring tribunal.

34 In those circumstances, the questions referred are not hypothetical and the request for a preliminary ruling is thus admissible.

Substance

Introductory observations

35 First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by or for public authorities (see, to this effect, Case C-524/09 *Ville de Lyon* [2010] ECR I-14115, paragraph 36, and Case C-204/09 *Flachglas Torgau* [2012] ECR, paragraph 30).

36 As recital 5 in the preamble to Directive 2003/4 confirms, in adopting that directive the European Union legislature intended to ensure the consistency of European Union law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest (*Flachglas Torgau*, paragraph 31).

37 It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that directive is designed to implement in European Union law (see, to this effect, *Flachglas Torgau*, paragraph 40).

38 In addition, the Court has already held that, while the Aarhus Convention Implementation Guide may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention, the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention (Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 27).

39 Finally, it should also be noted that the right of access guaranteed by Directive 2003/4 applies only to the extent that the information requested satisfies the requirements for public access laid down by that directive, which means inter alia that the information must be 'environmental information' within the meaning of Article 2(1) of the directive, a matter which is for the referring tribunal to determine in the main proceedings (*Flachglas Torgau*, paragraph 32).

Questions 1 and 2

40 By its first two questions, which it is appropriate to deal with together, the referring tribunal seeks in essence to ascertain the criteria for determining whether entities such as the water companies concerned can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of Article 2(2)(b) of Directive 2003/4.

41 Under Article 2(2)(b) of Directive 2003/4, a provision essentially identical to Article 2(2)(b) of the Aarhus Convention, the term 'public authority' covers 'any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment'.

42 According to settled case-law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see, inter alia, *Flachglas Torgau*, paragraph 37).

43 In the present case, it must, firstly, be determined whether the phrase 'under national law' is to be understood as an express reference to national law – here, to United Kingdom law – for the purpose of interpreting the concept of 'public administrative functions'.

44 In this regard, there is a disparity between the English and French versions of Article 2(2)(b) of Directive 2003/4 corresponding to the divergence between the versions in the same languages of Article 2(2)(b) of the Aarhus Convention, the authentic texts of which include the French and English versions. In the French version of Article 2(2)(b) of Directive 2003/4, the phrase 'under national law' is linked to the verb 'perform', so that, in this version, the provision's terms cannot be understood as making express reference to national law as regards the definition of 'public administrative functions'. In the English version of the same provision, that phrase is, by contrast, placed after the words 'public administrative functions' and is consequently not linked to that verb.

45 Recital 7 in the preamble to Directive 2003/4 sets out the objective of preventing disparities between the laws in force concerning access to environmental information from creating inequality within the European Union as regards access to such information or as regards conditions of competition. This objective requires that determination of the persons obliged to grant access to environmental information to the public be subject to the same conditions throughout the European Union, and therefore the concept of 'public administrative functions', within the meaning of Article 2(2)(b) of Directive 2003/4, cannot vary according to the applicable national law.

46 This interpretation is supported by the Aarhus Convention Implementation Guide, according to which the phrase 'under national law' means 'that there needs to be a legal basis for the performance of the functions under [Article 2(2)(b)]', this subparagraph covering '[a]ny person authorised by law to perform a public function'. That cannot be called into question by the fact that the guide adds that '[w]hat is considered a public function under national law may differ from country to country'.

47 In this context, contrary to what the Information Commissioner and the water companies concerned submitted at the hearing, if that phrase were to be interpreted as referring to the need for a legal basis to exist, it would not be superfluous since it confirms that performance of the public administrative functions must be based on national law.

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

49 Secondly, as regards the criteria that must be taken into account in order to determine whether functions performed under national law by the entity concerned are 'public administrative functions' within the meaning of Article 2(2)(b) of Directive 2003/4, the Court has already stated that it is apparent from both the Aarhus Convention itself and Directive 2003/4 that in referring to 'public authorities' the authors intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the performance of their functions (*Flachglas Torgau*, paragraph 40).

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

51 Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.

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

53 In the present instance, it is not in dispute that the water companies concerned are entrusted, under the applicable national law, in particular the WIA 1991, with services of public interest, namely the maintenance and development of water and sewerage infrastructure as well as water supply and sewage treatment, activities in relation to which, as the European Commission has observed, a number of environmental directives relating to water protection must indeed be complied with.

54 It is also clear from the information provided by the referring tribunal that, in order to perform those functions and provide those services, the water companies concerned have certain powers under the applicable national law, such as the power of compulsory purchase, the power to make byelaws relating to waterways and land in their ownership, the power to discharge water in certain circumstances, including into private watercourses, the right to impose temporary hosepipe bans and the power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water.

55 It is for the referring tribunal to determine whether, having regard to the specific rules attaching to them in the applicable national legislation, these rights and powers accorded to the water companies concerned can be classified as special powers.

56 In the light of the foregoing, the answer to the first two questions referred is that, in order to determine whether entities such as the water companies concerned can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of Article 2(2)(b) of Directive 2003/4, it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

Questions 3 and 4

57 By its third and fourth questions, which it is appropriate to deal with together, the referring tribunal seeks in essence to ascertain the criteria for determining whether entities such as the water companies concerned, which, it is not disputed, provide public services relating to the environment, are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive.

58 In the present instance, the question arises whether the existence of a regime such as that laid down by the WIA 1991, inasmuch as it places supervision of the water companies concerned in the hands of the Secretary of State and OFWAT, bodies which, it is not disputed, are public authorities referred to in Article 2(2)(a) of Directive 2003/4, means that those companies are 'under the control' of those bodies, within the meaning of Article 2(2)(c) of the directive.

59 In their written observations, the Information Commissioner, the water companies concerned and the United Kingdom Government submit that the fact that the water companies concerned are subject to an, admittedly relatively strict, system of regulation does not mean that they are subject to 'control' within the meaning of Article 2(2)(c) of Directive 2003/4. They submit that, as the Upper Tribunal (Administrative Appeals Chamber) noted in the decision in *Smartsource*, a fundamental difference exists between a system of 'regulation', which includes only the power for the regulator to determine the objectives that must be pursued by the regulated entity, and a system of 'control', which enables the regulator additionally to determine the way in which those objectives must be attained by the entity concerned.

60 In this context, the Aarhus Convention Implementation Guide states that, whilst Article 2(2)(c) of the Aarhus Convention, a provision essentially identical to Article 2(2)(c) of Directive 2003/4, covers '[a]t a minimum' persons 'that are publicly owned', it may '[f]urthermore … cover entities performing environment-related public services that are subject to regulatory control'.

61 In relation to this concept of 'control', the referring tribunal asks, in the context of its fourth question, what relevance might be attached to the judgment of the High Court of Justice of England and Wales in *Griffin* v *South West Water Services Ltd*, to which the Aarhus Convention Implementation Guide also refers in the context of Article 2(2)(c) of the convention.

62 In that judgment, it was held in particular that the criterion relating to control, referred to in *Foster and Others*, paragraph 20, was not to be understood as meaning that it would not cover a system of regulation, such as the system laid down by the WIA 1991, and that that system satisfied the criterion relating to control, so that, as the other criteria were also met, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29) could be relied upon against the water company involved in those national proceedings as an 'emanation of the State'.

63 In this context, the referring tribunal specifically asks whether a water company, as an 'emanation of the State', is necessarily a legal person caught by Article 2(2)(c) of Directive 2003/4.

64 Where a situation of control is found when applying the criteria adopted in *Foster and Others*, paragraph 20, that may be considered to constitute an indication that the control condition in Article 2(2)(c) of Directive 2003/4 is satisfied, since in both of those contexts the concept of control is designed to cover manifestations of the concept of 'State' in the broad sense best suited to achieving the objectives of the legislation concerned.

65 The precise meaning of the concept of control in Article 2(2)(c) of Directive 2003/4 must, however, be sought by taking account also of that directive's own objectives.

66 It is apparent from Article 1(a) and (b) of Directive 2003/4 that its objectives are, in particular, to guarantee the right of access to environmental information held by or for public authorities, to set out the basic terms and conditions of, and practical arrangements for, exercise of that right and to achieve the widest possible systematic availability and dissemination to the public of such information.

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

68 Those factors lead to the adoption of an interpretation of 'control', within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it

performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field.

69 The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence.

70 The mere fact that the entity in question is, like the water companies concerned, a commercial company subject to a specific system of regulation for the sector in question cannot exclude control within the meaning of Article 2(2)(c) of Directive 2003/4 in so far as the conditions laid down in paragraph 68 of the present judgment are met in the case of that entity.

71 If the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders or the imposition of fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management.

72 It is for the referring tribunal to determine whether, in the cases in the main proceedings, the system laid down by the WIA 1991 means that the water companies concerned do not have genuine autonomy vis-à-vis the supervisory authorities comprised by the Secretary of State and OFWAT.

73 In the light of the foregoing, the answer to the third and fourth questions referred is that undertakings, such as the water companies concerned, which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field.

Question 5

74 By its fifth question, the referring tribunal asks in essence whether Article 2(2)(b) and (c) of Directive 2003/4 must be interpreted as meaning that, where a person falls within that provision in respect of some of its functions, responsibilities or services, that person constitutes a public authority only in respect of the environmental information which it holds in the context of those functions, responsibilities and services.

75 The possibility of such a hybrid interpretation of the concept of a public authority was advanced in particular in the national proceedings that led to the decision in *Smartsource*. In that context, it was submitted in particular that if the water companies were to fall within Article 2(2)(b) of Directive 2003/4 because they performed certain public administrative functions, that provision could be interpreted as meaning that those companies would be obliged to disclose only environmental information held by them in the performance of those functions.

76 It must be held that, apart from the fact that a hybrid interpretation of the concept of a public authority is liable to give rise to significant uncertainty and practical problems in the effective implementation of Directive 2003/4, that approach does not, as such, find support in the wording or the scheme of that directive or of the Aarhus Convention.

77 On the contrary, such an approach conflicts with the foundations of both Directive 2003/4 and the Aarhus Convention as regards the way in which the scope of the access regime laid down by them is set out, a regime which is designed to achieve the widest possible systematic availability and dissemination to the public of environmental information held by or for public authorities.

78 As is clear from Article 3(1) of Directive 2003/4, the directive's central provision which is essentially identical to Article 4(1) of the Aarhus Convention, if an entity is classified as a public authority for the purposes of one of the three categories referred to in Article 2(2) of that directive, it is obliged to disclose to any applicant all the environmental information falling within one of the six categories of information set out in Article 2(1) of the directive that is held by or for it, except where the application is covered by one of the exceptions provided for in Article 4 of the directive.

79 Thus, persons covered by Article 2(2)(b) of Directive 2003/4 must, as the Advocate General has stated in points 116 and 118 of his Opinion, be regarded, for the purposes of the directive, as public authorities in respect of all the environmental information which they hold.

80 Also, as follows from paragraph 73 of the present judgment, in the specific context of Article 2(2)(c) of Directive 2003/4 commercial companies such as the water companies concerned are capable of being a public authority by virtue of that provision only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4.

81 It follows that such companies are required to disclose only environmental information which they hold in the context of the supply of those public services.

82 On the other hand, as the Advocate General has essentially stated in point 121 of his Opinion, those companies are not required to provide environmental information if it is not disputed that the information does not relate to the provision of those public services. If it remains uncertain that that is the case, the information in question must be provided.

83 Accordingly, the answer to the fifth question referred is that Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as the water companies concerned, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring tribunal, the decision on costs is a matter for that tribunal. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **In order to determine whether entities such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of Article 2(2)(b) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.**

2. **Undertakings, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field.**

3. **Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services.**

[Signatures]