100. We reject that method of argument. In a case like *Stewart*, the Court had all the relevant legal material and it could be sure that it had the necessary factual information, which was limited. Despite the amount of material included in the reference in these cases, the Court could not be sure that it had all the relevant details from the complicated legislation before it. And given the different ways that the water industry may be structured in different countries, it may have considered it unwise to venture into the application of the tests. We do not consider it safe to draw any conclusions from the fact that the CJEU left it to the national court to apply the tests it identified.

F. Special Powers

101. The only issue for us was whether each of the companies was a 'legal person performing public administrative functions under national law' within Article 2(2)(b) of EID. There was no dispute that they were performing 'specific duties, activities or services in relation to the environment'.

The CJEU judgment

102. The CJEU explained in the first paragraph of its Order how to decide whether a person was performing 'public administrative functions':

> ... 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.

For convenience, we refer to this as the *special powers* test. This is merely a shorthand for being vested with 'special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.' We consider that that phrase has to be read and applied as a whole. We also refer to *the rules of private law*, which again is a convenient shorthand for 'the normal rules applicable in relations between persons governed by private law.'

103. Mr Milford argued that *special* had to be given a meaning. We do not accept that approach. We do not read *special* as adding some additional element that would otherwise be absent. Rather, we read it as part of the composite phrase that captures the contrast between the powers vested in the bodies in question and those that result from the rules of private law. We note that the other language versions of the judgment that we have consulted do not use any equivalent term to *special*. We find in this confirmation for our view that the phrase has to be read as a whole.

Powers

104. The CJEU did not define *powers*. We accept Mr McCracken's argument that it was not using the word in the precise Hohfeldian sense of the ability to alter legal relations: see Wesley Hohfeld's *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (edited by David Campbell and Philip Thomas). Rather, it

was used in the more general sense of an ability to do something that is conferred by law.

105. Mr Wolfe argued, at least in his written argument, that the test would be satisfied if we identified just one special power. As we have found that the companies have a number of such powers, we do not need to deal with that issue.

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

107. We can illustrate the application of this practical approach by referring to the power of compulsory purchase. Section 155(1) of WIA provides:

> A relevant undertaker may be authorised by the Secretary of State to purchase compulsorily any land anywhere in England and Wales which is required by the undertaker for the purposes of, or in connection with, the carrying out of its functions.

Section 155 is supplemented by Schedule 11, which deals with the process by which the companies may apply to the Secretary of State for authorisation, the Secretary of State's powers, and compensation. Mr de la Mare called such powers *contingent* powers, whilst Ms Proops preferred *tandem* powers, but labels do not matter. What matters are the practical benefits that this power gives to the companies. There are at least two. One is what Mr Wolfe called the power to promote the exercise of the power. The formal process confers an advantage that is not generally available. In addition to the formal process, it provides the opportunity, which any sensible company would surely take, of checking first with officials on the likely response to an application, thereby conferring privileged access to those who will advise the Secretary of State. The other benefit is the leverage that the power confers in commercial negotiations. The evidence showed that section 155 is little used. It is, however, always present as a fall back if a company is unable to secure agreement by negotiation. We were not given evidence that this occurs, but it is a fact of commercial life that these purchases take place 'under the shadow of compulsion' (Megarry and Wade, *The Law of Real Property* 6th edition at 22-056). For these reasons, we reject Mr de la Mare's argument that the Secretary of State's involvement prevents the compulsory powers under section 155 being special powers.

108. Ms Proops argued that we should ignore powers that had fallen into disuse. We accept that argument as an aspect of the practical approach we have adopted. It is, though, necessary to be sure that the power does not have a value in one of the ways we consider in this decision. Powers may have a force even when they are not deployed.

109. Mr de la Mare pointed out that the powers conferred on the companies merely allowed them to undertake activities that any landowner might engage in. He made this point in relation to the companies' power under section 157 of WIA to make byelaws in respect of the public use of their land or waterways.

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

110. The power need not be unique to a particular body, sector or industry. Mr de la Mare repeatedly referred to other bodies or industries that had the same or similar powers. That does not show that the power cannot satisfy the special powers test. The extent to which the CJEU's judgment will result in bodies being classified as public authorities is unclear and undecided, but potentially wide. As Judge Jacobs noted in his reference, the reasoning in these cases is potentially relevant to other privatised, regulated industries that deliver a once publicly owned service: electricity, gas, rail and telecoms. It will have to be applied to those and other bodies as and when cases arise. The outcome cannot be assumed for the purposes of deciding the cases before us.

111. Related to this was Mr de la Mare's argument that bringing the companies within the scope of EIR would impose considerable, indeed intolerable, burdens. This is not our concern. The issue for us is whether or not the companies are public authorities. Moreover, as Mr McCracken pointed out, the water industries in Scotland and Northern Ireland have not been privatised and are, accordingly, public authorities, but there was no evidence presented that they were facing problems providing environmental information.

112. We do, though, accept Mr de la Mare's argument, with which Mr McCracken agreed, that it was necessary to distinguish a power from a limitation or qualification on a duty. Mr de la Mare gave the example of the duty under section 45 of WIA to provide a connection. Section 45 provides for a number of conditions that can be imposed for complying with that duty. Looked at in isolation, section 45 appears to confer a range of powers that would not be available under private law. Seen in their full context, however, these are not powers but part and parcel of the duty to connect. They operate together to create a qualified duty.

Hunting the Snark

113. Ms Proops argued that we should analyse the companies' powers to see if they were by their nature State powers. We cannot adopt that approach, because there are no exhaustive criteria by which we could classify powers as being by their nature exclusively State powers. That is because the nature of the State is not sufficiently clear. Take the last century. In 1900, there would have been a clear view of what did not constitute State powers. There was no national health service, no social security provision and no nationalised industries. Fast forward to 1950 and the position was different. There was a national health service, a fully developed welfare system, and recently nationalised industries. Fast forward now to 2000 and the position was again changed. The national health service was still there, the social security system had changed significantly, and industries and utilities had been privatised. The boundaries between business and the State had changed. The State was operating in more business-like ways, and was contracting out activities to the private sector. The boundaries between State and the private sector are less clear cut, varying from Administration to Administration, from Department to Department, and from country to country. We read the CJEU's judgment as identifying an autonomous test of public authority for the whole of the EU that can achieve broadly consistent results across the various industry structures and across the varying views of the proper role of the State over time. This reading reinforces and is reflected in the practical approach we have adopted to the application of the Court's test.

114. There has, of course, been continuity of some State powers across and beyond the previous century: the power to levy general taxes, to maintain a standing army, to exercise criminal powers, including powers of imprisonment, to conduct international negotiations, and so on. But, for the most part, these are not the types of power that will have to be classified.

115. Judge Jacobs had these difficulties in mind when he referred the questions to the CJEU. The Advocate General may have been trying to address those concerns in his Opinion when he wrote:

> 81. If 'public authority' is characterised by anything, it is the capacity of persons who wield it to impose their will unilaterally. While a public authority may impose its will unilaterally – that is, without the need for the consent of the person under the relevant obligation – an individual, on the other hand, may impose his will only if such consent is forthcoming.
>
> 82. Clearly, that consideration must always be viewed in the context of a State under the rule of law, governed by the democratic principle and subject to the jurisdiction of the courts. However, what is important for present purposes is that acts of public authority, while subject to review, are endowed per se with immediate and autonomous executive power, by contrast with the acts of individuals, which always require the intervention of the public authorities in order to take effect where the consent of those affected by such acts is not forthcoming.

> 83. On that basis, I believe that, for the purposes of the present proceedings, it can be concluded that, in the context of Directive 2003/4, 'public administrative functions', as an equivalent of public authority and save for possible legislative and judicial exceptions – which are not relevant in the present case – are functions by virtue of which individuals have imposed on them a will [sic] the immediate effectiveness of which, albeit subject to review, does not require their consent.
>
> 84. It is for the referring tribunal to establish whether the companies concerned exercise authority of that kind, that is to say, whether, in the course of managing water and sewerage services, the companies concerned are entitled to impose on individuals obligations for which they do not require the consent of those individuals, even though the individuals concerned may contest those obligations before the courts. In other words, the referring tribunal must determine whether the companies concerned are in a position substantially equivalent to that of the administrative authorities.
>
> 85. However, in order to offer the referring tribunal some guidance which may be helpful to it, it should be pointed out that it is important to establish, in particular, whether the companies concerned have, to some extent, powers of expropriation, powers of access to private property, powers to impose penalties and, in general, powers of enforcement vis-à-vis individuals, regardless of the fact that, when exercising those powers, they are also subject to judicial review, as public authorities *stricto sensu* always are.

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

117. We do, though, find Ms Proops' argument helpful as a check. We accept that the activities of Government are covered by head (a) in all the definitions. We also accept that Government can operate through the rules of private law. It is useful to ask whether duties, activities and services, and the means by which they are promoted, carried out and provided, would have been considered as public administrative functions if undertaken directly by Government. Applying this check, if Mr de la Mare's argument were correct, it would remove from the comparison set by the CJEU (see paragraph 119 below) vast tracts of powers that would, if undertaken by Government, have been properly considered as public administrative functions. That would, in our view, be surprising.

The rules of private law

118. The proper interpretation of this part of the special powers test is important, because it explains the difference of approach between the parties. Mr

de la Mare interpreted it to mean the powers that could be obtained by the exercise of the rules of private law. Take as an example section 159 of WIA, which authorises the laying of pipes in land other than a street:

> (1) Subject to the following provisions of this section, to section 162(9) below and to the provisions of Chapter III of this Part, every relevant undertaker shall, for the purpose of carrying out its functions, have power—
>
> (a) to lay a relevant pipe (whether above or below the surface) in any land which is not in, under or over a street and to keep that pipe there;
>
> (b) to inspect, maintain, adjust, repair or alter any relevant pipe which is in any such land;
>
> (c) to carry out any works requisite for, or incidental to, the purposes of any works falling within paragraph (a) or (b) above.
>
> (2) Nothing in subsection (1) above shall authorise a water undertaker to lay a service pipe in, on or over any land except where—
>
> (a) there is already a service pipe where that pipe is to be laid; or
>
> (b) the undertaker is required to lay the pipe in, on or over that land by virtue of any of subsections (3) to (5) of section 46 above.

Mr de la Mare argued that that power is subject to limitations and safeguards set out in Schedule 6 and that the same powers could be acquired under private law through an easement or a licence. We accept both those arguments, but they do not show that the powers exemplified by section 159 cannot be special powers. The flaw in the argument lies in the comparator used by Mr de la Mare. He has chosen the powers that can be obtained by the exercise of the rules of private law. That is not correct for two reasons.

119. First, it is not what the CJEU said. The test laid down by the CJEU requires the national court to undertake a comparison between the powers that have been vested in the body in question and the powers that result from the rules of private law. The test refers to the powers that result from those rules, not to the powers that *could* result from the *exercise* of those rules. In none of the other language versions that we have consulted is there any suggestion that the appropriate comparator is the possible result of the exercise of the rules.

120. Second, if Mr de la Mare's argument were right, the Court would have set a requirement that would effectively prevent the special powers test being satisfied in all but the most exceptional case. That would be surprising given the constitutional significance of the environment in the EU Constitution, and all the more so in respect of legislation that the Advocate General described in paragraph 92 of his Opinion as 'pushing EU authority to its limits'.

121. The rules of private law include those of contract and property. They are essentially facilitative, allowing the parties to fix the terms on which they are willing to enter into a relationship. They are able to fix the terms of their contracts and to choose which rights of property to create from those recognised by law. They give the parties the power to negotiate and agree. The correlative is

that they give a party the power to refuse to engage and to obstruct. Mr de la Mare's argument overlooks that important difference. The companies have the power to compel or, in the case of a tandem power (to adopt Ms Proops' phrase), effectively to compel. It may be that they do not have to use that power often, but it confers an important benefit that saves the need for the companies to negotiate in appropriate cases and, even if they were minded to do so, it could have an overweening effect on the course of the negotiations.

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

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

124. The rules of private law are not merely facilitative. They can also regulate what the parties may and may not do within a relationship. There are rules of public policy, rules about the validity and interpretation of exclusion clauses, and so on. They may be stated in the most general terms, but they usually operate within existing relationships. They may also operate where no legal relationship exists. For a common law example, take the right of self-help allowing access to another's land in order to abate a nuisance. For a statutory example, take the Access to Neighbouring Land Act 1992. This allows landowners to gain access to neighbouring land in order to preserve their property. But even in these examples, the operation of the rule is narrowly confined by reference to the existing proximity of the land.

125. In contrast, some of the powers given to the companies operate outside any existing relationship and without any practical limit. Take section 168, which allows the companies access to land:

> (1) Any person designated in writing for the purpose by a relevant undertaker may enter any premises for any of the purposes specified in subsection (2) below.
>
> (2) The purposes mentioned in subsection (1) above are—
>
> (a) the carrying out of any survey or tests for the purpose of determining—
>
> (i) whether it is appropriate and practicable for the undertaker to exercise any relevant works power; or
>
> (ii) how any such power should be exercised; or

(b) the exercise of any such power.

(3) The power, by virtue of subsection (1) above, of a person designated by a relevant undertaker to enter any premises for the purposes of carrying out any survey or tests shall include power—

(a) to carry out experimental borings or other works for the purpose of ascertaining the nature of the sub-soil; and

(b) to take away and analyse such samples of water or effluent or of any land or articles as the undertaker—

(i) considers necessary for the purpose of determining either of the matters mentioned in subsection (2)(a) above; and

(ii) has authorised that person to take away and analyse.

This is subject to Schedule 6 and may require a JP's warrant. And, like the Access to Neighbouring Land Act 1992, it operates as between the company and an individual landowner. But in reality the power is wide and of a different nature. Given the company's effective monopoly within its area, this is in effect a general power, operating against the whole world within the geographical area of its Licence. Section 168 is a particularly good example, because of two features. First, the conditions in which it applies: there need be no existing relationship with the landowner; it applies even if the company is not providing services to that particular land. Second, because of the extent of the power: it allows not only access, but surveying and even boring. This is unlike any rules of private law. It is more akin to general legislative powers that might be conferred on central or local government.

126. Section 76 is another example of a power that is not available under the normal rules of private law. At the time of the requests, the section provided as follows:

(1) If a water undertaker is of the opinion that a serious deficiency of water available for distribution by that undertaker exists or is threatened, that undertaker may, for such period as it thinks necessary, prohibit or restrict, as respects the whole or any part of its area, the use for the purpose of—

(a) watering private gardens; or

(b) washing private motor cars,

of any water supplied by that undertaker or a licensed water supplier and drawn through a hosepipe or similar apparatus.

(2) A water undertaker imposing a prohibition or restriction under this section shall, before it comes into force, give public notice of it, and of the date on which it will come into force, in two or more newspapers circulating in the locality affected by the prohibition or restriction.

(3) Any person who, at a time when a prohibition or restriction under this section is in force, contravenes its provisions shall be guilty of an offence

> and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.
>
> (4) Where a prohibition or restriction is imposed by a water undertaker under this section, charges made by the undertaker for the use of a hosepipe or similar apparatus shall be subject to a reasonable reduction and, in the case of a charge paid in advance, the undertaker shall make any necessary repayment or adjustment.
>
> (5) In this section 'private motor car' means any mechanically propelled vehicle intended or adapted for use on roads other than—
>
> (a) a public service vehicle, within the meaning of the Public Passenger Vehicles Act 1981; or
>
> (b) a goods vehicle within the meaning of the Road Traffic Act 1988,
>
> and includes any vehicle drawn by a private motor car.

The section has now been repealed and new sections 76-76C substituted by the Flood and Water Management Act 2010. Despite the substantial changes, the same point applies to both versions. The section authorises the companies to impose what were conveniently called at the hearing 'hosepipe bans'. Section 76(3) (now section 76(5)) provides that a person who contravenes a prohibition is guilty of an offence and liable to a fine. That sets the power apart from any normal rules of private law. The definition of a criminal offence is a classic use of State power that has survived the changes in the role of the State over the previous century.

Susceptible to judicial review

127. In his closing remarks, Mr McCracken introduced the idea that the powers on which he relied were susceptible to challenge by way of judicial review and, as such, special powers. This is an attractive argument, and the companies can be subject to judicial review in respect of some of their powers: *R v Northumbrian Water* [1999] Env LR 715. There is, though, a danger of circularity in this argument. As we did not hear argument on this from the other parties, we have not relied on it.

Foster

128. Mr de la Mare referred us to this case, which was the decision of the House of Lords following the decision of the CJEU on the reference in that case. The House decided that British Gas's monopoly on the supply of gas was a special power. Mr de la Mare argued that (i) this was the only example of a special power that had been identified and (ii) the House had provided a definition of a special power. We reject his argument on (ii). Lord Templeman set out section 29 of the Gas Act 1972, which confers the monopoly, and said (at 314):

> This section conferred on the B.G.C. 'special powers beyond those which result from the normal rules applicable in relations between individuals.'

Later (at 315) he said:

> Similarly, I see no justification for a narrow or strained construction of the ruling of the European Court of Justice which applies to a body which has 'special powers beyond those which result from the normal rules applicable in relations between individuals.' The Act of 1972 conferred on the B.G.C. an express power to prevent anyone else from supplying gas in the United Kingdom. That power was a special power which could not have resulted from transactions between individuals.

129. There is nothing in Lord Templeman's speech to support Mr de la Mare's argument. The House was not attempting to provide a definition of *special powers*; it was merely explaining why the monopoly power was a special power. The case provides an example of a special power, nothing more.

Conclusion

130. For these reasons, we have decided that the companies have special powers. The powers we have mentioned are sufficient, collectively in themselves and as examples of powers of the same type, to satisfy the test laid down by the CJEU. As such, the companies are public authorities for the purposes of Aarhus, EID and EIR.

G. Control

The CJEU judgment

131. The CJEU explained in the second paragraph of its Order that a person was under another's 'control':

> ... 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.

For convenience, we call this the *control* test. As in the case of the *special powers* test, this is merely a shorthand for the passage we have just quoted. The Court discussed this test at paragraphs 57 to 73 of its judgment.

132. The CJEU referred in its discussion to the *functions* that the companies perform (paragraphs 68 and 71), but in its formal answer it referred to the *services* they provide. We take those terms to be synonymous and use them accordingly. Other language versions use similar language.

133. The control test distinguishes between the functions that a body performs and the manner in which it performs them. It has to be applied to the manner of performance, not to the functions themselves. It is, therefore, irrelevant that the companies are by statute and their Licences required to perform specified functions. This includes the most basic functions allocated to the companies, such as the duty 'to develop and maintain an efficient and economical system of water

supply' (section 37(1) of WIA) and 'to provide, improve and extend such a system of public sewers ... and so to cleanse and maintain those sewers ... as to ensure that the area is and continues to be effectually drained' (section 94(1) of WIA). In applying the control test, we are only concerned with the manner in which the companies perform those and other functions, although not at the lowest level of day-to-day management: see paragraph 71 of the CJEU's judgment. This distinction between functions or services and the manner in which they are performed was not maintained in the arguments that were deployed against Mr de la Mare. To the extent that those arguments related to functions rather than performance, we reject them.

134. We read the judgment as laying down a single test with two elements that identify cause and effect: is a body performing its functions in 'a genuinely autonomous manner' (the effect) 'since a public authority ... is in a position to exert decisive influence on their action in the environmental field' (the cause)?

135. The language of the cause element reflects the subtlety with which influence may be exerted. As we have said in the context of the special powers test, powers may have a value even when they are not exercised. All powers, whether special or not, may exert their value through influence. The existence of the power may be sufficient to direct the manner in which a company performs its functions. This may make it difficult to prove that influence is in fact operating, but that is essential under the cause element. It is not sufficient merely to show the potential for influence. It is necessary to show that it has had an actual impact on the companies' decision-making. The test is only satisfied if they 'do not determine in a genuinely autonomous manner' how they provide their services.

136. As we read the control test, we have to take an overall view of whether in practice the companies operate in a genuinely autonomous manner in the provision of the services that relate to the environment. It is not sufficient to show that they do not do so in one or two marginal aspects of their business. Nor is it necessary to show that they do not do so in almost every aspect of their business. The CJEU has stated the test in a general way that excludes those extreme positions and requires an overview of the position in relation to environmental services. Although the Advocate General's reasoning is different in its concepts from that adopted by the Court, one passage seems to be broadly consistent with its overall approach:

> 107. That being so, a body will be 'under the control' of the State where that body itself is a creation of the public authorities to enable the State to participate in private affairs in a private capacity or where, since it is formally a body independent of the public authorities, it is required to participate in private affairs subject to conditions imposed by the public authorities which make it impossible for it to act with substantive autonomy in relation to fundamental aspects of its corporate activities.

Authorities

137. We heard a variety of arguments on the status of *Smartsource* and the validity of its reasoning. They ranged from an argument that the decision on the control issue was to all intents and purposes binding on us to an argument that its reasoning was so fundamentally flawed that it could not be safely relied on. We consider it unnecessary and unhelpful to engage in an analysis of these arguments. We are not hearing an appeal against that decision. The appropriate course for a three-judge panel convened to apply the answers provided by the CJEU is to consider the issue afresh. That is what we have done.

138. We were referred to the decision of the House of Lords in *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, in which the House referred at [11] to the 'supervision and control' exercised by the regulator. We do not find that helpful. The House was not applying the test we have to apply and the context was not comparable.

139. We were referred to two decisions in which the courts applied a control test. One was *Foster*, in which the CJEU had laid down a test whether a body was 'performing a service under the control of the state and has for that purpose special powers ...' The other was *Griffin v South West Water Services Ltd* [1995] IRLR 15, in which Blackburne J applied that test. In his reference, Judge Jacobs asked about the relevance of the 'emanation of the State' test in *Foster*. The CJEU said, at paragraph 64 of its judgment, that satisfying that test was an 'indication' that the control test under Aarhus and EID was satisfied. It is, therefore, not decisive. There are, moreover, two reasons why we do not find these authorities helpful in applying the control test to the companies in these cases. First, the Court in *Foster* did not draw a distinction between functions and performance. Second, its test did not explicitly include a cause element, although this may be implied.

Corporate control

140. The CJEU referred, in paragraph 69 of its judgment, to the possibility of what could be called corporate control. It gave a number of examples, which are remarkably similar to the statutory provisions that applied in *Foster*, which was before the Court. The companies are not subject to this sort of control. As the Court in paragraph 69 made clear, these are but examples of the ways in which control might be exercised. They are not exhaustive, as the manner in which control is exercised is irrelevant.

Autonomy and influence

141. No legitimate business has complete freedom of action. All businesses are constrained by the law, by competition and market forces, and by the realities of business life. We need only provide a few examples of these self-evident truths. As to the law, businesses are limited by what is permissible under planning law and are required to comply with health and safety legislation, the Equality Act 2010 and employment law. Some are subject to forms of regulation, such as that

exercised by Ofsted over child-minders. As to competition and market forces, no business can make customers buy products they do not want or at a price that is excessive compared to their competitors. As to the realities of business life, all businesses are subject to those who provide their finance. A corner shop is no less subject to the goodwill of its bank than a major public company depends on the continuing approval of the pension fund managers who invest in its shares. Constraints like these are always present as the background to, and set the limits within which, every business has to operate. But that does not prevent a business having genuine autonomy. In other words, autonomy has to be judged not by reference to absolute liberty, but against the normal background radiation of the constraints that limit the freedom of action for every business.

142. When influence becomes more than mere background, it may take various forms. Take a small family business that is financed by the directors and its bank. So long as business is going well, the bank's potential power is in the background providing at most the outer limits of the company's actions. When things are going wrong, the bank may take increasing interest. This might begin with a discussion that leads the directors to abandon their plans for expansion, followed by some advice or guidance that leads them to institute new methods of budgetary control, which may eventually lead to demands for redundancies to which they must accede rather than lose the company's funding, which may now be made dependent on the bank having a seat on the board and perhaps special voting rights. So far, the management is still the responsibility of the board. A next step may be the appointment of a receiver or a liquidator. This simple but realistic example shows that circumstances may change the degree and extent of the influence that the bank can bring to bear on the company. Somewhere along the way, the line may have been crossed at which the company ceased to have genuine autonomy.

143. In other circumstances, there may be less scope for such a graduated flow of influence into a business. Take the example of a child-minder who is subject to regulation by Ofsted and required to comply with the standards it sets. It may take only a single incident for the regulator to intervene in the business and suspend the owner's registration. To that extent, the freedom of action of all conscientious child-minders is constrained, as they wish to remain in business. But, despite the regulatory scheme, they retain such a degree of freedom to decide on the nature of their business and how they conduct it that they retain genuine autonomy.

144. These examples show that there are influences that operate in most businesses. Being subject to a degree of influence is not incompatible with a company having genuine autonomy in its decision-making. It is not just a case of taking account of the potential extent for intervention. That potential for influence can vary from being merely a background consideration that sets the limits of the company's freedom for action to micromanaging all aspects of the company's business, and every stage in between. It can vary from time to time and from one aspect of the company's business to another. The more complex the company's business, the more complex will be the varying pattern of control that

can be exerted at any time and over time, and the greater the difficulty in showing that overall the business has no genuine autonomy of action.

The case against the companies

145. The case presented against the companies proceeded in two ways. First, by way of specific instances of actual involvement in the companies' business. Second, by way of inference from the existence of the potential for such involvement. We take those in turn, beginning with the specific instances.

146. Mr McCracken referred us to the 328 page Report of the Inquiry into the Thames Water Revised Draft Water Resources Management Plan 2010-2015, in which the Inspector made a series of 25 recommendations, and to the Secretary of State conclusions following that Report. These Plans are governed by sections 37A-37D of WIA. Their purpose is to provide a long term plan to show how each company will be able to meet its obligation to maintain a water supply system. It is undoubtedly the case that this Report is an instance of strategic oversight of, and interference with, the planned delivery by Thames Water of its services.

147. If the Thames Water Report might be termed an example of macro involvement, Mr Wolfe referred us to an example of micro involvement. He showed us a final enforcement notice issued by OFWAT under section 18(1) of WIA, requiring United Utilities plc within 19 months to remedy its failure to deal with the risk of sewer flooding in respect of a small number of properties in the Penketh area. This is undoubtedly an instance of detailed oversight of the company to ensure that it complied with its statutory duty, but it is concerned with the manner in which the company has to carry out that duty only to the extent of having set a timetable for compliance.

148. To conclude on these specific instances, they do show involvement by the Secretary of State and OFWAT in the way the companies perform their duties and we accept that these are but examples of such instances. But they have to be kept in perspective. They show increased intensity of oversight at particular times and in respect of particular activities. The companies do not attract such intervention, whether at the macro or micro level, in respect of most of their activities. As a proposition of general experience, enforcement is only an effective tool if it is exceptional. There comes a point at which enforcement is so frequent that it ceases to be a viable option. At this point, the management of the business or activity has to be taken over or the business or activity has to be closed down. No one argued that that point was in prospect, or likely to be in prospect, in respect of any of the companies.

149. We now turn from specific instances of involvement in the companies' business to the extent to which there is potential for influence. Mr Wolfe's argument is indicative of the approach. He provided 12 pages of instances in which public authorities had the power to exert decisive influence over the companies. Just to take one example at random, he referred to section 115 of WIA, which deals with the use of highway drains as sewers and vice versa. He described the control or influence as:

> Cannot unreasonably refuse request or insist on unreasonable terms
> SoS binding/final determination of disputes over reasonableness (S115(5) WIA)
> Must accept if use is in accordance with system approved pursuant to Flood and Water Management Act Immigration (European Economic Area) Regulations 2000

He then set out the way that decisive influence was exerted:

> Public authority can suspend, annul after the event or requires prior authorisation of decisions

150. It is possible to analyse each of the powers listed by Mr Wolfe individually. Just to take an example, Mr de la Mare argued that the power of direction in respect of fluoridation of water under section 87 of WIA is very limited. We do not follow that approach. Instead we reject the method of argument that section 115 of WIA illustrates for three reasons.

151. First, some of the potential for influence arises from the need to provide a substitute for the competition and market forces that operate generally. Those forces are absent because of the companies' effective monopoly. Regulation seeks to remedy that by providing a substitute. To take one example from Mr McCracken's argument, OFWAT has power under section 143(6) of WIA to withhold approval of a company's charging scheme. As we have said, competition and market forces are part of the background radiation against which business operates. To the extent that regulation is a substitute for those forces, it is merely part of the background against which the companies perform their services and consistent with the exercise of genuine autonomy.

152. Second, this method of argument proceeds from cynicism. In effect, the argument is that the companies only perform their obligations because of the powers available to the Secretary of State, OFWAT and the EA. We reject that basis of argument. It is insufficient to satisfy the effect element of the control test. Parties do not generally honour their obligations just because they will be subject to enforcement if they don't. Contracting parties perform their contracts because they want what they have contracted for, motorists keep to the speed limit (more or less) because it is the safe and responsible thing to do, and child-minders refrain from abusing the children in their care because it is wrong to mistreat children. The risk of enforcement is at most only a marginal consideration for a reputable party, and no one argued that the companies are not reputable.

153. Third, the argument lacks balance. It presents the extent to which influence is possible, but fails to present the other side, which is the extent to which the companies in practice retain freedom over the way in which they provide their services. That overall view is essential to apply the CJEU's control test. The companies are commercial companies. We accept that this does not prevent them being subject to control, as the CJEU said in paragraph 70 of its judgment, but there is more. Each is run by an independent board of directors that is answerable to the shareholders and subject to the usual controls that operate

under company law. If the companies were subject to sufficient control to deprive them of genuine autonomy of action in the way they deliver their services, they would in effect be run by shadow directors within the meaning of section 251(2) of the Companies Act 2006. An important reason for privatisation of the water industry was to allow the companies access to private funding and the fact that they are able to attract it is evidence that they are able to operate freely in a manner acceptable to the capital markets. The extent of their freedom is apparent from our statement of the legal structure of the water industry. Despite the extent to which there is scope to influence the companies' decision-making on the way it delivers its services, the evidence does not show that that influence is actually exerted to such an extent that overall the companies lack genuine autonomy. Influence is undoubtedly exerted and can be extensive, but it is relatively marginal compared to the extent of the actual freedom exercised.

154. There is much merit in Mr de la Mare's detailed criticisms of the other parties' arguments on the control test. We have not adopted them, in whole or in part, because we consider that those arguments are flawed in the more fundamental ways that we have just set out. It is not necessary to descend to his level of detail. The evidence is not sufficient to show that the control test is satisfied.

Conclusion

155. The control test is a demanding one that few commercial enterprises will satisfy. The companies' functions may be fixed by law and by their Licences, but the test is concerned with the way in which they exercise those functions. They are subject to stringent regulation and oversight and there is the potential for extensive involvement and influence over the way in which they perform their services. But the evidence falls far short of showing that the Secretary of State, OFWAT and the EA influence their performance, individually or collectively, whether by actual intervention or by more subtle forms of influence, to such an extent that the companies have no genuine autonomy of action.

IV OVERALL CONCLUSIONS

156. For these reasons, we have decided that:

- the Upper Tribunal has jurisdiction on appeal over the public authority issue;
- the companies are public authorities under the special powers test, but not under the control test;
- they provided the information requested by Fish Legal and Mrs Shirley late; but
- no further steps are required of them;
- the decisions of the First-tier Tribunal are re-made to that effect.

Signed on original
on 16 February 2015

Mr Justice Charles
Chamber President

Edward Jacobs
Paula Gray
Upper Tribunal Judges

APPENDIX A

Relevant Provisions of FOIA

PART IV
ENFORCEMENT

50 Application for decision by Commissioner

(1) Any person (in this section referred to as 'the complainant') may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,

(b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a 'decision notice') on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice

and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

(7) This section has effect subject to section 53.

51 Information notices

(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with a notice (in this Act referred to as 'an information notice') requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or

(b) in a case falling within subsection (1)(b), a statement—

(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), and

(ii) of his reasons for regarding that information as relevant for that purpose.

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

(4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in

connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.

(7) The Commissioner may cancel an information notice by written notice to the authority on which it was served.

(8) In this section 'information' includes unrecorded information.

PART V
APPEALS

57 Appeal against notice served under Part IV.

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

(3) In relation to a decision notice or enforcement notice which relates—

(a) to information to which section 66 applies, and

(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,

subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

APPENDIX B

Parts IV and V of FOIA as Modified by EIR

PART IV
ENFORCEMENT

50 Application for decision by Commissioner

(1) Any person (in this section referred to as 'the complainant') may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Parts 2 and 3 of these Regulations.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under regulation 16(1),

(b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in these Regulations referred to as a 'decision notice') on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial [under regulation 12(6) or 13(5)], in a case where it is required to do so by regulation 5(1), or

(b) has failed to comply with any of the requirements of regulations 6, 11 or 14,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice

and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

(7) This section has effect subject to section 53.

51 Information notices

(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Parts 2 and 3 of these Regulations, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under these Regulations conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with a notice (in these Regulations referred to as 'an information notice') requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Parts 2 and 3 of these Regulations or to conformity with the code of practice as is so specified.

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or

(b) in a case falling within subsection (1)(b), a statement—

(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), and

(ii) of his reasons for regarding that information as relevant for that purpose.

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

(4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under these Regulations, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of these Regulations (including proceedings before the Tribunal) and for the purposes of such proceedings.

(6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.

(7) The Commissioner may cancel an information notice by written notice to the authority on which it was served.

(8) In this section 'information' includes unrecorded information.

PART V
APPEALS

57 Appeal against notice served under Part IV.

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

(3) In relation to a decision notice or enforcement notice which relates—

(a) to information to which regulations 17(2) to (5) apply, and

(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,

subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

APPENDIX C

Relevant Paragraphs in the CJEU Judgment

Fish Legal and Emily Shirley v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd

Case C-279/12
[2014] QB 521

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 EU law, a general principle of access to environmental information held by or for public authorities: see *Ville de Lyon v Caisse des dépôts et consignations* (Case C-524/09) [2010] ECR I-14115, para 36 and *Flachglas Torgau GmbH v Federal Republic of Germany* (Case C-204/09) [2013] QB 212, para 30.

36 As recital (5) in the Preamble to Directive 2003/4 confirms, in adopting that Directive the EU legislature intended to ensure the consistency of EU 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: see the *Flachglas Torgau* case, para 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 EU law: see the *Flachglas Torgau* case, para 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: see *Solvay v Région Wallonne* (Case C-182/10) [2012] Env LR 545, para 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: see the *Flachglas Torgau* case, para 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 EU law and the principle of equality require that the terms of a provision of EU 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, the *Flachglas Torgau* case, para 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 sub-paragraph covering 'any person authorised by law to perform a public function'. That cannot be called into question by the fact that the guide adds that 'what 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 EU 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: see *Flachglas Torgau GmbH v Federal Republic of Germany* (Case C-204/09) [2013] QB 212, para 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 1991 Act, 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 1991 Act, in as much 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 Drainage & Water Reports Ltd v Information Comr* [2011] JPL 455, 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 'at a minimum' persons 'that are publicly owned', it may 'furthermore ... 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 England and Wales in *Griffin v South West Water Services Ltd* [1995] IRLR 15, 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 v British Gas plc* (Case C-188/89) [1991] 1 QB 405; [1990] ECR I-3313, para 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 1991 Act, 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 L48, p 29) could be relied on 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 the Foster case, para 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)(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 para 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 1991 Act 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)(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 the *Smartsource* case. 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 para 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.

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 Parliament and Council Directive 2003/4/EC 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.**