



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 5 September 2013¹

Case C-279/12

**Fish Legal,
Emily Shirley**

v

**The Information Commissioner,
United Utilities, Yorkshire Water and Southern Water**

(Request for a preliminary ruling from the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom))

(Access to environmental information — Obligation incumbent upon public authorities — ‘Natural or legal person performing public administrative functions under national law’ — Natural or legal person ‘under the control’ of the State or of a body performing public functions — Autonomous concept of European Union law)

1. The present request for a preliminary ruling raises again the issue of the conditions governing access on the part of private individuals to environmental information held by the public authorities, the disclosure of which is governed by Directive 2003/4,² and it raises specifically the issue concerning the ‘public authority’ status of the body to which the request for information is to be addressed for the purposes of that directive. That issue is the subject of debate as the present case concerns private companies which manage a public service relating to the environment and the dispute centres on whether, in the circumstances of the case, the management of that service is of such a nature that, even though the companies concerned are private, they have to be regarded as ‘public authorities’ for the purposes of Directive 2003/4 and, in consequence, must comply with the request for information addressed to them by two private individuals.

2. In that context, the Court is called upon to clarify its case-law on two very specific subjects. The first, clearly, is the right of access to information itself. The second is the definition of the concept of ‘public authority’, an issue of importance across the board, in numerous fields of European Union (‘EU’) law and the resolution of which, in the present case, will require an examination of ‘dependence’ and ‘control’, concepts which commonly feature, for example, in the case-law on companies set up to provide certain services.

¹ — Original language: Spanish.

² — 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).

I – Legislative framework

A – *International law*

3. Article 2(2) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005³ (‘the Aarhus Convention’), provides:

“Public authority” means:

- (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 relating to the environment, under the control of a body or person falling within [points] (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. Under the terms of Article 4(1) of the Aarhus Convention, the parties must, subject to certain reservations and conditions, ensure that, in response to a request for environmental information, public authorities make such information available to the public, in accordance with their national legislation.

B – *EU law*

5. Of interest are the following recitals in the preamble to Directive 2003/4:

Recital 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.’

Recital 5: ‘... Provisions of Community law must be consistent with [the Aarhus Convention] with a view to its conclusion by the European Community.’

Recital 8: ‘It is necessary to ensure that any natural [or] legal person has a right of access to environmental information held by or for public authorities without his having to state an interest.’

Recital 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

³ — OJ 2005 L 124, p. 1.

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. The objectives of Directive 2003/4 are defined in Article 1 of that directive:

- ‘(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. For its part, Article 2(2) of Directive 2003/4 defines the concept of ‘public authority’ in the following terms:

- ‘(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. Under Article 3(1) of Directive 2003/4, ‘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.’

C – National law

9. In accordance with the information provided by the referring tribunal, the following national legislation is of interest:

1. Legislation on access to environmental information

10. The relevant national legislation is to be found in the Environmental Information Regulations 2004 (SI No. 3391) (‘EIR 2004’), which transposed Directive 2003/4 into national law and Regulation 2(2) of which defines the concept of ‘public authority’ as follows:

‘Subject to paragraph (3), “public authority” means—

- (a) government departments;

- (b) any other public authority as defined in section 3(1) of the [Freedom of Information Act 2000 ('FIA 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, environmental information must, if it has been requested, 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 FIA 2000, as amended by Regulation 18 of the EIR 2004, a person who has requested information may apply to the Information Commissioner for a decision as to whether the public authority concerned has dealt with his request in accordance with the requirements of the EIR 2004.

2. Legislation on the structure of the water industry in England and Wales

a) Background

13. In the middle of the 20th century, most water and sewerage services were in public ownership and were provided by local government authorities under the Public Health Act 1936.

14. The Water Act 1973 ('WA 1973') transferred, in general, responsibility for those services to regional water authorities. Some services were provided by statutory companies acting on behalf of those authorities.

15. The Water Act 1989 ('WA 1989') privatised the water industry in England and Wales, introducing largely the structure which applies today. The functions, powers, property and other assets of the regional water authorities were divided between the National Rivers Authority (now, after the Environment Act 1995, the Environment Agency) and the new privatised companies, which were in future to provide water and sewerage services in England and Wales.

16. The legislation governing water management in England and Wales was consolidated and amended in 1991. One of the principal statutes which now forms part of the statutory framework for the water industry is the Water Industry Act 1991 ('WIA 1991').

b) The corporate structure and governance of the appointed companies

17. Under section 6 of the WIA 1991, water and sewerage services may be provided only by companies which have been appointed by the Secretary of State or (now) by OFWAT (the economic regulator of the water industry in England and Wales) as water supply and/or sewerage undertaker for a particular area of England or Wales.

18. Only a limited company may be appointed as a water or sewerage undertaker (Section 6(5)). The companies are run by boards of directors, accountable to the shareholders. The companies are run in accordance with normal commercial principles, as set out in their memoranda and articles of association, with the aim of generating profits for distribution to shareholders as dividends and for reinvestment in the business.

19. The companies are subject to the rules binding upon all other public limited companies or limited companies. They receive no public subsidy. Neither borrowing nor investment decisions are directly dictated by government or any other public body. Nor is any borrowing by the companies backed by the State. Accordingly, each company's funds are generated by charges to customers, the sale of shares and other rights issues, borrowing through the capital markets at normal commercial rates, and other commercial activities such as the sale of land and other assets.

20. Each company has an Instrument of Appointment (a 'Licence') which sets out the terms of its appointment as a water and/or sewerage undertaker. The Licence not only imposes the general statutory duties and confers the general statutory powers but also entails other conditions (section 11). These may include the payment of sums of money to the Secretary of State.

21. The Licence can be terminated only upon 25 years' notice, with reasons (section 195A(l)(c)). The Licence may only be modified by OFWAT: (i) with the consent of the relevant company or (ii) without its consent, following a Competition Commission report.

22. Compliance with the terms of the Licence is enforced by the Secretary of State or by OFWAT, who may require an undertaker to carry out specific actions or measures. The WIA 1991 also provides for financial penalties and restricts the operation of the ordinary provisions governing the dissolution of companies.

c) Functions of OFWAT

23. The companies are effectively monopoly suppliers to most users of their services in their areas of appointment. Accordingly, the regulatory system is designed to ensure scrutiny of such monopoly prices through what is known as 'comparative competition', that is to say, a system under which the prices of the companies are benchmarked against each other so that an assessment can be made of how each company's performance compares with that of the most efficient companies. On the basis of that assessment, the maximum which each company can charge customers and the means by which their charges are to be levied is determined by OFWAT for five-year periods.

24. OFWAT is required to exercise its regulatory functions in such a manner as to ensure that the companies are able (in particular, by ensuring reasonable returns on their capital) to finance the proper performance of their functions as water and sewerage undertakers.

d) Powers and duties of water and sewerage undertakers

25. Water undertakers have a duty to develop and maintain an efficient and economical system of water supply within their area. The power of water undertakers to disconnect customers from the water supply is limited and subject to strict procedural requirements, breach of which is a criminal offence.

26. A sewerage undertaker has the following duties under the WIA 1991: (a) to provide, improve and extend a system of public sewers (whether within its own area or elsewhere) and to cleanse and maintain those sewers so as to ensure that specific drainage requirements are met; (b) to attain certain standards of performance in accordance with regulations; (c) to provide sewers in certain locations where there are, or are likely to be, adverse effects on the environment or amenity if a public sewer is not provided; and (d) to accept communication with its public sewers from the drains and private sewers of premises.

27. Water and sewerage undertakers are given a range of powers – some of which are shared with others – which far exceed those normally enjoyed by private companies.

28. Water and sewerage undertakers may not dispose of any operational land without the consent of the Secretary of State.

29. The Water Act 2003 ('WA 2003') placed water undertakers under an obligation to produce Water Resource Management Plans and Drought Plans.

e) Obligations to provide information other than those at issue in the present case

30. Apart from information which they provide on a voluntary basis, companies must provide certain information under other legislation, so as, for example, to comply with their obligations in relation to data protection and corporate reporting.

31. The companies must, as sewerage undertakers, keep a public register with details of trade effluent discharge consents and agreements.

32. OFWAT must keep a register of all appointments as undertakers and conditions attached thereto.

33. The Secretary of State may publish such information as he thinks fit about the operations of water undertakers. OFWAT has powers to disclose such information to consumers.

34. It is, in general, a criminal offence to disclose information obtained under the WIA 1991 about the operations of particular undertakers if they do not consent.

35. Public registers must be kept by the Environment Agency of all applications for discharge permits, permits granted, and conditions attached thereto. Details of samples, and the related analysis, taken by the Environment Agency of discharges and receiving waters must be included, as must any such information actually supplied by the companies to the Environment Agency. Information about samples must be placed on the register within two months. Information may not be included without the consent of the companies if it is considered commercially confidential.

36. The FIA 2000 requires much information actually held by public bodies, such as the Environment Agency, OFWAT and the Secretary of State, to be made available on request. It does not purport to transpose Directive 2003/4 into national law. It is in some respects narrower in scope than the directive. Information may be refused on grounds of commercial confidentiality. There is no right to information which has been supplied to a public body on a voluntary basis.

II – Facts

37. In the case before the referring tribunal, access was sought by a non-profit-making organisation and by a natural person to information held by companies which the national authority did not regard as ‘public authorities’ for the purposes of Directive 2003/4.⁴

38. The relevant proceedings were commenced and the administrative decision was upheld at first instance. With an appeal pending before the Upper Tribunal, the companies concerned finally agreed to provide the information requested although they did not consider themselves obliged to do so.

39. Nevertheless, the Upper Tribunal has made the present request for a preliminary ruling.

III – The questions referred

40. The questions referred are worded as follows:

‘Article 2.2 (b) of Directive 2003/4/EC

- (1) In considering whether a natural or legal person is one “performing public administrative functions under national law”, 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?

Article 2.2 (c) of Directive 2003/4/EC

- (3) What is meant by a person being “under the control of a body or person falling within Article 2.2(a) or (b)”?
- (4) Is an “emanation of the State” (under paragraph 20 of the judgment in *Foster v British Gas plc* (Case C-188/89)) necessarily a person caught by Article 2.2(c)?

Article 2.2 (b) and (c)

- (5) Where a person falls within either provision 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?

41. In the words of the Upper Tribunal Judge, ‘[t]he issue that I have to decide is whether water companies under English law are public authorities for the purposes of the disclosure of environmental information. In particular, I need to identify the criteria by reference to which a body is classified for that purpose. Although the issue arises in respect of water companies, it is relevant to other privatised, regulated industries that deliver a once publicly owned service: electricity, gas, rail and telecoms.’⁵

4 — The companies concerned are United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd (‘the companies concerned’), companies governed by English law.

5 — Order for reference, paragraph 1.

IV – Procedure before the Court of Justice

42. The request for a preliminary ruling was received at the Court Registry on 4 June 2012.

43. Written observations were submitted by the parties to the main proceedings, by the United Kingdom and Italian Governments and by the Commission.

44. At the hearing on 16 April 2013, oral argument was presented by the parties to the main proceedings, by the United Kingdom and Danish Governments and by the Commission.

V – Arguments

45. The companies concerned submit that, since they have supplied the information requested, the request for a preliminary ruling is purely hypothetical and, as such, inadmissible.

46. As regards Questions 1 and 2, Fish Legal, Mrs Shirley, the Italian Government and the Commission submit that those questions should be answered in the affirmative. In support of their position, after pointing out that, in accordance with the case-law, the concepts used in Article 2(2)(b) and (c) of Directive 2003/4 should be given an autonomous and uniform interpretation, they argue that the concept of ‘public administrative functions’ must be broadly construed since this is the only way of ensuring attainment of the objective of Directive 2003/4, which is the widespread, systematic dissemination of environmental information. That broad interpretation would, they argue, clearly encompass the functions performed by the water companies concerned, the public nature of which is confirmed by the obligations which they enter into when they take over the service and by the official powers which the State confers upon them for the purposes of performing that service.

47. On the other hand, the Information Commissioner, the companies concerned and the United Kingdom Government contend that the question whether a person is ‘performing public administrative functions under national law’ should be answered in accordance with national law and, in consequence, there is no need to reply to Question 2. They submit that it is clear that the phrase ‘under national law’ must be construed as an express reference to the laws of the Member States, in accordance with which the meaning and scope of the concept ‘public administrative functions’ fall to be determined.

48. However, should the Court take the view that a uniform concept must be used, the companies concerned and the United Kingdom Government submit that, in the light of the objective of Directive 2003/4, it must be borne in mind that the obligations laid down therein relate to the executive and to the national administrative authorities, which usually hold environmental information as a result of the public functions exercised. Water companies, on the other hand, do not perform public functions. In any event, it is for the national court to determine whether, in certain circumstances, an organisation performs functions which may place it on the same footing as a ‘public authority’. In the present case, there are a number of factors which support a negative reply, notably the private, profit-making nature of the water companies, which did not even have executive or governmental powers before they were privatised, while it is irrelevant that, historically, the water service was provided in whole or in part by the government or that that service benefits society and is in the general interest, since that alone does not mean that provision of the service by a profit-making undertaking becomes a public administrative function. In the context of the water service, only the regulatory authorities (OFWAT and the Environment Agency) perform public administrative functions and are by that token subject to the obligations laid down in Directive 2003/4.

49. As regards Question 3, Fish Legal and Mrs Shirley submit that, in view of the powers granted to the water companies under the national legislation and the degree of regulation to which they are subject, they cannot be regarded as private companies which pursue their activity independently; on the contrary, they act as a public authority. The Information Commissioner, the companies concerned and the United Kingdom Government counter that, according to certain national case-law,⁶ for a finding that a person is ‘under the control’ of a public authority for the purposes of Article 2(2)(c) of Directive 2003/4, the nature, form and degree of control exercised over that person must go further than the functions associated with the regulation. There is, they submit, no relationship of control if the person concerned remains independent as to the form in which he assumes his responsibilities and functions and supplies the service. However, there will be a relationship of control if the public authority is in a position to fix the objectives and the means that the person concerned must use to achieve those objectives.

50. For its part, the Italian Government submits that there is ‘control’ for the purposes of Article 2(2)(c) of Directive 2003/4 where important aspects of the activity relating to the environment depend on decisions taken by a public authority and, in consequence, the management autonomy of the organisation is significantly reduced by comparison with the autonomy which it would enjoy if it were operating in normal conditions. The Danish Government submits that the expression ‘under the control’ implies submission to the decisive influence of the public authorities without it being of any importance whether the body is subject to legal rules, and the factors to take into account when determining whether there is such submission are criteria such as ownership, the right to vote, the statutes and the composition of a steering group.

51. The Commission states that, as the Implementation Guide to the Aarhus Convention indicates, Article 2(2)(c) of Directive 2003/4 applies where a person is under the control of the government itself or of a body which performs public administrative functions under national law and that the ‘public responsibilities or functions’ are conferred on it *de facto* and not by application of a statutory or regulatory act. Accordingly, the Commission submits, there is no need to reply to the question in so far as it refers to the criteria to be taken into account in order to determine whether, in the case before the referring tribunal, the bodies concerned are ‘under control’ for the purposes of that provision.

52. As concerns Question 4, Mrs Shirley argues that it would be incompatible with the purpose and scope of Directive 2003/4 to exclude companies which the national court⁷ has already held to be ‘emanations of the State’ within the meaning of *Foster*.⁸ For their part, the Information Commissioner, the companies concerned and the United Kingdom Government submit that the case-law of the Court on the concept of ‘emanations of the State’ is not relevant to the interpretation of Article 2(2)(c) of Directive 2003/4. In their opinion, that provision uses a more restrictive concept, forming a kind of *lex specialis* which specifies the bodies ‘under control’ which must be treated as if they were part of the State. It is their submission that the complex nature of the concept of public authority used in Directive 2003/4 and the reference in Article 2(2)(b) to national law demonstrate that the EU legislature intentionally avoided the concept of ‘emanation of the State’, a concept which, furthermore, is autonomous and is not to be found in the Aarhus Convention, to which many non-member countries are party. Lastly, the Commission asserts that it follows from its proposed answers to Questions 2 and 3 that, where the special powers referred to in *Foster* (paragraph 20) rest on a formal legal basis, Article 2(2)(b) of Directive 2003/4 applies, but where the special powers are conferred *de facto*, Article 2(2)(c) of the directive comes into play.

6 — *Smartsources v Information Commissioner and Others* [2010] UKUT 415 (AAC).

7 — *Griffin v South West Water Services Ltd* [1995] IRLR 15.

8 — Case C-188/89 [1990] ECR I-3313.

53. In relation to Question 5, the last question referred, Fish Legal, Mrs Shirley, the companies concerned and the Italian Government are not in favour of a 'hybrid' solution, their argument being that, if a person satisfies the definition in Article 2(2)(a) or (b) of Directive 2003/4 and the information requested is covered by the concept of 'environmental information', all the information concerned must be provided regardless of the purpose for which it is held. Any other approach would make it very difficult to apply the directive, under which, moreover, an exception may be made only where the information is held by bodies or institutions acting in a judicial or legislative capacity. The Information Commissioner and the United Kingdom Government submit that the approach described in Question 5 should be adopted if the Court finds that a body which is essentially private in nature is capable of being a public authority for the purposes of Directive 2003/4. Lastly, the Commission submits that since a body is only considered to be a public authority by virtue of the special functions entrusted to it, there is nothing to justify the treatment of such a body as a public authority when it does not act in the exercise of those functions.

VI – Assessment

A – The admissibility of the reference for a preliminary ruling

54. As already mentioned, the companies concerned finally agreed to provide the information requested. In principle, therefore, it could be argued that the substantive claim made in the main proceedings was satisfied out of court. That is the submission of the companies concerned, which argue that the request for a preliminary ruling is now purely hypothetical and must accordingly be ruled inadmissible.

55. In my opinion, the request for a preliminary ruling has not lost its purpose.

56. There is certainly no pending claim for compensation based on the damage caused by the initial refusal of the companies concerned, which means that no autonomous interest in the outcome of the request for a preliminary ruling subsists via that indirect route. Moreover, the simple assertion made by the referring tribunal that the reply given by the Court would be helpful to it when disposing of similar cases⁹ does not of itself appear to be sufficient for a finding that there is a dispute actually pending before it.

57. In those circumstances, it should merely be observed that 'the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute'.¹⁰

58. However, as the referring tribunal points out in paragraph 3 of the order for reference, although the information requested was eventually provided voluntarily, it remains to be determined whether the companies concerned were in any event under a duty to provide that information and, furthermore, whether they were under a duty to do so within the period laid down in the national legislation, which had already expired when they agreed to the disclosure.

⁹ — The Upper Tribunal, with a different composition, recently disposed of a similar case (*Smartsources*) in the manner argued for by the administrative authorities. The composition of the Upper Tribunal which has made the present request for a preliminary ruling has an interest in a ruling from the Court on whether the approach adopted in that judgment is correct.

¹⁰ — Order in Case C-155/11 PPU *Mohammad Imran* [2011] ECR I-5095, paragraph 21, citing Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 28, and the order in Case C-525/06 *Nationale Loterij* [2009] ECR I-2197, paragraph 10.

59. It should be borne in mind that the real subject-matter of the main proceedings is the refusal of the administrative authorities to regard the companies concerned as public authorities and being, as such, under a duty to provide the information requested within specified time-limits. That question was not resolved through the voluntary disclosure of the information, since the point at issue in the main proceedings is, specifically, whether such disclosure in fact constitutes a duty enforceable against the companies concerned; or whether, on the other hand, disclosure is an act which takes place only if those companies so wish.

60. Not until that question has been answered will it be possible to characterise in law the conduct of the companies concerned and, on that basis, to find that they have exercised a freedom or that, on the contrary, they have failed to comply with the duty to provide information *within specified time-limits*.

61. However, the fact that the matters covered by the dispute remain at issue does not follow solely from the fact that the question of legal characterisation remains pending. The truth is that the claims made by Fish Legal and Mrs Shirley cannot, strictly speaking, be said to have been satisfied out of court. This is because Fish Legal and Mrs Shirley seek not only access to certain information but also access to that information *within specified time-limits*, namely, the period within which the companies concerned, as public authorities for the purposes of Directive 2003/4, should have disclosed the information. Since it is established that the disclosure was not made within those time-limits, it is clear that, in relation to this point, the claim made by Fish Legal and Mrs Shirley has not been satisfied out of court. In order to ascertain whether their claim is legitimate, it is necessary first of all to determine whether the prerequisite for that claim is satisfied, that is to say, whether the companies concerned were under a duty to disclose the documents within fixed time-limits rather than when they actually did so. To that end, it is essential to ascertain, in short, whether the companies concerned must be regarded as public authorities for the purposes of Directive 2003/4.

62. If that question is answered in the affirmative, the disclosure will not have obviated an unlawful act entailing consequences which will have to be assessed, where appropriate, in terms of their nature and extent by the referring tribunal, which will be unable to make any determination, however, if it does not first obtain the reply sought from the Court, since any unlawfulness attaching to the conduct of the companies concerned depends on whether or not they are classified as public authorities for the purposes of Directive 2003/4, a question which the Court alone is able to answer.

63. In short, I do not believe that there are any grounds for treating the request for a preliminary ruling as inadmissible.

B – Question 1

64. The first question concerns the interpretation of Article 2(2)(b) of Directive 2003/4 and asks whether the concept of a natural or legal person ‘performing public administrative functions under national law’ must be established exclusively by reference to national law or on the basis of EU law.

65. In my opinion, the reply to Question 1 requires an examination of the two aspects which, I believe, are inherent in Article 2(2)(b) of Directive 2003/4. First, there is the aspect relating to the *concept* of ‘public administrative functions’ in the strict sense. Second, there is the aspect relating to *identification* of the persons authorised to ‘perform’ those functions.

66. As regards the *concept*, suffice it to note that, in the words of the judgment in *Flachglas Torgau*,¹¹ also with reference to Directive 2003/4, ‘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’.

67. That being so, there is clearly a need to define an autonomous concept of the category ‘public administrative functions’. As is usual in EU law, the use of categories intended to apply in 28 national legal systems is feasible only in so far as those categories are reduced to a unitary and uniform concept for all the Member States.

68. Admittedly, the concept in question is not relevant solely in the context of EU law; on the contrary, it comes within the ambit of an international convention – the Aarhus Convention – which is binding on the European Union and in the light of which Directive 2003/4 must be construed. Obviously, that directive is not decisive when it comes to the interpretation of the Aarhus Convention but it is decisive for the purposes of ensuring that the European Union meets its obligations in relation to that convention, since it can only do justice to them if it is able to ensure that, in the context of the European Union, the concept of ‘[n]atural or legal persons performing public administrative functions under national law’, as used in Article 2(2)(b) of the Aarhus Convention, is uniformly construed in all the Member States.

69. The fact that Article 2(2)(b) of Directive 2003/4 refers to national law as the basis for the performance of public administrative functions might suggest – as the Information Commissioner, the companies concerned and the United Kingdom Government contend – that the concept in question must be defined on the basis of each national legal system.

70. However, I do not believe that to be the case. The reason for this lies with the second aspect referred to in point 65 above. Article 2(2)(b) of Directive 2003/4 is based on a concept of public administrative functions which, for the reasons set out, cannot but be a common, shared concept and, accordingly, an EU concept. However, in accordance with the principle of institutional autonomy, EU law cannot determine which persons or institutions actually *perform* those functions in each Member State. That and no other, therefore, is the reason why Article 2(2)(b) of Directive 2003/4 provides that it is to be national law which determines, where this is called for, *who* performs public administrative functions other than ‘the public authorities’ in the strict and formal sense of the term (in other words, outside the case envisaged in Article 2(2)(a) of the directive), while it is for EU law alone, of course, to establish *what* those functions are and *in what they consist*. That being so, since certain functions are defined under EU law as ‘public administrative functions’, it will then be necessary to determine, *in accordance with national law*, which bodies – in addition to the public authorities in the strict sense – may perform such functions and are therefore covered by Article 2(2)(b) of Directive 2003/4.

71. Accordingly, as a first interim conclusion, I propose that the Court should state in reply to Question 1 that the concept of a natural or legal person ‘performing public administrative functions under national law’ must be established by reference exclusively to EU law so far as the definition of the concept of ‘public administrative functions’ is concerned, while it is for the laws of the Member States to determine which natural and legal persons are authorised to perform such functions, in the event that provision is made to that effect.

11 — Case C-204/09 [2012] ECR, paragraph 37, citing Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraph 72. To the same effect, see Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-482/09 *Budějovický Budvar* [2011] ECR I-8701, paragraph 29.

C – Question 2

72. Having made that determination, it is necessary to reply to the second question referred and accordingly to establish, in the terms requested by the Upper Tribunal, what EU law criteria are relevant for the purposes of (A) defining a function as a ‘public administrative’ function, and (B) determining whether national law has in substance vested such a function in a particular natural or legal person.

73. In other words, it is necessary at this point to define the concept of ‘public administrative functions’ before going on to determine the conditions which must be satisfied in order to establish that, under national law, the performance of those functions has been entrusted to a particular natural or legal person.

1. Criteria for definition of the concept of ‘public administrative functions’

74. In the context of Article 2(2) of Directive 2003/4, the concept of ‘public administrative functions’ is, quite simply, equivalent to that of ‘public authority’. To my mind, there are two factors which account for this. The first is the fact that the concept of ‘public administrative functions’ is used in that provision as the key element for the definition of the general concept of ‘public authority’. The second and more important factor is the exception allowed under the subparagraph immediately following Article 2(2)(c), which provides that Member States may exclude from the definition of the concept of public authority ‘bodies or institutions ... acting in a judicial or legislative capacity’.

75. To my mind, that possibility of exclusion means that the concept of ‘public administrative functions’ does not refer strictly to administrative or executive institutions in the true sense but rather, in general terms, to the full panoply of State powers. Only in this way does it make sense for it to be possible to exclude from the definition of ‘public authority’ institutions performing judicial or legislative functions: in other words, functions of State authority other than those which are administrative or executive functions *stricto sensu*.¹²

76. Those considerations lend a very specific context to the issue which has to be resolved in the present case, since – unlike, for example, the situations addressed in *Solvay and Others*¹³ or *Flachglas Torgau* – the Court is not required to determine in the present case whether an act involving the exercise of public authority may fall within the category of legislation and, as such, be covered by the exception allowed under Directive 2003/4; rather, the Court simply has to determine what constitutes the exercise of public authority *tout court*, without, therefore, having to refer to possible exceptions.¹⁴

77. That does not make the issue any less complex, since, as in the case of other basic categories, the definition of ‘public authority’ is, to say the least, thorny and controversial. However, for the purposes of the present request for a preliminary ruling, it is necessary to arrive at a definition of ‘public administrative functions’ which is appropriate in the context of Directive 2003/4.

12 — By expressly providing that legislative and judicial authorities may be excluded from the scope of ‘public authority’, Directive 2003/4 prohibits, *a contrario*, the exclusion of administrative authorities. Consequently, Member States may broaden the scope of the definition to cover the legislature and the judiciary, but they may not restrict it further than the minimum represented by the administrative authorities, which are, strictly speaking, the authorities which really matter in the context of Directive 2003/4, ‘since within States it is those authorities which are usually required to hold environmental information in the exercise of their functions’ (*Flachglas Torgau*, paragraph 40).

13 — Case C-182/10 [2012] ECR.

14 — The difficulty of the exception allowed under Article 2(2) of Directive 2003/4 was also the subject of the Opinion delivered on 21 March 2013 by Advocate General Sharpston in Case C-515/11 *Deutsche Umwelthilfe*.

78. To my mind, that approach brings us back to the rulings given by the Court since *Foster* and thus to a less restrictive definition of public administrative functions than that used, for example, in the case-law on the exercise of ‘official authority’ as an exception to the freedom to provide services (Article 51 TFEU).¹⁵

79. In that specific context, the Court has tended to employ a concept formulated on the basis of a distinction between ‘public authority’ and ‘private authority’, based in particular on the difference in importance of the desires to which each type of authority serves to give effect.

80. As mentioned, that approach is found in *Foster*, in which it is stated that ‘a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose *special powers beyond those which result from the normal rules applicable in relations between individuals* is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon’.¹⁶

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.¹⁷

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 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.

15 — In that connection, see, for example, the series of judgments beginning with Case C-47/08 *Commission v Belgium* [2011] ECR I-4105. That case-law is based, in particular, on the need to define in the best terms possible the scope of an EU freedom vis-à-vis the exception represented by the exercise of official State authority.

16 — *Foster*, paragraph 20; emphasis added.

17 — See generally in that respect, De Otto y Pardo, I, ‘Estudios sobre el Poder Judicial’, in *Obras Completas*, Universidad de Oviedo/Centro de Estudios Políticos y Constitucionales, Madrid, 2010, pp. 1266 to 1279.

2. Criteria for assessing whether individuals have been entrusted with the performance of public administrative functions

86. By the second part of Question 2, the referring tribunal asks what criteria may be applied in order to determine whether, again in the context of Directive 2003/4, national law has vested a natural or legal person with public authority.

87. In my opinion, the reply to the second part of Question 2 is supplied by the structure of Article 2(2) of Directive 2003/4. That provision makes a succession of references. In point (a), it refers to ‘government or other public administration, including public advisory bodies, at national, regional or local level’; that is to say, it refers to public authority in the formal and strict sense of the term, including, for the reasons I set out in point 75 above, the judiciary and the legislature. For its part, point (b) refers to ‘any natural or legal person performing public administrative functions under national law’. In my opinion, this relates to persons or bodies in whom national law, where relevant, has explicitly and formally vested public authority;¹⁸ it therefore contrasts with point (c), which refers to persons having public responsibilities or functions, or providing public services ‘under the control’ of either the public authorities *stricto sensu*, as mentioned in point (a), or of a natural person vested with public authority within the meaning of point (b). As we shall see, that third and final option under point (c) brings us into the territory of the informal, implied or indirect delegation of authority.

88. I believe, therefore, that in order to determine whether the law of a Member State has conferred on an individual responsibility for performing ‘public administrative functions’ for the purposes of Article 2(2)(b) of Directive 2003/4, account must be taken of whether there is a formal and express legal act conferring official powers. In the absence of an act granting such powers, and it thus having been established that the cases referred to in points (a) and (b) of Article 2(2) of the directive are not satisfied, it will be necessary to consider whether point (c) applies, which brings us to the third question referred by the Upper Tribunal.

89. Accordingly, as an interim conclusion, I propose that the Court should state in reply to Question 3 that it is for the referring tribunal to establish whether the companies concerned may, by virtue of a formal, express legal act conferring official powers, impose on individuals obligations for which they do not require the consent of those individuals, with the result that they are in a position substantially equivalent to that of the administrative authorities of the State.

D – Questions 3 and 4

90. It is now necessary to determine the situations in which a natural or legal person who is not a ‘public authority’ in the strict sense (Article 2(2)(a)) and does not perform ‘public administrative functions’ pursuant to a formal, express act granting official powers (Article 2(2)(b)), has ‘public responsibilities or functions, or provid[es] public services, relating to the environment under the control’ of a public authority *stricto sensu* or of a natural or legal person who performs ‘public administrative functions’. That, in short, is the issue raised in the third and fourth questions, which ask when a person is ‘under the control’ of one of the bodies referred to in Article 2(2)(a) and (b) (Question 3) and whether a person in that position may be regarded as an ‘emanation of the State’ within the meaning of *Foster* (Question 4).

18 — That was the situation in *Foster*, in which the Court referred to ‘a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State ...’ (paragraphs 20 and 22; emphasis added).

91. It is my view that, by means of those provisions, Directive 2003/4 seeks to exhaust all the possible means of identifying holders – primary, secondary or circumstantial – of public authority in order to enable the attainment of the objectives pursued by the EU legislature, such as ‘more effective participation by the public in environmental decision-making’¹⁹ and ensuring that ‘any natural [or] legal person has a right of access to environmental information held by or for public authorities without his having to state an interest’.²⁰

92. In short, it is a question of pushing EU authority to its limits by removing the difficulties arising from the fact that directives lack direct effect in relationships between individuals. In other words, it is a question of identifying public authority where it exists in substance and making it genuinely subject to the requirements laid down in Directive 2003/4.

93. That is the spirit of the case-law on which *Foster* is based, in accordance with which, as Advocate General van Gerven observed in his Opinion in that case, ‘whenever, in the light of the underlying purpose of the measure, the concept of “the State” is given a broad interpretation, reference is made to the criterion of actual control, dominating influence and the possibility on the part of the authorities to give binding directions, regardless of the manner in which such control is exercised (by means of ownership, financial participation, dependence for purposes of management or finance, or through legislative provisions)’.²¹

94. That is the criterion to which Directive 2003/4 has given formal expression in Article 2(2)(c), which refers to the case of persons or bodies having public responsibilities or functions, or providing public services, ‘*under the control* of a body or person falling within (a) or (b)’²²; in other words, under the control of the State in the strict sense (point (a)) or of a private person who has been formally empowered to exercise public authority (point (b)).

95. Accordingly, and again quoting Advocate General van Gerven, ‘the assumption is thus that there is a “core” of authority ... which, for the purpose of the measure concerned, *imparts a public character by its control and influence* to other bodies or transactions, even where these are governed by private law’.²³

96. In order to make the meaning of the phrase ‘under the control of a body or person falling within (a) or (b)’ more explicit, I would suggest that, in that phrase, the EU legislature is referring to something other than the position of control which, by definition, is enjoyed by public authorities when regulating activities carried on by individuals. To my mind, what is meant is not the general situation of subordination or dependence in which any individual who carries on an activity controlled or regulated by the State finds himself. That phrase refers, rather, to a relationship of specific dependence or subordination, the result of which is not simply that the individual is under an obligation to act within the framework of conditions laid down by the public authorities, but rather that it is the public authorities which in fact define the individual’s conduct.

97. In other words, a regulatory authority simply delimits the ambit within which free and autonomous will can be exercised, that is to say, the scope of what is possible for an individual in the strict sense, namely, someone who freely engages in an activity within a framework defined by the public authorities. On the other hand, a person who simply acts *under the control* of a public authority lacks freedom. In reality, it is the public authority itself which acts and manifests itself through the person acting *under its control*.

19 — Recital 1.

20 — Recital 8.

21 — Opinion of Advocate General van Gerven, point 16.

22 — Emphasis added.

23 — Opinion of Advocate General van Gerven, loc. cit. Emphasis added.

98. In that regard, it is possible to refer figuratively to an ‘emanation of the State’, in accordance with *Foster*. However, I do not believe that the meaning of that expression warrants the fourth question submitted by the referring tribunal, which itself acknowledges that it has referred the question ‘without much enthusiasm’.²⁴ In my opinion, it is clear that a person covered by Article 2(2)(c) of Directive 2003/4 may be classified as an ‘emanation of the State’ if that can be taken to mean that the nature and extent of his subordination to the public authorities is such that, ultimately, his own actions are, in reality, those of the public authorities themselves. In any event, it remains a term indicating a relationship characterised by subordination and dependence, which is what ultimately matters.

99. As an ‘emanation of the State’, a natural or legal person covered by Article 2(2)(c) of Directive 2003/4, is, for the purposes of that directive, identified with the State itself (Article 2(2)(a)) or with those who, formally empowered by the State, exercise public authority (Article 2(2)(b)), so that, as such, he is bound by the duty to provide access to the environmental information which he holds.

100. In that respect, it is necessary to add a qualification to the effect that, although such a person may be classified as an ‘emanation of the State’, a natural or legal person covered by Article 2(2)(c) continues to be an individual for all intents and purposes. In other words, by contrast with the State *stricto sensu* and the bodies covered by Article 2(2)(b), such a person does not exercise public authority, in the sense that he is not able to impose his will unilaterally on other individuals. However, in so far as the State acts through him, he is of necessity covered by the concept of public authority laid down in Directive 2003/4.

101. Certainly, the State then acts as an individual, without the *imperium* which accrues to it as the primary holder of public authority. Nevertheless, that does not mean that it ceases to be the State and there is nothing to justify its exclusion in that case from the formal concept used in Article 2(2)(a) of the directive, since it is clear that the State may also act by itself in the area of private relationships as a mere individual. The reasons which, as we have seen, militate in favour of a broad, substantive, interpretation of the concept of ‘State’ also militate in favour of a purely formal interpretation if, as is the case here, by merely referring to the State as an individual and regardless of the public or private nature of its acts, the best conditions for the effective attainment of the objectives of Directive 2003/4 are ensured.

102. That being so, since individuals who exercise public authority by virtue of an express delegation of authority (Article 2(2)(b)) may be said figuratively to ‘be’ the State, in the sense that they exercise official powers (primary or secondary) over other individuals, those individuals become an instrument *sine imperio* of State action in the sphere of private relationships; they are also ‘the State’, even though they act only as individuals, simply because, ultimately, their actions can be traced back to the will of the State itself, which also habitually intervenes in the sphere of private relationships as a mere individual.

103. Briefly, the foregoing may be summarised as expressing the view that Article 2(2)(b) refers to individuals who, by virtue of a formal, express delegation of authority, exercise with some degree of autonomy certain official powers, whereas Article 2(2)(c) encompasses individuals who, without substantive autonomy, are instruments of the State for the purposes of the latter’s actions in the sphere of private relationships as a mere individual. Accordingly, both cases involve the State, either because an individual exercises public authority which is the monopoly of the State or because an individual allows the State (directly or via an intermediary) to act through him as an individual governed by private law.

24 — Paragraph 28 of the order for reference.

104. It is therefore a question of determining what type of control is necessary in order for it to be said that an individual – without ceasing to be an individual – acts as an ‘emanation of the State’ and what criteria may be used to identify such control.

105. As far as control is concerned, I believe that it must be sufficient to ensure that an individual is unable to act in private affairs with a measure of substantive autonomy, whether in terms of the determination of his objectives or in terms of the definition of strategies and the selection of the appropriate methods for achieving those objectives.

106. That lack of autonomy may be the result of two factors. The first is the fact that the private entity is a creation of the public authorities and comes directly under their direction and control. The second is the fact that, while being a formally independent body, the private body must operate in a context defined to the last detail (and not simply regulated) by the public authorities: for example, through the establishment of public prices, the imposition of management plans or the obligation to comply with detailed guidelines for the operation of the service. The latter is a case of what may be categorised as ‘actual control’, in the sense that it is not the result of immediate and direct intervention in the private body but rather the definition of its activities to an extent that renders illusory the substantive autonomy of the body concerned. Contrary to the view of the Italian Government, it is not a case of control which is ‘alegal’ or unknown in law – a mere *factum* – but rather of (legal) control indirectly exercised over the body by means of legal rights which enable the public authorities to intervene in the activities of that body, by contrast with those which afford them direct, formal control over the body itself.

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.

108. Naturally, it is for the national court to determine the extent to which factors of that kind are present in each case, and for that purpose it may rely on the rules established in the case-law of the Court relating to companies set up to provide certain services.

109. In my view, it is perfectly possible to apply the criteria used by the Court to establish cases in which a contracting authority exercises over a legally distinct successful tenderer *control similar*²⁵ to that exercised over its own departments.²⁶

110. In that connection, the Court considers that ‘there is “similar control” where the entity in question is subject to control enabling the contracting authority to influence that entity’s decisions’,²⁷ specifying that ‘[t]he power exercised must be a power of decisive influence over both the strategic objectives and the significant decisions of that entity ... In other words, the contracting authority must be able to exercise a structural[,] ... functional [and effective] control over that entity’.²⁸

111. Accordingly, as an interim conclusion, I propose that the Court should state in reply to Questions 3 and 4 that a person is ‘under the control of a body or person falling within (a) or (b)’ of Article 2(2) of Directive 2003/4 if his actions are subject to a degree of control by that body or person which prevents him from acting with real autonomy in private affairs, so that he is reduced to the status of an instrument of the body or person’s will, a matter which it is for the referring tribunal to determine.

25 — Not necessarily *identical*, as specified in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 46, citing Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62.

26 — Case-law laid down in, for example, Joined Cases C-182/11 and C-183/11 *Econord* [2012] ECR.

27 — *Econord*, paragraph 27.

28 — *Loc. cit.*

E – Question 5

112. The last question refers jointly to points (b) and (c) of Article 2(2) of Directive 2003/4 and asks whether bodies covered by those provisions must provide all the environmental information which they hold or only such information as relates to the performance of public functions within the meaning of Directive 2003/4.

113. The reason for the obligation to disclose information obtained in the performance of public functions is the fact that it was possible to obtain that information specifically as a result of the performance of those functions.

114. The question asked is whether, for that reason, bodies and persons covered by Article 2(2)(b) and (c) of Directive 2003/4 must also provide access to any environmental information obtained in the performance of activities other than those carried on in their capacity as public authorities for the purposes of the directive.

115. To my mind, the reply to that question calls for a distinction to be made between points (b) and (c) of Article 2(2) of the directive.

116. As holders of *express and formal* power to exercise public authority, persons and bodies covered by point (b) must be subject to a duty of disclosure on the same terms as public authorities in the strict sense, that is to say, the State itself. The duty to provide access to all the environmental information that they hold, regardless of the capacity in which they obtained it, must apply in its full extent to such persons and bodies, since – as I argued in point 101 above – the formal meaning of the concept of ‘State’ must prevail when it facilitates the best conditions for the effective attainment of the objectives pursued by Directive 2003/4.

117. As concerns, for their part, persons or bodies covered by point (c), two possible situations must be considered: (i) the situation of bodies or persons whose activities are limited to the management of a service under conditions which mean that they must be regarded as public authorities for the purposes of Directive 2003/4; and (ii) the situation of bodies or persons who, in addition to managing a service under such conditions, also perform other, completely unconnected, activities, an example being bodies or persons who also manage a service relating to the environment in another territory but under free competition conditions and without it being possible to classify them as ‘public authorities’ for the purposes of Directive 2003/4.

118. As far as the persons or bodies in situation (i) are concerned, the question is answered by Directive 2003/4 itself, Article 3(1) of which provides that ‘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 ...’.²⁹ In short, Directive 2003/4 imposes on the State – both the State *stricto sensu* and a ‘public authority’ in the broader sense of Article 2(2)(b) of Directive 2003/4 – the obligation to permit access to environmental information held by it, regardless of the capacity in which it obtained that information: in other words, both where that information is the result of exercising its *imperium* and where it is the result of its activities as a body governed by private law.

²⁹ — Emphasis added.

119. As far as the persons or bodies in situation (ii) are concerned, it is my view that they do not warrant the same treatment. They may be regarded as public authorities only to the extent that they perform activities relating to the environment in circumstances which may be classified as ‘control’ within the meaning of Article 2(2)(c) of Directive 2003/4; in other words, in so far as they act ‘under the control’ of the public authorities. Aside from that, they are merely individuals and, as such, are not subject to the requirement laid down in Article 3(1) of the directive.

120. I accept that, as the parties have observed, the foregoing may, in certain circumstances, give rise to a ‘hybrid’ situation which is difficult to handle in practice. In so far as that is the case, it is my opinion that, in the light of the spirit of Directive 2003/4 and its objective of promoting access to information held by the public authorities in the broadest sense of the term, situations of uncertainty should always be resolved in favour of the person requesting information.

121. In short, as a final interim conclusion, I propose that the Court state in reply to Question 5 that bodies or persons falling within Article 2(2)(b) of Directive 2003/4 must be subject to the obligation to disclose information on the same terms as public authorities in the strict sense, that is to say, the State itself. The same obligation applies to the bodies and persons referred to in Article 2(2)(c), where their activities are limited to the management of a service under conditions which mean that they must be regarded as ‘public authorities’ for the purposes of Directive 2003/4. However, bodies or persons who, in addition to managing a service of that kind, also perform other, completely separate, activities are not under an obligation to provide the information which they obtain in relation to those activities. Where there is doubt, the obligation of disclosure must prevail.

VII – Conclusion

122. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred:

- (1) In considering whether a natural or legal person is a person ‘performing public administrative functions’ for the purposes of Article 2(2)(b) of Directive 2003/4/EC, regard must be had exclusively to European Union law so far as the definition of the concept of ‘public administrative functions’ is concerned, while it is for the laws of the Member States to determine, as appropriate, which natural and legal persons are authorised to perform such functions.
- (2) It is for the referring tribunal to establish whether the water companies concerned may impose on individuals obligations for which they do not require the consent of those individuals, with the result that the companies concerned are in a position substantially equivalent to that of the administrative authorities, pursuant to a formal, express legal act granting official powers.
- (3) An individual is ‘under the control of a body or person falling within [point] (a) or (b)’ of Article 2(2) of Directive 2003/4 if his actions are subject to a degree of control exercised by that body or person which prevents him from acting with real autonomy in private affairs, thereby reducing him to the status of an instrument of the will of the State, a matter which it is for the referring tribunal to determine.
- (4) Bodies or persons falling within Article 2(2)(b) of Directive 2003/4 must be subject to the obligation to disclose information on the same terms as the public authorities in the strict sense. The same obligation applies to the bodies and persons referred to in Article 2(2)(c), where their activities are limited to the management of a service under conditions which mean that they must be regarded as ‘public authorities’ for the purposes of Directive 2003/4. However, bodies or persons who, in addition to managing a service of that kind, also perform other, completely separate, activities are not under an obligation to provide the information which they obtain in relation to those activities. Where there is doubt, the obligation of disclosure must prevail.