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**TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION**

OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the Court of Justice, by the European Commission, represented by Peter Oliver, Legal Advisor, and Ken Mifsud Bonnici, a Member of the Commission's Legal Service, acting as its Agents, with an address for service in Luxembourg at the office of Antonio Aresu, also of its Legal Service, Bâtiment BECH, 11 rue A. Wecker, 2721 Luxembourg

Case C-279/12

Fish Legal

v.

**Information Commissioner,
United Utilities Water plc and
Yorkshire Water Services Ltd**

Emily Shirley

v.

**Information Commissioner,
Southern Water Services Ltd**

in which the Upper Tribunal (Administrative Appeals Chamber) has posed a series of questions pursuant to Article 267 of the Treaty on the Functioning of the European Union.

1. BACKGROUND

1.1. International Law

1. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was signed in Aarhus in June 1998 under the auspices of the United Nations Economic Commission for Europe (UN ECE) and concluded by the European Union in 2005.¹ The Convention consists of three "pillars": access to information (Articles 4 and 5); the participation of the public in the decision-making process (Articles 6 to 8); and access to justice (Article 9). Article 2(2) defines "public authority" as follows:

"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, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization 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."

2. The Aarhus Convention Implementation Guide,² which dates from 2000, is not binding and carries limited authority (Case C-204/09 Flachglas Torgau (judgment of 14 February 2012), paragraphs 35 and 36). Nevertheless, it is

¹ Decision 2005/370/EC (2005 OJ L124/1). The Convention itself is at 2005 OJ L124/4; see also the UN's website <http://live.unece.org/env/pp/welcome.html>

² www.unece.org/fileadmin/DAM/env/pp

helpful to have regard to this aid to the interpretation of the Convention. On the definition of "public authority", this document states generally:

"The definition is broken into three parts to provide as broad a coverage as possible. Recent developments in "privatised" solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public involvement, information and participation."

3. On Article 2(2)(b), the Implementation Guide states:

"What is considered a public function under national law may differ from country to country. However, reading this subparagraph together with subparagraph (c) below, it is evident that there needs to be a legal basis for the performance of the functions under this subparagraph, whereas subparagraph (c) covers a broader range of situations. As in subparagraph (a), the particular person does not necessarily have to operate in the field of the environment. Any person authorised by law to perform a public function of any kind falls under the definition of "public authority", although references in the environmental field are provided as examples of public administrative functions and for emphasis.

... The kinds of bodies that might be covered by this subparagraph include public utilities and quasi-governmental bodies such as water authorities."

4. As to Article 2(2)(c), the Implementation Guide offers the following guidance:

"One key difference between subparagraph (c) and (b) is the source of authority of the person performing public functions or providing public services. It can be distinguished from subparagraph (b) in that the bodies addressed derive their authority not from national legislation, but indirectly through control by those defined in subparagraphs (a) and (b).

...

The second key difference distinguishes sub paragraph (c) from both previous subparagraphs. Whilst subparagraphs (a) and (b) define as public authorities, bodies and persons without limitation as to the particular field of activities, this subparagraph does so limit the scope of the definition. Only persons performing public responsibilities or functions or providing public services in relation to the environment can be public authorities under this subparagraph.

...

The provision also reflects certain trends towards the privatization of public functions that exist in the UN/ECE region. During the Convention's negotiations, Belgium, Denmark and Norway issued an interpretative statement relating to this definition. They considered that an entity for which policy and other major issues were subject to approval or decision by the public authorities would be considered under the control of such authorities for the purposes of this article. Some of these entities are government-created and/or -financed corporations that perform certain functions normally within the sphere of public authority competence. For example, the Netherlands Energy and Environment Enterprise has been officially delegated grant-making authority in energy conservation, while practically being a part of the Netherlands Government's energy policy.

An example from the **United Kingdom** may help to illustrate the relevance of this provision. There, public functions previously carried out by governmental authorities had been taken over through a privatisation process by public corporations. These included major providers of natural gas, electricity, and sewerage and water services. In the case of the **water** providers, they were highly regulated by the Government and kept financial accounting for these services separate from their other activities. In a court case in the United Kingdom about the applicability of European Community directives to such a water services company, the judge determined that such a service provider was an 'emanation of the state' and therefore covered by the directive."³

1.2. Union Law

1.2.1. Directive 2003/4

5. The first pillar of the Convention has been implemented in Union law by Directive 2003/4/Ec of the European Parliament and the Council on public access to environmental information and repealing Council Directive 90/313/EEC.⁴ That is plain from recital 5 in the preamble to that Directive. Article 2(2) defines "public authority" as follows:

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

³ Emphasis added. The case referred to in the last sentence of that quotation was Griffin v. South West Water Services Ltd [1995] IRLR 15.

⁴ 2003 OJ L 41/26

(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."

6. Sub-paragraphs (a), (b) and (c) are almost identical to Article 2.2 (a), (b) and (c) of the Aarhus Convention, the only difference being that Article 2.2(a) of the Directive contains the additional words "or other public administration, including public advisory bodies".

1.2.2. The Earlier Directive

7. As is clear from its title, Directive 2003/4 replaced Directive 90/313.⁵ The relevant provisions of that enactment were very different. The definition of "public authorities" in Article 2(b) read as follows:

"any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity."

This was supplemented by Article 6 which was drafted in the following terms:

"Member States shall take the necessary steps to ensure that information relating to the environment held by bodies with public responsibilities for the environment and under the control of public authorities is made available on the same terms and conditions as those set out in Articles 3, 4 and 5 either via the competent public authority or directly by the body itself."

⁵ 1990 OJ L158/56

8. In 2000, the Commission produced a report on the application of this Directive,⁶ which is appended as Annex 1 to these submissions. With regard to Article 2(b) of Directive 90/313/EEC the report noted:

"In some cases, organs of the public administration which were not environmental authorities in the strict sense of the term claimed that their responsibilities did not relate to the environment and so refused to give access to environmental information which they held."

As to Article 6 of Directive 90/313/EEC, the report noted with regard to the term "bodies with public responsibilities for the environment":

"This expression had given rise to diverging interpretations. Functions traditionally performed by the State are increasingly transferred to quasi-public or private bodies. The final outcome had often been the denial to the public of access to environmental information held by bodies which should have fallen within the scope of the Directive."

9. The report also referred to the adoption of the the Aarhus Convention. The report noted that, whilst the first draft of the provisions of the Convention relating to access to environmental information were largely inspired by Directive 90/313/EEC, subsequent negotiations highlighted the weaknesses or shortcomings of the latter in the light of experience gained in its application.
10. Interestingly, the United Kingdom's comments to the Commission are reflected in the report and with regard to Article 6 of Directive 90/313/EEC the following comments by that Member State were noted:

"Clarification on the status of privatised public utilities for the purposes of Article 6 would be welcomed. It was unsatisfactory, in terms of environmental protection, that two bodies with relevant functions in common could be differently treated, for example, public water authorities and privatised water companies."

⁶ COM(2000)400 final

1.3. National Law

11. It is unnecessary to repeat all the national statutory provisions referred to in paragraphs 46ff. of the order for reference. Suffice it to set out the salient points: under the Water Act 1991 and other enactments, the "water undertakers" approved by the Water Services Regulation Authority (generally known as "Ofwat") are subject to various statutory obligations as regards the maintenance and improvement of the water infrastructure and the supply of water in their designated area; the same applies to sewage undertakers with respect to sewage services; and these companies also enjoy powers not usually conferred on private corporations (e.g. compulsory purchase, the right to adopt bye-laws over waterways in their ownership, the imposition of temporary hosepipe bans etc.)
12. Many of these functions are linked to ensuring compliance with numerous EU Directives on water, in particular Directive 91/271/EEC concerning urban waste water treatment,⁷ Directive 98/83/EC on the quality of water intended for human consumption,⁸ Directive 2006/7/EC concerning the management of bathing water quality and repealing Directive 76/160/EEC and Directive 2000/60/EC establishing a framework for Community action in the field of water policy.⁹

1.4. The Facts

13. The cases which triggered this reference concern two applicants who requested information from different privatised water companies in England under the national legislation implementing Directive 2003/4/EC.
14. The first applicant is Fish Legal which is the legal arm of the Angling Trust in England. It is a non-profit organisation set up with the stated aim of using

⁷ OJ L 135, 30.5.1991, p. 40–52.

⁸ OJ L 330, 5.12.1998, p. 32–54.

⁹ OJ L 64, 4.3.2006, p. 37–51.

the law to combat pollution and other damage to the water environment and to protect anglers and angling.

15. In August 2009, the organisation made a number of requests to two water companies in England (Yorkshire Water Services Ltd and United Utilities Water plc.) requesting information relating to discharges, clean-up operations and emergency overflows. According to the Commission's information, the context of these requests was that, since the water industry had been privatised in England in 1989, thousands of combined sewer overflows were being allowed to discharge untreated waste waters without proper permits. This is a matter of serious concern which is now the subject of Case C-301/10, *Commission v. United Kingdom* (pending).
16. Mrs Shirley is a private individual. She wrote to Southern Water Services Ltd. asking for information relating to sewerage capacity for a planning proposal in her village.
17. In both cases, the Information Commissioner decided that the water companies were not public authorities for the purposes of the Regulations which implement Directive 2003/4. Fish Legal and Mrs Shirley both appealed to the First-Tier Tribunal which dismissed their appeals. They then exercised their rights to appeal to the Upper Tribunal (Administrative Appeals Chamber), which has posed the following questions pursuant to Article 27 TFEU:

"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)? In particular, what is the nature, form and degree of control required and what criteria may or may not be used to identify such control?
4. Is an 'emanation of the State'(under paragraph 20 of the judgment in 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?"

2. LAW

2.1. Question 1

18. Question 1 has already been answered by this Court in the above-mentioned judgment in Case C-204/09 Flachglas Torgau, which concerned a different aspect of Article 2(2) of Directive 2003/4. Paragraph 37 of that ruling reads:

"According to settled case-law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see, in particular, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraph 72)."

19. In that case, the Court gave Article 2(2) an autonomous and uniform interpretation. There is no reason to otherwise in the present instance.

2.2. Question 2

20. Article 2(2)(b) of Directive 2003/4 speaks of public administrative functions "under national law". Consequently, the Commission can only endorse the view expressed in the Aarhus Convention Implementation Guide to the effect that, for this provision to apply, there must be a legal basis for the performance of the functions concerned (paragraph 3 above).
21. As has already been pointed out in paragraph 11 above, various English statutes confer exceptional obligations and powers on water and sewerage undertakers. Whilst these entities operate as private companies, the fact is that these obligations and powers have been conferred in the public interest and are more commensurate with the functions of public administration than with those of purely commercial bodies. Moreover, as already noted, many of these obligations and powers are designed to ensure compliance with the various Union Directives relating to water.
22. In the Commission's submission, it is plain that companies in such a position "perform public administrative functions under national law" within the meaning of Article 2(2)(b).
23. In conclusion, where statutory or regulatory provisions confer on a party powers and duties in the public interest and those powers and duties are more commensurate with the functions of public administration than with those of purely commercial bodies, then that party "performs public administrative functions" within the meaning of Article 2(2)(b) of Directive 2003/4.

2.3. Question 3

24. As already mentioned, the Aarhus Convention Implementation Guide states:

"One key difference between subparagraph (c) and (b) is the source of authority of the person performing public functions or providing public services. It can be distinguished from subparagraph (b) in that the bodies addressed derive their authority not from national legislation, but indirectly through control by those defined in subparagraphs (a) and (b)."

In the Commission's view, the difference between the two sub-paragraphs is neatly encapsulated in this statement, as long as the term "legislation" is

understood in a broad sense to cover regulatory as well as statutory acts: as already mentioned, the important point is that there must be a legal basis for this authority.

25. Where Article 2(2)(c) is engaged, the control is exercised by a body which is either the Government itself or a body performing public administrative functions under national law. In addition, where that provision applies, the "public responsibilities or functions" are conferred on the person concerned *de facto*, not by a statutory or regulatory act, as is the case under Article 2(2)(b).
26. That suffices to answer the first part of question 3.
27. In the second part of question 3, the Court is asked to set out the nature, form and degree of control required and what criteria may or may not be used to identify such control. This is open-ended. What is more, the order for reference does not give any guidance as to the factors which might be at play in the main case. Finally, given the Commission's position on question 2, there is no need for the Court to take a position on the second part of question 3.
28. Accordingly, in answer to question 3 it suffices to say that the control referred to in Article 2(2)(c) of Directive 2003/4 is control exercised by a body which is either the Government itself or a body performing public administrative functions under national law.

2.4. Question 4

29. In this question, the Upper Tribunal asks whether a body of the kind referred to in paragraph 20 of the judgment in Case C-188/89 Foster v British Gas [1990] ECR I-3313 is a person necessarily caught by Article 2(2)(c). In that paragraph the Court spoke of:

"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".

30. It follows from the answer to questions 2 and 3 above that:

- where the "special powers" rest on a formal legal basis, then Article 2(2)(b) applies; and
- where the "special powers" are conferred *de facto*, then Article 2(2)(c) is engaged.

2.5. Question 5

31. Before considering question 5, the Commission would point out that it is not obvious why the Upper Tribunal has posed this question at all. It is not clear how the water companies could claim that any relevant activity of theirs falls outside both Article 2(2)(b) and Article 2(2)(c). No doubt, this will come to light in the course of the present proceedings.
32. In any case, by way of general background it should be noted that bodies caught by Article 2(2)(a) fall within the concept of "public authorities" for all purposes. That is logical: government or public administration must always be regarded as public authorities, so that none of their activities are outside the scope of the Directive. The only limit is that the Directive is confined to "environmental information" within the meaning of Article 2(1).
33. In contrast, there is no reason why a body falling within Article 2(2)(b) or Article 2(2)(c) should be treated in the same way. Persons only qualify as public authorities under one of these subparagraphs by virtue of special functions conferred on them either by a statutory or regulatory act or on a *de facto* basis. There could be no rationale for treating them as public authorities when they act outside those functions. For instance, if a water company were to engage in a second quite separate activity (e.g. dairy farming), it would be straining language beyond all reasonable limits to treat it as a public authority when it acts in its capacity as a dairy farmer.
34. The only apparent authority for a different view may perhaps be found in the Implementation Guide which, as mentioned earlier, states:

"The second key difference distinguishes sub paragraph (c) from both previous subparagraphs. Whilst subparagraphs (a) and (b) define as public authorities, bodies and persons without limitation as to the particular field of activities, this subparagraph does so limit the scope of the definition. Only persons performing public responsibilities or functions or providing public services in relation

to the environment can be public authorities under this subparagraph."

35. This might appear to suggest that bodies falling under Article 2(2)(b) are to be regarded as public authorities for all purposes, whereas the same cannot be said of those within the scope of Article 2(2)(c). Even if that is the view of the authors of the Implementation Guide, there does not appear to be any basis for such a view. In any case, as already mentioned, it has been established that the Implementation Guide is not binding and carries limited authority (Case C-204/09 Flachglas Torgau).

3. CONCLUSION

36. In the light of these considerations, the Commission respectfully submits that the questions referred by the Court of Appeal should be answered as follows:

1. The concept of natural and legal persons 'performing public administrative functions under national law' in Article 2(2)(a) of Directive 2003/4/EC of the European Parliament and the Council on public access to environmental information and repealing Council Directive 90/313/EEC is subject to an autonomous and uniform interpretation throughout the European Union.
2. Where statutory or regulatory provisions confer on a natural or legal person powers and duties in the public interest and those powers and duties are more commensurate with the functions of public administration than with those of purely commercial bodies, then that party "performs public administrative functions" within the meaning of Article 2(2)(b) of Directive 2003/4.
3. The control referred to in Article 2(2)(c) of Directive 2003/4 is control exercised by a body which is either the Government itself or a body performing public administrative functions under national law.
4. Where a body 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 resulting from the normal rules applicable in relations between individuals, it falls under Article 2(2)(b) of Directive 2003/4 if those special powers rest on a legislative or statutory basis. Otherwise, that body falls under Article 2(2)(c) of Directive 2003/4.

5. Where a person falls within Article 2(2)(b) or Article 2(2)(c) of Directive 2003/4, it is only to be regarded as a public authority for the purposes of that Directive in so far as it exercises responsibilities or functions or provides public services which themselves are caught by those sub-paragraphs.



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