DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The additional parties (being water and sewerage companies (WASCs) or water only companies (WOCs)) are not public authorities for the purposes of regulation 2(2)(c) or (d) of the Environmental Information Regulations 2004 (SI 2004/3391).

We therefore confirm the decision of the Information Commissioner dated 12 March 2010 that he has no jurisdiction to consider the complaint by the Appellant under the Environmental Information Regulations 2004.

This decision is given under section 57 of the Freedom of Information Act 2000, as applied by regulation 18 of the Environmental Information Regulations 2004 (SI 2004/3391) and given pursuant to the transfer to the Upper Tribunal under regulation 19(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976).

REASONS FOR DECISION

The issue in this appeal

1. The issue for the tribunal in this case may be stated shortly: is a privatised water company a "public authority" for the purposes of the Environmental Information Regulations (EIR) 2004 (SI 2004/3391)? We have decided that it is not, for the following reasons.

The parties to this appeal

2. The appellant is a company called Smartsource, a specialist business that provides information about water and wastewater billing, pipe locations and related data.

3. The Information Commissioner is the respondent in these proceedings. In addition there are a further 19 additional parties, 8 of which are water and sewerage companies (WASCs) and 11 of which are water only companies (WOCs) in England and Wales. We refer to them generically as "the water companies". Together the additional parties represent the bulk of the water industry in England and Wales (where there are in total 10 WASCs and 12 WOCs).

A short history of the water industry

4. The water and sewerage industry originally developed as a patchwork of public and private providers during the nineteenth century with a trend towards consolidation in public ownership in the twentieth century. By the late 1960s there were some 200 separate providers of water and sewerage services, comprising statutory water companies, local authorities and others

granted powers under local enactments. The Water Act 1973 replaced these disparate arrangements with ten unitary regional and public water authorities with effect from 1974, arguably representing the highwater mark of public ownership of the water industry. However, the Water Act 1989 privatised the water and sewerage industry with effect from 1 September 1989, introducing the arrangements now embodied in the Water Industry Act 1991. The White Paper which had preceded the 1989 Act envisaged that the new privatised companies would take over all of the regulatory functions undertaken by the ten unitary water authorities. In the event, most of the environmental regulatory functions were transferred to a new public authority, the National Rivers Authority, now the Environment Agency. In addition, regulation of the water and sewerage services themselves (e.g. on matters such as pricing) became vested in another public authority, the Office of Water Services or "OFWAT".

A note on the difference between a WASC and a WOC

5. All water companies provide services within a defined geographical area. As their names suggest, WASCs provide both water and sewerage services whereas WOCs only provide water. So any given area will be served by either a WASC or alternatively by a WOC together with a separate WASC providing sewerage (but not water) services in that district. There are separate statutory regimes governing the provision of water and sewerage services respectively. However, the differences are at the level of detail – we received no submissions to the effect that WASCs and WOCs should be treated differently for the purposes of the EIR 2004.

6. We should also stress at the outset that we are solely concerned with the position of water companies in England and Wales. The Water Industry Act 1991, with one very limited exception, applies solely to that jurisdiction (section 223(3)). We were informed that in both Scotland and in Northern Ireland there is a single water company, in both cases being a company in public ownership. Scottish Water, we were advised, was created by statute, is wholly owned by the Scottish Government and is expressly listed as a public authority in Schedule 1 to the Freedom of Information (Scotland) Act 2002 (at paragraph 102). Plainly, therefore, very different considerations may apply in both of these other jurisdictions in the United Kingdom.

How this appeal came about

7. On 18 December 2008 the appellant requested various types of information from a total of 16 of the water companies. The WASCs in question were each asked for the following seven items of information: (1) their asset mapping database; (2) water and sewerage billing records; (3) a list of all properties subject to "building over agreements"; (4) sewer flooding register; (5) water pressure register; (6) water quality reports; and (7) trade effluent register. The WOCs were asked for items (1), (2), (5) and (6).

8. The water companies agreed to provide the information requested under categories (6) and (7), where there are specific statutory rights of

access independently of the EIR 2004 (under Part VIII of the Water Supply (Water Quality) Regulations 2000 (SI 2000/3184) and section 196 of the Water Industry Act 1991 respectively). However, the water companies declined to provide the remaining information, partly on the basis that they said they were not public authorities within the EIR 2004 and partly (if they were wrong about that) on the basis of various exemptions under the EIR 2004.

9. The appellant complained to the Information Commissioner, who invited submissions on the preliminary issue of whether the water companies were public authorities under the EIR 2004. On 12 March 2010 the Information Commissioner sent the appellant a letter stating that he did not have the power to adjudicate on the appellant's complaints against the water companies as he had concluded that they were not public authorities under the relevant legislation.

10. The appellant then appealed to the First-tier Tribunal against the Information Commissioner's letter. That appeal fell within the remit of the Information Rights division of the General Regulatory Chamber. The First-tier Tribunal ruled that the present appeal should proceed as a lead case and stayed several other parallel appeals raising the same issues. The First-tier Tribunal also directed that the appeal deal with two preliminary points of law, namely (1) whether the tribunal had jurisdiction to hear the appeal (being an appeal against a decision letter rather than a formal decision notice); and (2) if so, whether the water companies are public authorities for the purposes of the EIR 2004.

How this appeal came before the Upper Tribunal

11. The Tribunals, Courts and Enforcement Act 2007, which established the First-tier Tribunal and the Upper Tribunal, provides for considerable flexibility in the allocation of cases (see section 22 and paragraphs 2 and 19 of Schedule 5). Rule 19(2) and (3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 accordingly enable certain cases arising under either the Freedom of Information Act 2000 or the EIR 2004 to be transferred from the General Regulatory Chamber (GRC) of the First-tier Tribunal for hearing before the Upper Tribunal.

12. Such a transfer can only take place with the concurrence of the GRC Chamber President and the Chamber President of the Administrative Appeals Chamber of the Upper Tribunal (on the procedure involved see the Joint Office Note No. 2 *Discretionary Transfers of Information Rights Appeals on or after 18 January 2010*, which is available on the GRC website at http://www.informationtribunal.gov.uk/Documents/14_AACGRCnote_DiscretionaryTransfers.pdf).

13. The present appeal is the second such discretionary transfer from the GRC to the AAC, but the first to be decided. The composition of the Upper Tribunal in such cases is governed by the Senior President's Practice Statement on the *Composition of Tribunals in relation to matters that fall to be*

decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 1 October 2010. The present tribunal comprises two judges and one expert member of the Upper Tribunal and has been constituted under paragraph 3e(ii) of the Practice Statement as the Chamber President considers that the matter "involves a question of law of special difficulty or an important point of principle or practice".

14. At the oral hearing before the Upper Tribunal on 27 and 28 October 2010 the Appellant was represented by Mr T. Pitt-Payne QC, the Respondent by Miss A. Proops of Counsel and the Additional Parties by Mr M. Shaw QC. We are indebted to them all for their detailed and helpful analysis, both in the skeleton arguments and in their oral submissions.

The first preliminary point

15. The first preliminary point was whether the tribunal had jurisdiction to hear the appeal at all, given that the Information Commissioner had sent the appellant a decision letter rather than a formal decision notice. All the parties agree that the tribunal has jurisdiction, although they acknowledge that they cannot by agreement confer on the tribunal a jurisdiction if it has no statutory basis. We can deal with this issue relatively briefly.

16. We find that we do have jurisdiction to hear this appeal. Regulation 18 of the EIR 2004 incorporates by reference the decision-making and appeals machinery of the Freedom of Information Act (FOIA) 2000, with certain necessary modifications. Under section 50(1) of the FOIA 2000 a requester may apply to the Information Commissioner for a decision on whether a request has been dealt with in accordance with the legislation. Where the Commissioner finds that a public authority has failed to deal with the request in accordance with the relevant legislation, he must issue a decision notice under section 50(4). The tribunal's jurisdiction is limited to hearing appeals against decision notices issued by the Commissioner under section 50(4) (see section 57 of the FOIA 2000).

17. The fact that the Commissioner's decision was set out by way of a letter, rather than in the official decision notice format, cannot be decisive. The letter ran to seven pages of detailed legal analysis, referring to both the legislation and relevant case law. We must have regard to the substance and not to the form. Either the water companies are public authorities within the EIR 2004 or they are not – if they are, then the Commissioner would be bound to rule on the complaint under section 50(4); if they are not, the Commissioner is ruling the complaint to be outside his jurisdiction. We conclude that we have jurisdiction for two reasons.

18. First, in *Sugar v BBC* [2009] UKHL 9 the House of Lords held that the then Information Tribunal had jurisdiction to hear an appeal against the Commissioner's decision that a particular request fell outside the scope of FOIA 2000. In particular, Lord Phillips of Worth Matravers ruled that "Section 50 of the Act does not prescribe the form of a 'decision notice'. I consider that

this phrase simply describes a letter setting out the Commissioner's decision" (at paragraph [37]).

19. Secondly, we also note that article 6(1) of Directive 2003/04/EC, which the EIR 2004 give effect to for domestic purposes, requires member states to provide access to an expeditious and free or inexpensive procedure in cases where an applicant considers that a request for information has been wrongfully refused. We doubt whether the process of applying for judicial review in the High Court meets those criteria. We can therefore turn to the second preliminary issue, the question which lies at the heart of this appeal, namely whether or not a privatised water company in England and Wales is a public authority for the purposes of the EIR 2004.

The definition of "public authority" in the EIR 2004

20. The FOIA 2000 provides a list of those bodies which are "public authorities" for the purposes of all or some types of requests for information under that legislation (see section 3 and Schedule 1). We note in passing that the water companies in England Wales are not listed as public authorities for the purposes of FOIA 2000 (contrast the position in Scotland – see paragraph [6] above). However, the EIR 2004 follow a different approach. It does not adopt the list model. Instead, regulation 2(2) provides the following definition (references to "the Act" are to the FOIA 2000 – see further regulation 2(1)):

> "(2) Subject to paragraph (3), "public authority" means—
> > (a) government departments;
> > (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—
> > > (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
> > > (ii) any person designated by Order under section 5 of the Act;
> >
> > (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."

21. The parties are all agreed that none of the WASCs or WOCs falls within the definition of "public authority" for the purposes of heads (a) or (b) of regulation 2(2). However, the Appellant argues that the water companies are "public authorities" under both regulation 2(2)(c) and (d), whereas the Respondent and the Additional Parties submit that neither head (c) nor head (d) applies.

22. We were not pointed to any binding case law on the meaning of "public authority" within the context of the EIR 2004. Counsel referred us to two decisions of the First-tier Tribunal which turned on the same point: *Network Rail Ltd v Information Commissioner* [EA/2006/0061 and EA/2006/0062] ("the *Network Rail* case") and *Port of London Authority v Information Commissioner* [EA/2006/0083] ("the *Port of London Authority* case"), which we deal with later. We were also referred to several decisions of the courts, interpreting the term "public authority" in rather different contexts. We start, however, with the EIR 2004 and with the relevant official guidance.

The background to the Environmental Information Regulations 2004

23. In part the EIR 2004 seek to give effect to the United Kingdom's international treaty obligations under the Aarhus Convention or, to give it its full title, The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Convention was signed in the Danish city of Arhus on 25 June 1998 and came into force on 30 October 2001. It was ratified by the European Community on 17 February 2005 and by the United Kingdom on 24 February 2005.

24. Article 1 of the Aarhus Convention defines its objective in the following terms:

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

25. Article 2(2) of the Aarhus Convention defines the expression "public authority" as meaning:

> "(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;".

26. The EIR 2004 are also designed to give effect to Directive 2003/04/EC of the European Parliament and of the Council of 28 January 2003 on public

access to environmental information (which itself repealed Council Directive 90/313/EEC). Article 1 of Directive 2003/4/EC defined its objectives as being two-fold, namely:

> "(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."

27. Article 2(2) of Directive 2003/4/EC then defines the term "public authority" in the following terms, following the terminology of Article 2 of the Aarhus Convention:

> "(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."

28. Mr Pitt-Payne also drew our attention to Recital (11) to the Directive, which declares that:

> "... the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment."

29. We agree with Miss Proops that the thrust of Recital (11) of the Preamble is on the State apparatus and governmental and executive functions. To that extent we do not find the reference to the definition of

"public authorities" being "expanded" of great assistance, as Recital (11) to some extent begs the question by restating the definition.

Guidance on the interpretation of the Aarhus Convention, Directive 2003/04/EC and the EIR 2004

30. *The Aarhus Convention: An Implementation Guide* (2000) ("the Aarhus Guide), published by the Economic Commission for Europe under the auspices of the United Nations, provides both an overview and a detailed article-by-article analysis of the Convention. The analysis of Article 2 begins as follows (emphasis added):

> "The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken in to three parts to provide as broad a coverage as possible. **Recent developments in 'privatized' 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.**"

31. We refer to further passages in the Aarhus Guide in the context of our discussion below of regulation 2(2)(c) and (d) respectively of the EIR 2004. We were not referred by counsel to any specific European jurisprudence or indeed any official guidance on the scope of Directive 2003/04/EC. Obviously, however, the domestic legislation needs to be interpreted in a fashion which is consistent with the Directive.

32. The Department for Environment Food and Rural Affairs (DEFRA) has published its own guidance to the domestic EIR 2004. Chapter 2 of that guidance, entitled "Who is covered by the Regulations?" (July 2010), opens by noting that the term "public authorities" is

> "defined broadly, so as to encompass all organisations that 'carry out functions of public administration'. Bodies 'under the control' of 'public authorities' may also be included. It is a wider definition than covered by the Freedom of Information Act 2000. Private companies may also be covered under EIR. As the nature of control of a body may change over time, it is impossible to produce a definitive list of bodies covered by EIR."

33. Paragraph 2.13 then goes on to give the following guidance (emphasis in the original):

> "2.13 **Given the complex definition of a public authority, each body needs to decide for itself whether it is covered by EIR based on its own circumstances. The decision may raise difficult legal issues.**

> **What follows is guidance only and if in doubt about their status under the Regulations bodies should seek legal advice.** In case of dispute, it will be for the Information Commissioner, the Information Tribunal and ultimately the courts to decide."

34. Subject to the reference to the Information Tribunal being updated to read the First-tier Tribunal (General Regulatory Chamber) (Information Rights) and Upper Tribunal (Administrative Appeals Chamber), that is obviously a correct statement as to the status of that, or other, guidance material.

The statutory definition of "public authority" under regulation 2(2)(c)

The statutory test

35. Regulation 2(2)(c) of the EIR 2004 defines a public authority to include "any other body or other person, that carries out functions of public administration". Mr Pitt-Payne argued that the focus of regulation 2(2)(c) is not on the status of the body in question but rather on its functions. However, it is important to note that a body will not be a public authority under regulation 2(2)(c) simply because it carries out public functions; they must be "functions of public administration". We hope we do no disservice to counsel by summarising their respective arguments as follows.

The parties' submissions in outline

36. Mr Pitt-Payne's submission was that a detailed analysis of both the overall framework and the minutiae of the Water Industry Act 1991, the primary legislation governing the water industry, demonstrated that the water companies carried out three inter-related activities. First, they provide water and sewerage, or water only, services in their respective areas on an exclusive basis. Secondly, they carry out certain regulatory and law enforcement functions, principally as regards the operation and management of the infrastructure and the way in which water resources are used. Thirdly, in doing so, they are not simply providing a service to their customers, but are managing an essential element of the environment. Taking all those matters together, and interpreting regulation 2(2)(c) in the light of the Aarhus Convention and the EC Directive, Mr Pitt-Payne argued that the water companies carried out "functions of public administration" and so were public authorities for the purposes of the EIR 2004.

37. Miss Proops suggested that the correct starting point was to consider which types of bodies regulation 2 of the EIR 2004 was designed to capture. In her submission, the history of the Aarhus Convention and the EC Directive demonstrated that regulation 2 was intended to cover executive governmental processes in all their guises. She noted that privatisation took many different forms, such that some privatised bodies might fall within the definition whereas others would not. Miss Proops argued that the mere fact that functions may be public in nature did not mean they were functions of public administration; rather, the functions concerned must be an extension of the State system of public administration. Furthermore, the provision of

commercial services, albeit subject to State regulation, even intensive State regulation, does not amount to functions of public administration. She contended that the Information Commissioner was right to find that regulation 2(2)(c) did not apply to the water companies. Miss Proops also submitted that the question of whether a water company is a public authority for the purpose of either regulation 2(2)(c) or (d) is a mixed question of fact and law, and that the onus lies on the Appellant to demonstrate that the companies fall within the statutory definition.

38. Mr Shaw, for the additional parties, put forward five overarching points. First, he conceded that the water companies were not ordinary private companies, e.g. in that they had certain residual regulatory functions vested in them by statute. Second, he argued that the fact that their commercial freedom was curtailed by statute was not decisive. Third, he suggested that a finding that the water companies were not public authorities was actually consistent with the Aarhus Convention, which was concerned with promoting public participation and making public bodies more accountable in the environmental arena. Fourth, he argued it was important to look at all the characteristics of the water companies, and not a limited range of functions. Lastly, he suggested that there would be no gap in rights of access to environmental information, given other statutory schemes. With regard to regulation 2(2)(c), Mr Shaw's primary submission was that the functions of the WASCs and WOCs were not sufficiently public but, even if they were, they were not sufficiently administrative.

The Aarhus Convention: An Implementation Guide

39. Regulation 2(2)(c) of the EIR 2004 is the domestic equivalent of Article 2(2)(b) of both the Aarhus Convention and the EC Directive. The analysis of Article (2)(2)(b) of the Convention in the Aarhus Guide (at p.33) reads as follows (emphasis added):

> "'Public authority' also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities as determined according to national law. 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 authorized 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.
>
> A natural person is a human being, while 'legal person' refers to an administratively, legislatively or judicially established entity with the capacity to enter into contracts on its own behalf, sue and be sued, and

make decisions through agents, such as a partnership, corporation or foundation. While a governmental unit may be a person, such persons would already be covered under subparagraph (*a*) of the definition of 'public authority'. Public corporations established by legislation or legal acts of a public authority under (*a*) fall under this category. **The kinds of bodies that might be covered by this subparagraph include public utilities and quasi-governmental bodies such as water authorities.**"

40. Mr Pitt-Payne naturally placed reliance on the final sentence of this extract. However, taken as a whole, the references in the Aarhus Guide to utility companies in general, and to water companies in particular, are, as Miss Proops put it, equivocal: they demonstrate that the assessment as to whether or not they are "public authorities" is both fact-specific and jurisdiction-specific.

The DEFRA guidance on regulation 2(2)(c)

41. As for the DEFRA document, its guidance on regulation 2(2)(c) of the EIR 2004 refers to the Aarhus Guide's suggested definition of "public administrative function" as "a function normally performed by governmental authorities as determined according to national law. What is considered a public function under national law may differ from country to country" (at paragraph 2.15).

42. The DEFRA guidance continues as follows (footnote omitted but emphasis as in the original):

> "2.16 In accordance with this definition [i.e. the Aarhus suggested definition], any private company that is sufficiently associated with the activities of the government that they owe similar obligations (i.e. that they are performing a function normally performed by governmental authorities) may have responsibilities under the EIR. However, the function that is being performed is unlikely to be determinative of an organization's status as a public authority in and of itself. The Information Commissioner issued two Decision Notices in which he found that Network Rail is a public authority in that it carries out functions of public administration. However, the Information Tribunal found that it was not sufficient for a body to be performing public functions related to the environment but that they must be public **administrative** functions."

The decisions of the Information Tribunal

43. We were referred to the *Network Rail* and the *Port of London Authority* cases (see paragraph [22] above), both decisions of the former Information Tribunal. Neither decision was appealed to the High Court, the route for appeals before the implementation, in the arena of information rights at least, of the Tribunals, Courts and Enforcement Act 2007.

44. In the *Port of London Authority* case, the Information Commissioner had decided that the Authority was a public authority for the purposes of the EIR 2004. The Information Tribunal dismissed the authority's appeal, holding that it performed functions of public administration and so fell within the scope of regulation 2(2)(c) (see paragraphs 22-40). In the *Network Rail* case, the Information Commissioner had decided that Network Rail was a public authority for the purposes of the EIR 2004. The Information Tribunal in that case allowed the company's appeal, holding that it (i) did not carry out "functions of public administration" (see paragraphs 24-33); (ii) was not a body carrying out public functions (see paragraphs 34-52); and (iii) was accordingly not covered by regulation 2(2)(c).

45. Both are decisions which turn on their own facts and, of course, are not binding on the Upper Tribunal. In our view, however, both cases were correctly decided. They also illustrate the fact that whilst the decision in principle as to whether a body is a public authority for the purposes of the EIR 2004 is a binary choice, the position in practice is more complex. For present purposes the important issue is not what the Information Tribunal decided in those two cases but why it decided the cases the way it did.

46. In the *Port of London Authority* case the Information Tribunal approved of the Commissioner's analysis of the factors relevant in deciding whether a body fell within the terms of regulation 2(2)(c). Five factors were identified (see paragraph 27):

- whether these are the type of functions that are typically governmental in nature?
- do the functions of the body in question form part of a statutory scheme of regulation?
- are those functions such that if the body did not exist some Governmental provision would need to be made for the exercise of those functions?
- whether the organisation has a statutory basis, or whether it exists purely as a matter of contract;
- whether the organisation is accountable to members or shareholders, or alternatively whether it has some formal accountability to government (e.g., a requirement to make reports to Parliament).

47. Taking into account the statutory framework embodied in the Port of London Act 1968 (see paragraphs 29-40), the tribunal concluded that the Authority was indeed a public authority within regulation 2(2)(c).

48. In the *Network Rail* case the Information Tribunal referred to the parallel jurisprudence under the Human Rights Act 1998. In particular, the tribunal adopted the analysis of Lord Nicholls of Birkenhead in *Parochial Church Council for the Parish of Aston Cantlow and Wilmcote with Billesley v Wallbank and another* [2003] UKHL 37 at paragraph 12:

> "12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

49. In addition to the four factors identified by Lord Nicholl in the final sentence of the passage cited above, the Information Tribunal in *Network Rail* added two further considerations: the performance of a regulatory function and the degree of governmental control (see paragraph 38). Applying those criteria, the tribunal concluded that Network Rail was not carrying out public functions (paragraphs 39-48). As noted above, the tribunal also ruled that the company did not carry out "functions of public administration". In doing so the tribunal relied on the Aarhus Guide, the DEFRA guidance and dicta of Blackburne J. in *Griffin* (discussed further below). The tribunal further took into account (at paragraph 32) the fact that Directive 91/440/EEC embodied

> "the principle that running railways is an activity for independent bodies, however created and funded, operating as competitive, commercial concerns according to the dictates of the market. Such an approach is the antithesis of the proposition that running railways is a function of governmental authorities."

50. Directive 91/440/EEC has been given effect to in the UK by the Railways Act 1993. As the tribunal explained (at paragraph 29):

> "Whatever the position in 1947, running a railway is not seen nowadays in the United Kingdom as a function normally performed by a government authority. Indeed the 1993 Act reflected the view of the Conservative government of the day that ownership of and responsibility for running a rail network and providing train services belonged in the private sector. The present government shows no sign of wishing to return the railways to public ownership or control."

The case law from the courts

51. The definition of "public authority" under regulation 2(2)(c) of the EIR 2004 has not been tested in the courts to date. However, we were referred to several court decisions which, it was argued, were helpful in seeking to interpret the term "functions of public administration" in the present context.

52. In our view the jurisprudence on the meaning of "public authority" for the purposes of the Human Rights Act 1998 was of the most assistance. In *Cameron v Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2006] EWHC 1133 (QB), arising out of the Potters Bar rail crash, the High Court

held that Network Rail Infrastructure Ltd (NRIL) was neither a core nor a hybrid public authority for the purposes of section 6(3) of the 1998 Act. Sir Michael Turner set out eight factors which were particularly relevant in reaching this conclusion (at paragraph 28). As Mr Shaw noted, this conclusion was reached on an application for summary judgment, and the High Court had no hesitation in deciding that NRIL was not even a hybrid authority, let alone a core public authority. There is plainly a symmetry in the findings of the Information Tribunal in the Network Rail case and the High Court in *Cameron v Network Rail Infrastructure Ltd*.

53. Miss Proops and Mr Shaw also relied on the decision of the House of Lords in *YL v Birmingham City Council* [2007] UKHL 27, in which the majority of the House concluded that a private care home (operated by Southern Cross) was not performing a public function when providing care and accommodation in pursuance of arrangements with the local authority, itself acting under the National Assistance Act 1948. Lord Mance, in the majority, explained his reasoning as follows:

> "116. In providing care and accommodation, Southern Cross acts as a private, profit-earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses, with operations which may impact on members of the public in matters as diverse for example as life, health, privacy or financial well-being. Regulation by the state is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature, if anything perhaps even the contrary…"

54. Similarly, Lord Neuberger of Abbotsbury, articulating what his Lordship described as his "particulate analysis", observed that:

> "134. Reliance was placed on the fact that care homes are subject to detailed rules and supervision under the provisions of the Care Homes Regulations 2001. That is not, in my opinion, a telling reason for saying that, in providing care and accommodation to a private person, the proprietor of a care home is carrying out a function of a public nature. There is no identity between the public interest in a particular service being provided properly and the service itself being a public service. As a matter of ordinary language and concepts, the mere fact that the public interest requires a service to be closely regulated and supervised pursuant to statutory rules cannot mean that the provision of the service, as opposed to its regulation and supervision, is a function of a public nature. Otherwise, for example, companies providing financial services, running restaurants, or manufacturing hazardous material would ipso facto be susceptible to being within the ambit of section 6(1)."

55. Mr Pitt-Payne seeks to distinguish *YL v Birmingham City Council* on the basis that the courts are concerned with the categorisation of a body as public or private, and so the focus is not on its functions, as required by

regulation 2(2)(c). However, as part of their analysis Lord Mance and Lord Neuberger plainly considered the nature of the functions being carried out, and to that extent we agree with Miss Proops and Mr Shaw that the reasoning of the majority of the House in *YL v Birmingham City Council* supports the proposition that in the present case the water companies are not performing "functions of a public nature".

56. All three counsel sought support from the High Court's decision in *Griffin v South West Water Service Limited* [1995] IRLR 15. The issue there was whether the EC Collective Redundancies Directive 75/129 (as revised by Directive 92/56), which had not been fully implemented in domestic UK law, was directly enforceable against a privatised water company. The High Court ruled that in principle the water company was a State authority against which EC Directives were capable of direct enforcement, as the three conditions laid down by the European Court of Justice in *Foster v British Gas plc* C-188/89 [1991] IRLR 268 were fulfilled. The three conditions were that the body in question (i) was providing a public service (ii) under the control of the State and (iii) for that purpose enjoyed special powers, beyond those applicable in relations between individuals. Mr Pitt-Payne relied on the finding of Blackburne J. that a post-privatisation water company was a State authority to support his argument that such a company is also a public authority under the EIR 2004.

57. However, a further issue in *Griffin v South West Water Service Limited* was whether the company was a "public administrative body" within the meaning of Article 1(2)(b) of the relevant Directive. If it was, then the Directive was disapplied. Blackburne J. rejected that argument, observing (at paragraph 123) that:

> "SWW [the water company] is no more an 'administrative body' because it 'administers' a service (the supply of water and sewerage services) than is a company carrying on business, manufacturing and distributing sweets because such a company 'administers' that enterprise or is a firm of solicitors because it administers a service of supplying legal advice. I agree with Mr Hendy that SWW's primary function, as a supplier of water and provider of a sewerage service, is to be contrasted with administrative functions such as town planning, court administration and any of the myriad administrative functions of the civil service. I further agree that the true distinction in the context in which SWW operates is illustrated by the difference between OFWAT which, in my view, is a public administrative body, and SWW which is not."

58. Miss Proops and Mr Shaw placed reliance on this passage in support of their argument that even if the companies' functions were public, they were certainly not functions of public administration.

59. Unlike the Information Tribunal in the *Network Rail* case, we have come to the view that we cannot place great reliance on *Griffin v South West Water Service Limited* in applying the test under regulation 2(2)(c). True, that

case concerns a post-privatisation water company. However, the context was very different, concerning as it did an industrial dispute against a background of the United Kingdom's failure fully to implement an EC Directive. The fact that a privatised water company was found to be a State authority against which the Directive was in principle capable of direct enforcement cannot be decisive in applying the test for a public authority under the EIR 2004. In terms of the three-fold test under *Foster v British Gas plc*, we also note that conditions (i) and (iii) were agreed as common ground between the parties. We deal with Blackburne J's analysis in *Griffin v South West Water Service Limited* of the control condition (ii) in more detail below, in the context of regulation 2(2)(d).

60. Nor do we find Blackburne J.'s relatively summary treatment of the public administration issue especially persuasive in the present context of the EIR 2004. In particular, we note that if the Directive had been disapplied, because the workers were employed by a "public administrative body", on the basis that the company was "administering" the supply of water to the public, then any organisation which met the *Foster* test necessarily fell within Article 1(2)(b). The result would have been that the Directive could never be directly enforceable, which was plainly a deeply unattractive prospect. Accordingly we conclude that we cannot readily translate and apply the dicta of Blackburne J. in *Griffin v South West Water Service Limited* into the EIR context, even though both cases concern post-privatisation water companies.

61. Miss Proops and Mr Shaw also sought to draw support from *A B and Others v South West Water Services Ltd.* [1993] QB 507. There the Court of Appeal held that a claim for exemplary damages against a pre-privatisation water company, which had been responsible for providing contaminated drinking water at Camelford, had to be struck out as unarguable. The Court's view was that the company had been undertaking a commercial operation, rather than exercising functions of an executive or governmental nature. As Sir Thomas Bingham MR explained (at 532A), South West Water were not "wielding executive or governmental power. They were a publicly owned utility acting as monopoly supplier of a necessary commodity, enjoying certain statutory powers and subject to certain obligations, but they were not acting as an instrument or agent of government." Mr Shaw submitted that this principle must apply with even greater force since privatisation in 1989. We do not think that submission can be right, given the express observations of Stuart-Smith L.J. (at 525F-G):

> "A serious mishap had occurred in the course of the defendants' commercial operations, their reaction to it was open to serious criticism if the allegations in the statement of claim are true, as they must be assumed to be for the purpose of this case. But their conduct was not an exercise of executive power derived from government, central or local and no amount of rhetoric describing it as arbitrary, oppressive, unconstitutional, arrogant or high handed makes it so. It would have been no different if the defendants had already been privatised and their servants were answerable to a board of directors and the shareholders rather than a board set up under statute."

62. *A B and Others v South West Water Services Ltd.* has since been overruled on other grounds (*Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29), but that is not the reason why we find the decision of only limited assistance in the present context. We agree with Mr Pitt-Payne that the particular context of that decision – turning on the scope of a judge-made criterion for the award of exemplary damages in tort – is too far removed from the point of construction on the EIR 2004 with which we are concerned.

Our conclusion on the test under regulation 2(2)(c)

63. We agree with the submission on behalf of the Information Commissioner that the ambit of regulation 2(2)(c) is narrower than the scope of section 6(3)(b) of the Human Rights Act 1998, which in dealing with public authorities refers to "persons certain of whose functions are functions of a public nature". We also accept that regulation 2(2)(c) is narrower than CPR 54.1 which, in the context of proceedings for judicial review, refers to bodies "performing a public function". It follows that a body may be a public authority for the purpose of the Human Rights Act 1998, and/or amenable to judicial review under CPR 54.1, and yet still fall outside regulation 2(2)(c). In our view the human rights and judicial review case law needs to be read with that important qualification in mind.

64. We agree with, and approve of, the multi-factor approach taken by the Information Tribunal in both the *Network Rail* and the *Port of London Authority* cases, namely that the decision on whether a body is a "public authority" within regulation 2(2)(c) of the EIR 2004 depends on a range of factors. As noted above, this approach is consistent with the analysis undertaken by the High Court in *Cameron v Network Rail Infrastructure Ltd* in concluding that NRIL was not a core or hybrid public authority for the purposes of the Human Rights Act 1998. We also pay due regard to Lord Neuberger of Abbotsbury's observation in *YL v Birmingham City Council* that the mere fact of the existence of an intensive regulatory regime "cannot mean that the provision of the service, as opposed to its regulation and supervision, is a function of a public nature". For the reasons set out above, even though both cases concerned water companies, we do not find either the Court of Appeal's decision in *A B and Others v South West Water Services Ltd.* or the High Court's decision in *Griffin v South West Water Service Limited* to be determinative or even highly persuasive either way in the present context.

65. We also agree with Miss Proops that the question of whether a water company is a public authority for the purpose of regulation 2(2)(c) (and indeed (d)) is a mixed question of fact and law, and that the onus lies on the Appellant to demonstrate that the companies fall within the statutory definition.

Applying the multi-factor approach in the present case

66. Applying the multi-factor approach means that we have to identify the relevant factors which point one way or the other and weigh them in the

balance in the process of determining whether the body in question is performing functions of public administration and so a public authority within regulation 2(2)(c). There are, firstly, a number of similarities between the position of the water companies and Network Rail. In particular, the water companies:

- own and manage a major utility industry which serves paying customers;
- operate under a licence supervised by a regulator;
- have considerable commercial freedom, e.g. in setting staff salaries, pension arrangements and other terms and conditions of employment;
- are subject to a degree of price regulation;
- neither set nor enforce health and safety standards, but are rather subject to a regulator.

67. There are also a number of differences between the position of the water companies and Network Rail. Unlike Network Rail, the water companies:

- have institutional and private shareholders to whom the companies are accountable through their AGMs (and indeed in several instances the majority shareholdings are owned by foreign companies);
- receive no public funding by way of income or capital, other than that public sector bodies buy water and sewerage services in the same way as other customers, e.g. there is no public funding in England and Wales for major capital projects in the water industry, such as replacing the Victorian water mains in major cities (in contrast 70 per cent of Network Rail's funding came from the government or government-backed borrowing);
- do not have government nominees on their boards of directors.

68. We agree with Mr Shaw that the cumulative effect of these factors amounts to a compelling argument that water companies have fewer of the characteristics of a public authority than Network Rail and so fall outside the reach of regulation 2(2)(c). In this context we also note that several of the water companies are foreign-owned and that they can buy each other, or buy parts of each other, subject only to competition legislation. On this basis the preponderance of factors points to the water companies not being public authorities.

69. It is therefore important to consider the factors which Mr Pitt-Payne identified as making the water companies more like a public authority than Network Rail. In summary, he argued that their functions were inherently public in nature for four principal reasons: (1) WASCs and WOCs are appointed as statutory undertakers and subject to conditions imposed under the 1991 Act; (2) the water companies are subject to a comprehensive and detailed statutory regime; (3) unlike ordinary commercial service providers, water companies cannot choose their customers, set their own prices or refuse to deal with domestic customers who fail to pay them; rather, they have

to provide a universal service; (4) finally, in the event that a WASC or WOC was to fail, then the government would have to act to ensure continuity of service, demonstrating the public nature of the function. We did not find these arguments compelling, for the following reasons.

70. As to the first point, the WASCs and WOCs in England and Wales are not now creatures of statute, whatever may have been the position historically (some were originally established as private corporations in the Victorian era under private Acts of Parliament). Today WASCs and WOCs may be appointed by statute and licensed under statute but they are not created by statute. The reality is that they are private companies incorporated under the Companies Acts and established in the normal way with a Memorandum of Association and Articles of Association. Thus they are fundamentally private companies, independent of government, in the business of supplying water and sewerage services to the public for profit.

71. Mr Pitt-Payne's second point was that the water companies are subject to a comprehensive and detailed statutory regime. We deal with this argument in more detail below, in the context of the control test under regulation 2(2)(d). For present purposes it is sufficient to say that the mere existence of such a statutory regime does not mean that the water companies are necessarily performing public functions. As Miss Proops countered, a pub landlord operates a commercial business; the fact that he is subject to a licensing regime does not entail the consequence that he is performing a public function. In addition, as Dr Fitzhugh put it in argument, the very fact that an intensive regulatory framework exists may itself demonstrate the counter proposition, namely that the water companies operate in an arm's length relationship viz-à-viz government – if they were truly carrying out public functions and under the control of a government agency, such a regime would not be needed.

72. Thirdly, it was said that the water companies have to provide a universal service. In this context Mr Pitt-Payne stressed the statutory duties imposed on water and sewerage undertakers under section 37 and 94 respectively. For example, section 37(1) provides as follows:

> **"General duty to maintain water supply system etc**
> **37(1) –** It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made–
>
> > (a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and
> > (b) for maintaining, improving and extending the water undertaker´s water mains and other pipes,
>
> as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part."

73. He also relied on sections 61(1A) and 63A and Schedule 4A to the 1991 Act, which prohibit disconnection for non-payment where the water

supply relates to a person's sole or principal home, and ban limiting devices. However, there are other providers of services licensed under statute who lack the ability to pick and choose their customers (e.g. black cab drivers in London). Section 37(1) and its counterpart for sewerage undertakers (section 94) simply reflect the business model for the water industry established under the 1991 Act. We were referred to the recommendations of the Cave Review, designed to ensure greater competition in the water industry but could not attach much weight to those proposals, not least as we are concerned with the water industry as it is now, not as it may look in the future.

74. Lastly, Mr Pitt-Payne drew our attention to the Secretary of State's statutory obligation to exercise the power to make appointments of water companies as undertakers so as to ensure universal coverage (section 7(1) and (3)). Further, if a water company were to fail, the High Court may make a special administration order (sections 23 and 24) so as to safeguard continuity of service and supply. However, this facility does not mean that the water companies are necessarily carrying out public functions. Indeed, as Miss Proops submitted, the provisions in question do not envisage the State stepping in as a provider of last resort. The whole point of a special administration order is to transfer the failing enterprise in question as a going concern to another private sector provider (see section 23(2)).

75. Mr Pitt-Payne also sought to persuade us that not only were the water companies carrying out public functions, but they were carrying out functions of public administration. In this context he referred to some of their functions which are of a regulatory, rule-making or law enforcement nature. For example, water companies may impose hose-pipe bans in times of actual or anticipated water shortage (section 76); they can decide whether to grant consent to trade effluent being discharged into public sewers (section 118); they have certain compulsory purchase powers (section 155) and even have the power to make by-laws (section 157).

76. Mr Shaw rightly conceded that the water companies are not ordinary private companies. However, he also argued, correctly in our view, that the special features identified by Mr Pitt-Payne are ancillary to their primary commercial purposes and are there to enable them to protect their assets. The core regulatory functions, or "functions of public administration", were vested in the Secretary of State and OFWAT during the 1989 process of privatisation. The bottom line is that the water companies are commercial enterprises in the business of supplying water and providing sewerage services; any administration they undertake is ancillary to that central activity. It does not become a function of public administration simply because there is an obvious and indeed significant public interest in securing a clean water supply and safe sewerage system.

77. In that context Mr Pitt-Payne referred us to the EU Water Framework Directive (Council Directive 98/83/EC), which governs the quality of water intended for human consumption. He relied on the Directive to counter the suggestion in *Griffin v South West Water Services Limited* that the supply of water and sewerage services can be equated to the business of

manufacturing and supplying sweets (see paragraph [57] above). We have already explained why we do not find the analogy with that case helpful in the present context. In any event, we do not think the grand words of Recital (1) to Council Directive 98/83/EC assist Mr Pitt-Payne in quite the way he suggested. Recital (1) does not describe water as part of our heritage and not a commercial product – rather it states that "Water is not a commercial product *like any other* but, rather, a heritage which must be protected, defended and treated as such" (emphasis added). In other words, it is both part of the heritage of our natural environment and a special commercial product.

78. We therefore agree with the Information Commissioner's conclusion that the water companies are not carrying out "functions of public administration" within the meaning of regulation 2(2)(c) of the EIR 2004.

The statutory definition of "public authority" under regulation 2(2)(d)

The statutory test

79. The appellant's alternative submission is that the water companies are covered by regulation 2(2)(d) of the EIR 2004, which applies to:

> "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."

The parties' submissions in outline

80. Mr Pitt-Payne's submissions were essentially two-fold. First, he argued that, even if we were against him on regulation 2(2)(c), the water companies fell within the terms of regulation 2(2)(d), in that they were "under the control of a person falling within sub-paragraphs (a), (b) or (c)", namely the Secretary of State and/or OFWAT (there being no dispute that both those bodies fell within regulation 2(2)(a)-(c)). He referred back to his detailed analysis of the structure of the Water Industry Act 1991, undertaken for the purposes of his submissions on regulation 2(2)(c), but equally relevant, he argued, in the present context. Secondly, and again referring back to that earlier analysis of the 1991 Act, his submission was that the water companies' various functions meant that they (i) had "public responsibilities relating to the environment", (ii) exercised "functions of a public nature relating to the environment" and (iii) provided "public services relating to the environment".

81. Miss Proops submitted that the test for "control" under regulation 2(2)(d) was more than simply regulation; the degree of control had to be so all-embracing that the body in question was effectively part of the governmental or executive machinery. In her submission the water companies had a high degree of commercial and practical autonomy from the State, notwithstanding

the regulatory regime established by the 1991 Act, such that they could not sensibly be regarded as agents or creatures of the State for the purposes of regulation 2(2)(d). She pointed out that other industries were subject to extensive and indeed stringent regulation, including price controls (e.g. in the pharmaceuticals market), but the mere fact that such companies were intensively regulated could not bring them within regulation 2(2)(d). Similarly, many other enterprises are subject to licensing regimes in which breach of a licence may result in the business being shut down (e.g. pubs), but such businesses would not be said to be "controlled" by State agencies within the meaning of that term in the EIR 2004.

82. Mr Shaw concurred with Miss Proops that the term "control" in regulation 2(2)(d) set a high threshold. In his submission it was significant that the test was whether the body in question was 'controlled', rather than simply 'regulated' or 'licensed'. Given that the organisation in question had to be the agent or an extension of the State, this implied that the controlling body was in a position to dictate not just the outcome it required, but also the means to achieve that outcome. He argued that the statutory regulatory regime under the 1991 Act set the destination, but the water companies still enjoyed the commercial freedom to choose the route to that destination, indicating that they were not under the control of the Secretary of State or OFWAT for the purposes of regulation 2(2)(d).

The Aarhus Convention: An Implementation Guide

83. Regulation 2(2)(d) is the domestic equivalent of Article 2(2)(c) of both the Aarhus Convention and the EC Directive. The analysis of Article (2)(2)(c) of the Convention in the Aarhus Guide (at pp.33-34) reads as follows (omitting footnotes):

> "In addition to government and persons performing public administrative functions, the definition of public authority also includes other persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of the other categories of public authorities. There are two key differences between this subparagraph and the others. 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 difference is also reflected in the terminology used, since this subparagraph uses the term "public responsibilities or functions", a broader designation than "public administrative functions" used under subparagraph (*b*) to denote the connection between law and State administration. The provision is similar to that of article 6 of the Council Directive 90/313/EEC, which refers to bodies with public responsibilities and under the control of public authorities. However, article 2, paragraph 2 (*c*), fills a gap found in the Directive, because it includes not only persons under the control of governmental authorities but also persons

that might not be under the control of governmental authorities but are under the control of those persons referred to in article 2, paragraph 2(*b*). Such can be service providers or other companies that fall under the control of either public authorities or other bodies to whom public functions have been delegated by law. For example, water management functions might be performed by either a government institution or a private entity. In the latter case, the provisions of the Convention would be applicable to the private entity insofar as it performs public water management functions under the control of the governmental authority.

The second key difference distinguishes subparagraph (*c*) from both previous subparagraphs. While subparagraphs (*a*) an d (*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.

At a minimum, this subparagraph covers natural or legal persons that are publicly owned, for example, community-owned public service providers. It may also cover publicly or privately owned entities providing public services where the service provider can oblige residents to pay fees or engage in particular activities, such as those relating to waste collection. Furthermore, it may cover entities performing environment-related public services that are subject to regulatory control.

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 privatization 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.
>
> Implementation of the Convention would be improved if Parties clarified which entities are covered by this subparagraph. This could be done through categories or lists made available to the public."

84. Again, Mr Pitt-Payne naturally prayed in aid both the example at the end of the first paragraph and the penultimate paragraph of this extract (the reference in the text to the UK domestic court case being to *Griffin*). However, we regard the example in the first paragraph as equivocal and also limited in its application, referring expressly and solely to "public water management functions". Likewise the penultimate paragraph restates rather than answers the question. In any event, we have explained both above and further below why we find *Griffin* to be of only limited relevance.

The DEFRA guidance on regulation 2(2)(d)

85. The DEFRA guidance correctly notes that regulation 2(2)(d) imposes a two-fold test: first that the body in question must be under the control of a "public authority," and secondly that the body must demonstrate at least one of public responsibilities relating to the environment, functions of a public nature relating to the environment, or provision of public services relating to the environment. As to the first of these requirements, that of control, the DEFRA guidance continues as follows:

> "2.19 In section [sic] 2(2)(d), control could mean a relationship constituted by statute, regulations, rights, license, contracts or other means which either separately or jointly confer the possibility of directly or indirectly exercising a decisive influence on a body. Control may relate, not only to the body, but also to control of the services provided by the body.
>
> 2.20 It is important to note that the level of control needs to be sufficient to exert a decisive influence on the body – the simple existence of a contract with a public authority does not necessarily provide this control. The existence of one contract between, for example, a government body and a private company or other organisation will not necessarily bring that company or organisation within the scope of the regime, although it may do so. Each case will need to be considered on its merits and a range of factors would need to be taken into account…"

86. The DEFRA guidance also gives the following illustration (omitting footnotes in the original):

> "2.22 Examples of bodies that may be covered by EIR limb (d) are private companies or Public Private Partnerships with obvious environmental functions such as waste disposal, water, energy,

> transport regulators. Public utilities, for example, are involved in the supply of essential public services such as water, sewerage, electricity and gas and may fall within the scope of the EIRs. The Foster case in 1990 ruled that British Gas was an "emanation of the state", but there have been significant legislative changes since and profound developments in the gas/electricity industry that would need to be considered in determining whether or not Foster would be similarly decided now."

87. Mr Shaw pointed out that one of the leading works in the field, *Information Rights: Law and Practice*, by Philip Coppel QC (Third Edition, Hart Publishing, 2010) deals with this point. Chapter 6 notes that "the requirement that the body or person be 'under the control' of a public authority (as defined in paras (a)-(c)) might be thought to exclude utility companies in the United Kingdom" (at p.183). The text then cites the first two sentences of paragraph 2.22 of the DEFRA guidance. An extensive footnote (n. 124) to that extract then comments in part as follows:

> "…The notion that the Regulations apply to environmental information held by private companies is not easily reconciled with the purpose of the regulations or with the other 'pillars' of the Aarhus Convention. The public does not normally participate in decisions made by private companies and are not normally thought to have a legitimate interest in doing so. It may be that where a non-public authority company carries out 'obvious environmental functions', this will constitute a powerful facet of the public interest in favour of disclosure of information addressed to or received from that company but held by those public authorities regulating or otherwise communicating with that company…"

88. We see considerable force in that analysis, which directly bears on the construction of the statutory language before us. We found that textbook discussion more helpful than the definition of "control" in EC Regulation No. 139/2004 (the EC Merger Regulation), urged on us by Mr Shaw, given the very different context). Likewise, again given the very different context, we did not feel that we could place much reliance on the definition of companies controlled "by or on behalf of the Crown" under section 443 of the Corporation tax Act 2010, to which Miss Proops drew our attention. We also found only limited assistance in the case law jurisprudence cited to us.

The decisions of the Information Tribunal

89. These decisions provide no assistance. Regulation 2(2)(d) was not in issue in the *Port of London Authority* case (see paragraph 23). In the *Network Rail* case, regulation 2(2)(d) might potentially have come into play as regards NRIL but only if Network Rail itself had been found to be a public authority within regulation 2(2)(c) (see paragraph 22). As the tribunal answered that question in the negative, it did not need to address regulation 2(2)(d) and did not discuss the matter further (paragraph 53). There are

therefore no previous relevant decisions of the Information Tribunal on the scope of regulation 2(2)(d).

The case law from the courts

90. The courts have also not yet had the opportunity to pronounce on the proper construction of regulation 2(2)(d) in the context of the EIR 2004. The meaning of the term "control" has been the subject of judicial discussion in other contexts. Mr Shaw referred us to the well-known authority of *Ready Mixed Concrete v Ministry of Pensions* [1968] 1 All E.R. 433, where McKenna J. ruled as follows (at 440C):

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done."

91. Although those observations were made in a very different context – that of employment law, or, as it was still known then, the law of master and servant – they do seem to us to give something of the appropriate flavour to the term "control" more generally. However, we certainly do not regard *Ready Mixed Concrete* as conclusive of the matter in the context of this appeal.

92. Mr Pitt-Payne placed considerable reliance on the High Court's decision in *Griffin v South West Water Service Limited*, discussed above. It will be recalled that the second condition of the three-part *Foster v British Gas* test imported a control element. Blackburne J. considered both the regulatory framework under the 1991 Act (at paragraphs 95-99 and 109-110) and the terms of SWW's licence in some detail (at paragraphs 100-108). His Lordship concluded that, notwithstanding some features of operational independence, SWW was "under the control of the state" for the purposes of the second limb of the *Foster* test. At first sight this case appears to be a powerful authority in support of Mr Pitt-Payne's position. However, the context of *Griffin*, although it shares some common features with the present appeal, is by no means identical. In particular, the focus of the inquiry in *Griffin* was subtly distinct from the present case. At paragraph 94, Blackburne J. prefaced his analysis of the control condition with the following observations:

> "The plaintiffs contend, and SWW disputes, that the second of the three conditions, the so-called 'control condition', is fulfilled. In considering that condition it is necessary, in my view, to appreciate several points:
> 1. The question is not whether the *body* in question is under the control of the State but whether the *public service* in question is under the control of the State.
> 2. The legal form of the body is irrelevant.
> 3. The fact that the body is a commercial concern is also irrelevant.
> 4. It is also irrelevant that the body does not carry out any of the traditional functions of the State and is not an agent of the State.

5. It is irrelevant too that the State does not possess day-to-day control over the activities of the body."

93. In the light of those caveats, and especially the first, we do not think that we can readily translate Blackburne J.'s conclusion in *Griffin* to the present situation. In the present proceedings the fundamental question is indeed whether the water companies are "under the control of the State" (or another State organ). We cannot accept Mr Pitt-Payne's submission that paragraph 94.1 of Blackburne J.'s judgment points to a distinction without a difference. In our view the fact that a different question is being asked is a highly material distinction. In addition, though the factual context is effectively the same (a post-privatisation water company), the legal context is very different. In *Griffin* the legal issue was whether a Directive designed to safeguard workers' rights, which had not been fully implemented in the United Kingdom, was directly enforceable. In this case there has been no suggestion that the EIR 2004 (in this respect at least) do other than faithfully give effect to the relevant Directive. Given the premise of Blackburne J.'s analysis is so different then, notwithstanding the superficial similarity between *Griffin* and this case, we cannot rely on it for present purposes.

Our conclusion on the test under regulation 2(2)(d)

94. The scope of regulation 2(2)(d) of the EIR 2004 is virgin territory so far as the courts are concerned. For the reasons above, we have obtained only limited assistance from the case law authorities cited to us. In our judgment it is important to start with the plain words of regulation 2(2)(d), read against the background of the Aarhus Convention and the Directive. We agree with Miss Proops and Mr Shaw that the focus of both instruments is on capturing governmental and executive functions in their various guises – see, for example, the reference in the Aarhus Guide to "a whole range of executive or governmental activities" (see paragraph [30] above). This must be in contradistinction to the activities of private commercial entities, which may be subject to a degree of State regulation, and indeed even intensive State regulation, but still remain at arm's length from the machinery of the State.

95. We therefore accept the submission made on behalf of the Commissioner and the water companies that there is an important distinction to be made between regulation and control. Regulation involves the regulator formulating policy and strategy, determining outcomes, setting standards, making and enforcing rules and issuing guidance for those bodies it regulates. Regulation may be "light touch" or "heavy-handed". Control must go further than the functions associated with regulation. As Mr Shaw argues, it connotes command or compulsion, and the power to determine not just ends but the means to achieve those ends. There is, in our view, a step change between the degree of regulation to which the water companies are subjected and control. The DEFRA guidance, which refers to a "decisive influence", is just another form of words to reflect this important distinction.

Applying the control test in the present case

96. We accept that the water companies are subject to a detailed regulatory regime. Mr Pitt-Payne referred us, by way of example, to the very detailed action plan given by the Secretary of State to one of the water companies, issued under section 19 of the 1991 Act, which related to the risk of excess nitrate levels in water supplied from certain treatment works. We acknowledge that this prescribes a detailed and precise specification of both the steps to be taken and a timetable for those measures. Although this may appear to suggest the ability to control means as well as ends, we agree with Mr Shaw that this perspective neglects the bigger picture. For example, the HSE routinely issues similar types of notices to all manner of enterprises, often after negotiations with the business concerned. This does not mean that the firm in question is "under the control" of a public authority – rather, this is part and parcel of regulation, albeit at the more intensive and intrusive end of that spectrum.

97. Our conclusion is that the regime under the 1991 Act remains a system of regulation and not a system of control (see paragraph [4] above). In our view Mr Pitt-Payne's analysis fails to accord sufficient weight to the free market principles which underpin the Water Industry Act 1991. For example, the Secretary of State and OFWAT are subject to certain general duties with respect to the water industry (see section 2). In particular, in exercising their powers and performing their duties they must seek "to further the consumer objective" (section 2(2a)(a)). This is defined in turn as being "to protect the interest of consumers, wherever appropriate *by promoting effective competition* between persons engaged in, or in commercial activities associated with, the provision of water and sewerage services" (section 2(2B)). The statutory imperative to have regard to promoting effective competition recurs elsewhere in the 1991 Act (see e.g. section 40(6)(a)), especially since its amendment by the Water Act 2003.

98. In addition we note that the Secretary of State and OFWAT, when exercising their powers and performing their functions,

> "shall have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be transparent, accountable, consistent and targeted only at cases in which action is needed").

99. The statutory reference to regulatory activities being "targeted only at cases in which action is needed" is, in our view, telling – it emphasises one of the fundamental differences between regulation and control. We also bear in mind the framework established following privatisation, as a result of which there is now a separation between the public authority regulators (who are, of course, subject to the EIR 2004) and the privatised commercial firms, which have been sufficiently distanced from the public role so as to fall outside the definition. We do not regard this as inconsistent with the objectives of the Aarhus Convention and the Directive.

100. We therefore agree with the Information Commissioner's assessment in the decision letter that

> "WOCs and WASCs enjoy a high level of commercial freedom, and independence from decisive regulatory interference, such that they should not be considered to be under the control of any licensing or regulatory body."

101. We heard some argument on whether or not the individual limbs under regulation 2(2)(d)(i) to (iii) were met. Mr Pitt-Payne argued that they were; Mr Shaw submitted to the contrary; Miss Proops declined to take a position on the point. In the circumstances we shall not lengthen an already over-long judgment by exploring those issues. The appellant's case falls at the "control" hurdle and so the scope of heads (i) to (iii) inclusive does not arise for decision. There is, however, one final matter – the question of possible hybridity.

The hybrid issue

102. Mr Pitt-Payne for the appellant sought to persuade us that the water companies were public authorities within the EIR 2004 for all purposes and not only for some limited respects. As we have seen, Mr Shaw, for the additional parties, submitted that the WASCs and WOCs were not public authorities at all under the EIR 2004. Miss Proops, for the Information Commissioner, for the most part adopted Mr Shaw's arguments, contending that the water companies were sufficiently remote from the apparatus of the State. However, she raised the possibility that there might be circumstances in which some functions might be carved out of the EIR to the extent that the water companies might be public authorities in respect of certain types of information (for example, if it was found that some of the companies' own regulatory functions might be said to amount to "functions of public administration").

103. In doing so Miss Proops relied on both the Information Tribunal's conclusions in the *Port of London Authority* decision (at paragraphs 41-42) and the DEFRA guidance. However, the tribunal in *Port of London Authority* was accepting a submission made by both the Commissioner and the Authority that an organisation may be a public authority in respect of some information they hold but not for other information. The tribunal stated that it "does not dissent" from the general proposition that a public organisation may undertake private acts, relying on judicial review cases, but rightly noted that the case law may not be of assistance, "dealing as it does with a specific example unique to the facts in each case" (at paragraph 42). The tribunal in *Port of London Authority* was, in effect, accepting a joint concession by the parties and without the benefit of further argument. We do not think the DEFRA guidance takes this issue any further forward.

104. On balance we prefer Mr Shaw's analysis of the hybridity question. He made the pragmatic point that the application of regulation 2 could become time-consuming and problematic if a body was a public authority for some purposes of the EIR 2004 but not for others. More importantly, as a matter of statutory interpretation, he submitted that regulation 2 did not suggest that an

organisation could be simultaneously both within and without the ambit of the EIR 2004. We find that a compelling argument. In particular, we are not persuaded that the human rights jurisprudence on hybrid public authorities can be imported into the EIR 2004, not least as section 6(3)(b) of the Human Rights Act 1998 expressly defines a public authority to include "any person *certain of whose functions* are functions of a public nature" (emphasis added), a nuance which is absent from regulation 2(2).

Conclusion: are the water companies in England and Wales "public authorities" for the purposes of the EIR 2004?

105. The definition of "public authority" for the purposes of the EIR 2004 may be fixed as a matter of its wording, but the outcome of its application will necessarily change according to the context and over time. To that extent the notion of a "public authority" is both place- and time-specific. We have already identified the differences that exist within the United Kingdom, without having to refer to differences across Europe as a whole today. As regards the passage of time, the Information Tribunal observed in the *Network Rail* case (at paragraph 29) that "Whatever the position in 1947, running a railway is not seen nowadays in the United Kingdom as a function normally performed by a government authority."

106. In the same way, perceptions of the water industry have shifted over time. In Ibsen's Norway, in the late nineteenth century, the characters in *An Enemy of the People* would have been under no doubt whatsoever that those officials responsible for the town's water supply were carrying out "functions of public administration". Dr Stockmann's campaign to expose the contamination of that water supply to the town baths, which were the subject of the mayor's civic pride, was seen as an attack on the same "public authority". More recently, in England and Wales in the 1970s, the ten unitary water authorities established under the Water Act 1973 would presumably have been "public authorities". (The position of the small number of private WOCs during that period is less clear). However, we have to apply the definition in regulation 2(2)(c) in a completely different environment, one regulated by the Water Industry Act 1991. For the reasons set out above, the WASCs and WOCs in England and Wales are not "public authorities" within the meaning of either regulation 2(2)(c) or 2(d)(d) of the Environmental Information Regulations 2004.

A postscript

107. The Aarhus Guide suggests as follows (see paragraph [83] above):

> "Implementation of the Convention would be improved if Parties clarified which entities are covered by this subparagraph. This could be done through categories or lists made available to the public."

108. The DEFRA guidance states that there can be "<u>no comprehensive list</u> of those bodies that are under the control of another body because such relations are dynamic and are prone to frequent change" (paragraph 2.21,

original emphasis). Clearly the authors of the Aarhus Guide did not see that as an insuperable problem. In addition, while it may be a valid argument against having an authoritative list of public authorities in primary legislation, on the same model as FOIA 2000, it would not preclude such a list being kept up to date through secondary legislation. However, that is a matter for others to determine.

Signed on the original
on 23 November 2010

Nicholas Wikeley
Judge of the Upper Tribunal

Christopher Ryan
Judge of the Upper Tribunal

Henry Fitzhugh
Member of the Upper Tribunal