

**[2016] AACR 39**  
**(Cross v Information Commissioner and the Cabinet Office**  
**[2016] UKUT 153 (AAC))**

**Mr Justice Charles CP**  
**Judge Gray**  
**Mr H Fitzhugh**  
**22 March 2016**

**GIA/2187/2013**

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**Environmental information – whether the Sovereign or the Royal Household a “public authority” for the purposes of the Environmental Information Regulations 2004**

Following the refusal of her request for the minutes of the Royal Household’s Social Responsibility Committee meetings, Mrs Cross complained to the Information Commissioner. He rejected her complaint on the basis that neither the Sovereign nor the Royal Household constituted a public authority for the purposes of the Environmental Information Regulations 2004 (EIR). Mrs Cross’s appeal to the First-tier Tribunal was transferred to the Upper Tribunal, and among the issues before it were not only the difference in language between the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC) and the Environmental Information Regulations 2004, but also the meaning of the phrases “the performance of services of public interest” and “special powers” within the Court of Justice of the European Union’s decision in *Fish Legal and Shirley v Information Commissioner C-279/12*, EU:C:2013:853, [2014] 2 WLR 568, [2014] AACR 11.

*Held*, dismissing the appeal, that:

1. the Crown was personified by the Sovereign, as a legal person and a constitutional monarch, but the Sovereign was not and did not act as the Crown in the sense of government; there was a clear distinction between the public administration and executive and the Sovereign’s constitutional functions and powers (paragraphs 52 to 58);
  2. the Royal Household served the Sovereign, not the Crown in the sense of government. The roles, duties and powers of the Royal Household’s members were directed to the implementation of the Sovereign’s functions and powers and co-extensive with them and it had no separate legal personality and was not an unincorporated association or partnership. In broad and private law terms the members of the Royal Household are agents for the Sovereign (paragraphs 59 to 64 );
  3. the Sovereign, not being a part of the government, was not a public authority; as a matter of substance she held and exercised all of her functions and powers in a formal, ceremonial or personal capacity, and, under constitutional law, the Sovereign had no executive or administrative role to play when exercising her function and powers (paragraph 71);
  4. regulation 2(2)(a) and (b) of the EIR did not apply to the Sovereign. She was not a government department and did not appear in Schedule 1 to the Freedom of Information Act 2000 and the Sovereign’s addition to that list, or that of the Royal Household, would not fit easily with section 37 of the Act (paragraphs 75 to 76);
  5. the natural meaning, intention and effect of Article 2(2)(b) of the Directive meant that in order to satisfy the functional test the relevant entity must be “performing public administrative functions under national law, including specific duties, activities or services relating to the environment ” and that approach clearly reflects Recital (11) of the Directive and the Court of Justice of the European Union’s decision: *Fish Legal and Shirley v Information Commissioner C-279/12* (paragraphs 86 to 94);
  6. *Fish Legal and Shirley v Information Commissioner C-279/12* contained important and binding guidance on the meaning and application of the tests set by the Directive and the EIR so as to give effect to the Directive’s underlying objectives. It followed that C-279/12 should not be applied rigidly or without reference to both the Directive and the EIR, including determining whether in all the circumstances of the case the relevant entity was a functional public authority (paragraphs 99 to 100).
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**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**REASONS**

**Overview and conclusion**

1. The difference in language between the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC) (“the Directive”) and the Environmental Information Regulations 2004 (SI 2004/3391) (“the EIR”) causes complications. For example, it is not immediately apparent where the Sovereign, or the Royal Household, or the holder of an office or an employee (who together are commonly described as the Royal Household) is included within the definition of a public authority in the EIR if they fall within that definition in the Directive.

2. The use of the descriptors “the performance of services of public interest” and “special powers” by the CJEU in *Fish Legal v Information Commissioner* [2014] 2 WLR 568 (*Fish Legal EU*) introduces descriptions that have a range of meaning into the approach to be applied.

3. Additionally, convention and practice relating to the Monarchy cause complications and probably explain why much time and effort was initially directed in the written arguments to whether the Royal Household, rather than the Sovereign, is a public authority or the relevant public authority in this case. Before us it became common ground that this was a red herring although the Information Commissioner reserved for another day the argument whether only bodies with a legal personality can qualify as a public authority under regulation 2(2)(c) of the EIR.

4. Before us, and in our view correctly, it became common ground that whether or not the Royal Household has a legal personality or is a body for the purposes of the EIR:

- i) the relevant roles and functions of the Royal Household are co-extensive with those of the Sovereign, and so
- ii) the determinative question is whether the Sovereign, and so the relevant roles and functions of the Sovereign, make her a public authority for the purposes of the Directive,
- iii) if the answer is that the Sovereign is a public authority under the Directive, it was accepted that we should conclude that the Sovereign, as a natural and so legal person, was a public authority under the EIR or that the Directive was directly enforceable, and
- iv) if the answer is that the Sovereign is a public authority, an officer of the Royal Household would act on her behalf in dealing with any request made under the EIR or the Directive and any decision (eg. by the Information Commissioner) made in respect of that request.

5. In our view the answer to this determinative question is that the Sovereign is not a public authority for those purposes because the Sovereign does not have executive or administrative functions and so in the terms of paragraphs 51 and 52 of the judgment of the CJEU in *Fish Legal EU*:

- i) the Sovereign is not an administrative authority, namely an entity which forms part of the public administration or the executive of the state, and so does not fall within Article 2(2)(a) of the Directive and so for that reason within regulations 2(2)(a) or (b) of the EIR, and
- ii) the Sovereign is not a person entrusted with the performance of services of public interest, *inter alia* in the environmental field, who is for this purpose vested with special powers, and so does not fall within Article 2(2)(b) of the Directive or regulation 2(2)(c) of the EIR.

6. Alternatively, standing back and applying a cross check with the wording and underlying purposes and objectives of the Directive and the EIR, we have concluded that the functions and powers of the Sovereign that are relied on by Mrs Cross do not have a sufficient connection to what entities that are organically part of the administration or the executive of a state do.

7. Also, the Sovereign is not a person under the control of a public authority who has public responsibilities, exercises public functions or provides public services relating to the environment, and so does not fall within Article 2(2)(c) of the Directive or regulation 2(2)(d) of the EIR.

8. This conclusion means that we do not have to consider whether the approach described in paragraph 4(iii) is correct, or the point expressly reserved by the Information Commissioner on legal personality.

## **Introduction**

9. Mrs Cross made an information request of 16 March 2012, to “*the Information Officer, the Royal Household*”, seeking “*all minutes of meetings held by the Social Responsibility Committee*”. The Deputy Senior Correspondence Officer for the Royal Household refused the request on 26 March 2012, on the basis that “*the Royal Household is not considered a public authority under the terms of [the EIR]*”.

10. Mrs Cross complained to the Information Commissioner on 20 May 2012 about the refusal of her request. In doing so she provided detailed grounds for her contention that the Royal Household was a public authority for the purposes of regulation 2(2)(c) of the EIR. The Information Commissioner investigated, and replied by letter of 21 March 2013. He concluded that as the Royal Household was not a public authority for the purposes of the EIR he had no jurisdiction to issue a decision notice. Because the Information Commissioner found that the Royal Household’s response was made on behalf of the Sovereign, he went on to consider whether the Sovereign herself was a public authority under the EIR, and concluded that the answer was “no”.

11. Mrs Cross appealed to the First-tier Tribunal (the F-tT) on 17 April 2013, now contending that both the Royal Household and the Sovereign were public authorities under the EIR. The appeal was transferred from the F-tT to the Upper Tribunal (the UT) on 20 June 2013 and, on 8 July 2013, it was stayed pending the decision of the CJEU on a preliminary ruling in *Fish Legal v Information Commissioner and Ors* and *Shirley v Information Commissioner and Ors*, concerning whether water companies were public authorities for the purposes of the Directive. The CJEU gave judgment on 19 December 2013 and the case is reported as *Fish Legal and Shirley v Information Commissioner* C-279/12, EU:C:2013:853, [2014] 2 WLR 568, [2014] AACR 11 (“*Fish Legal EU*”). As a result, the stay was lifted on 16 January 2014 but, following

a directions hearing on 2 June 2014, it was re-introduced until after the UT's own judgment in *Fish Legal* on whether the water companies were public authorities for the purposes of the EIR. The UT's judgment was promulgated on 16 February 2015 and is reported as *Fish Legal and Shirley v Information Commissioner and ors* [2015] UKUT 52 (AAC); [2015] AACR 33 ("*Fish Legal UK*"). It found that the water companies were public authorities under regulation 2(2)(c) of the EIR, but not regulation 2(2)(d) thereof.

12. Two of us sat on the *Fish Legal UK* appeal. The parties in this and another case relating to the Duchy of Cornwall ("*the Duchy case*") were given and took the opportunity to attend the hearing of the *Fish Legal* appeal to the UT and to make submissions on the public authority point. The third member of this panel sat in to hear the argument in the *Fish Legal* appeal to the UT.

13. We had hoped to promulgate this decision before the hearing of the appeal to the UT in the *Duchy case* before one of us (Charles J). But further information relating to the factual findings sought which we understood the parties had agreed to provide was not sent to us before that hearing took place.

14. We record that we have considered whether we should put to the parties points raised in the *Duchy case* [*The Attorney-General for the Prince of Wales v the Information Commissioner and Mr Michael Bruton* [2016] UKUT 154 (AAC)] that were not taken or which were reserved in this transferred appeal and have concluded that it is not necessary or appropriate for us to do so. However, a reader of the decisions in the two cases will see a number of common paragraphs and that the *Duchy case* addresses points that were reserved, not pursued or left open in this case.

#### *The EIR and the Directive*

15. The European Union implemented the Aarhus Convention by the Directive.

16. The general approach to the application of the Directive is set out in paragraphs 35 to 39 of *Fish Legal EU*:

#### "Introductory Observations

35 First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by or for public authorities ... .

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

37 It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that Directive is designed to implement in European Union law ... .

38 In addition, the Court has already held that, while the *Aarhus Convention Implementation Guide* may be regarded as an explanatory document, capable of being

taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the Convention, the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention ... .

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

17. The definition of “public authority” in Article 2 of the Aarhus Convention is very similar to that in Article 2(2) of the Directive. It is:

“‘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;

...

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

18. The body responsible for the Aarhus Convention (the United Nations Economic Commission for Europe – UNECE) has published an Implementation Guide, now in its second edition (2014) (the UNECE guide). It has no binding force, but is an explanatory document capable of being taken into account for the purpose of interpreting the Convention’s provisions: see for example *Solvay v Région Wallonne* C-182/10, EU:C:2012:82, [2012] 2 CMLR 19 at paragraphs 26 and 27 and *Fish Legal EU* at paragraph 38. The UNECE guide states:

“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 into three parts to provide as broad 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 information, participation or justice.

(a) **Government at national, regional and other level;**

‘Public authority’ includes ‘government’ – a term which includes agencies, institutions, departments, bodies, etc, of political power – at all geographical or administrative levels. In a typical situation, national ministries and agencies and their regional and local offices, State, regional or provincial ministries and agencies and their regional and local offices, as

well as local or municipal government offices, such as those found in cities, towns or villages, would be covered.

...

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

‘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.

...

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, to sue and be sued, and to make decisions through agents, such as a partnership, corporation or foundation. While a governmental unit may be a legal 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.”

19. The definition of “public authority” in Article 2(2) of the Directive is as follows:

“‘Public authority’ shall mean:

- (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 person or body 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. ...”

20. The recitals to the Directive state:

“(5) On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘the Aarhus Convention’). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.

...

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

21. The definition of public authority in regulation 2(2) of the EIR is in different terms and is as follows:

“Subject to paragraph (3) [Scottish public authorities], ‘public authority’ means –

(a) government departments;

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

22. Regulation 2(1) provides that “environmental information” has the same meaning as in Article 2(1) of the Directive and repeats that definition. More generally regulation 2(5) provides that:

“Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.”

23. And regulation 3 provides that:

“(1) Subject to paragraph (3) and (4), these Regulations apply to public authorities.

(2) For the purposes of these Regulations, environmental information is held by a public authority if the information ...

(3) These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity.”

### **Preliminary comment**

24. The general approach of the Directive and the EIR is to give a right to request *environmental information* from a defined class of entities namely *public authorities*.

25. In our view, the point made in paragraph 39 of *Fish Legal (EU)* concerning the extent of the right given by the Directive applies to the need for the entity to be a public authority as well as to the need for the information to be environmental information.

26. So although, as indicated by the opening paragraph from the UNECE guide and the introductory observations of the CJEU in *Fish Legal EU* (both cited above), the Directive, and so the EIR, are intended to have a wide reach, they nonetheless were not intended to give a right to request *environmental information from anyone* simply because they hold it. This is the case even if it can be said that the environmental information relates to the exercise of powers or responsibilities concerning an iconic building (eg Buckingham Palace) or a large estate in respect of which it can be said there is a strong public interest in favour of the disclosure of environmental information.

27. This means that the application of the Directive and the EIR in this case cannot be founded on:

- i) an argument that as the occupied Royal Palaces (eg Buckingham Palace) are iconic buildings of importance to the nation, and so to the public, a request under the Directive and the EIR can be made of any person or body who holds environmental information relating to them, and so the Sovereign, or
- ii) an argument that occupied and unoccupied Royal Palaces are held for the nation and were both managed by a government department until, as a product of arrangements made between the government and the Sovereign, this changed with the result that the former are held for the nation and managed by the Sovereign and the latter are held for the nation and managed by the Historic Royal Palaces Trust which is a public authority for the EIR because it is within the list in part VI of Schedule 1 to the Freedom of Information Act 2000 (FOIA).

28. The reason for this is that the relevant holder of the information has to be a public authority as defined. Additionally, on argument (ii) the inclusion of the Historic Palaces Trust could be an extension of the Directive and so the point that it has expressly been made a public authority does not indicate that the Sovereign, who has not, is also a public authority.

29. We record that Mrs Cross did not advance either of those arguments and we mention them because of exchanges during the hearing.

### *Fish Legal*

30. *Fish Legal EU* was a decision made by the CJEU on a reference from the Upper Tribunal. The case here concerned the application of regulation 2(2)(c) and (d) of the EIR to the water companies (and so Article 2(2)(b) and (c) of the Directive). In giving its guidance the CJEU considered the whole of the structure of Article 2 of the Directive.



31. At paragraphs 40 to 52 the CJEU said:

“Questions 1 and 2

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

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

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

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

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

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

46. This interpretation is supported by the Aarhus Convention Implementation Guide, according to which the phrase ‘under national law’ means ‘that there needs to be a legal basis for the performance of the functions under [Article 2(2)(b)]’, this subparagraph covering ‘[a]ny person authorised by law to perform a public function’. That cannot be

called into question by the fact that the guide adds that '[w]hat is considered a public function under national law may differ from country to country'.

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

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

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

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

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

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

32. Paragraphs 48 and 52 effectively mirror the approach taken in the citation by the Advocate General (at paragraph 80 of his opinion with his emphasis) from *Foster v British Gas plc* C-188/89, EU:C:1990:313, [1991] 1 QB 405 at paragraph 20, namely:

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

33. Later at paragraph 67, when it is dealing with the issue of control and reflecting paragraphs 50 and 51, the CJEU said:

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

34. These citations show and confirm the hierarchy of the provisions of the Directive and the EIR. They also reflect the purposes set out in the quotation from the UNECE guide and recital (11) to the Directive cited above.

35. The CJEU describe the first two stages using the neutral expression “entities” which are organically or functionally *administrative authorities*.

36. The hierarchy or structure of the Directive is an important factor to be taken into account when determining whether entities are administrative authorities that fall within the definition of *public authorities*. It provides a further indication that if, at the functional stage, the functions or services of public interest with which the relevant entity is entrusted do not have a sufficient link with the public administration or executive of the State at national or local levels it would be surprising if the Directive and the EIR applied to the environmental information held by that entity, even though there was a strong public interest in it being disclosed because, for example, it was used by a public figure who benefitted from public funding.

37. The language relating to the links in the chain of the hierarchy or structure differ between the Directive and the EIR. Articles 2(2)(b) and (c) of the Directive both make reference to the environment whereas regulation 2(2)(c) of the EIR does not.

38. However, there is no effective difference between an entity “performing public administrative functions” (the language of the Directive) and an entity that “carries out public administration” (the language of the EIR). So this language of the EIR replicates the functional test under Article 2(2)(b) of the Directive at the regulation 2(2)(c) stage of the hierarchy or structure of the EIR.

39. Paragraph 52 of the judgment of the CJEU describes that functional test. The second part of the paragraph has to be read with, and is informed by, the overarching description of the entities as *administrative authorities*. Paragraph 52 provides that it is the combination of the following that make an entity a functional administrative authority and so a public authority:

- i) the entity is a legal person governed by public or private law,
- ii) the legal regime applicable to it has entrusted it with the performance of services of public interest, *inter alia* in the environmental field, and
- iii) it has been vested with special powers.

40. In our view applying the description or test in paragraph 52 of *Fish Legal EU*:
- i) the special powers also have to be vested in the entity by the legal regime applicable to the entity, and
  - ii) it is the vesting of special powers that makes a service of public interest an administrative function that counts or qualifies in determining whether the entity is an administrative authority (and so a public authority under the functional definition).

41. The reference to the controller in regulation 2(2)(d) as a “person” referred to in the earlier parts of the definition shows that there “person” is being used to cover entities that do not have legal personality for example if they are listed in Schedule 1 to FOIA (eg a government department).

*What did not arise in Fish Legal*

42. In *Fish Legal UK* the lack of reference in regulation 2(2)(c) of the EIR to a legal person and to the environment did not matter because it was common ground that the water companies were legal persons entrusted with services of public interest in the environmental field. Also, it did not matter whether the special powers referred to by the CJEU had to relate to the environmental functions because the relevant powers were so directed.

43. The issue for the Upper Tribunal, in applying the guidance of the CJEU on regulation 2(2)(c) of the EIR, was therefore whether the water companies had special powers (see paragraph 55 of the judgment of the CJEU).

44. Accordingly, *Fish Legal* in the CJEU and the Upper Tribunal:

- i) did not consider whether regulation 2(2)(c) of the EIR is wider than the Directive because “the other body or other person” referred to in regulation 2(2)(c) does not have to be a legal person entrusted with environmental functions and/or whether they must have special powers directed to such environmental functions as are entrusted to them or which they have, and
- ii) proceeded on the basis that, in the case of the water companies, no point arose on the different wording and structure of the EIR and the Directive and the guidance given by the CJEU on the application of Article 2(2)(b) applied to the application of regulation 2(2)(c) to the water companies.

45. Also in *Fish Legal* no point arose on whether regulations 2(2)(a) and (b) of the EIR are narrower than Article 2(2)(a) of the Directive and so, absent the exercise of the power conferred by FOIA to add to the list of public authorities, how any such gap should be filled.

46. In this case it was not argued that:

- i) to be a public authority under the functional test the entity had to be entrusted with special powers for the purpose of the performance of services of public interest in the environmental field, or that
- ii) the reference in paragraph 52 of the judgment of the CJEU to “this purpose” linked the need for special powers to only the services of public interest in the environmental field.

Rather the case was argued on the common ground that (i) the reference to “this purpose” was to the whole of the description “the performance of services of public interest, inter alia in the environmental field”, and (ii) if the Sovereign was not vested with special powers for the performance of services of public interest in the environmental field, but was vested with special powers for the performance of other services of public interest, she was or could be a public authority.

47. We have adopted that approach.

## Discussion

### *The Crown and the Sovereign*

48. Much of Mrs Cross’ argument relates to the role and position of the Sovereign. This introduces the need to examine the position of the Sovereign and, in turn, the need to appreciate the different uses in our constitutional law of references to the Crown that are, for example, reflected in sections 6 and 7 of FOIA.

49. This is so notwithstanding the points that:

- i) Community law must be placed in its context and interpreted as a whole having regard to its objectives (see for example *Srl CILFIT v Ministry of Health* C-283/81, EU:C:1982:335, [1983] 1 CMLR 472 at paragraph 20), and
- ii) the definition of what are “*public administrative functions*” must be so construed to capture and reflect the EU approach and so the underlying scheme of EU environmental law (see paragraph 45 of *Fish Legal EU* ).

This is because a starting point to that approach is to identify the functions and roles of the relevant entity and so, in this case, of the Sovereign under national law and then to ask on that Community law approach: Are they *public administrative functions*?

50. Also, as is pointed out at paragraph 48 of *Fish Legal EU*, if the relevant functions are *public administrative functions* the relevant entity only falls within Article 2(2)(b) if it is empowered to perform them by virtue of a legal basis specifically defined in the national legislation which is applicable to it.

### *The Crown in the sense of the government*

51. A classic and regularly used explanation of what the Crown is in this sense is that given by Lord Diplock in *Town Investments Ltd v Department of the Environment* [1978] AC 359. At 380F to 381D he said:

“To use as a metaphor the symbol of royalty, ‘the Crown’, was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will. But to continue nowadays to speak of ‘the Crown’ as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion. We very sensibly speak today of legislation being made by Act of Parliament – though the preamble to every statute still maintains the fiction that the maker was Her Majesty the participation

of the members of the two Houses of Parliament had been restricted to advice and acquiescence. Where, as in the instant case, we are concerned with the legal nature of the exercise of executive powers of government, I believe that some of the more Athanasian-like features of the debate in your Lordships' House could have been eliminated if instead of speaking of 'the Crown' we were to speak of 'the government' – a term appropriate to embrace both collectively and individually all of the Ministers of the Crown and Parliamentary Secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law."

(Explanations to the same overall effect can be found in the speech of Lord Simon in the *Town Investments* case at pages 397 to 401 and in the speech of Lord Templeman in *M v Home Office* [1994] 1 AC 377 at 395 B/G.)

52. As explained by that high authority, although the Crown is personified by the Sovereign, as a legal person and a constitutional monarch the Sovereign is not, and does not act as the Crown in the sense of government.

53. Rather the Crown in the sense of government is effectively a concept of our unwritten constitution to describe the public administration and executive of the state, or who those involved in it are and are acting for. To use the CJEU classification in *Fish Legal EU* at paragraph 51 which accords with the recital to the Directive and the UNECE guide (cited above) the Crown in that sense:

- i) is a description of the administrative central authorities and so entities which organically form part of the public administration and the executive of the state, and is **not**
- ii) a description of the Sovereign as a natural and so legal person carrying out duties or functions or exercising powers as part of the public administration and executive of the state at a national or a local level.

54. This constitutional classification means that there is a clear distinction to be made between on the one hand:

- i) the public administration and executive of the state at national and local level, on the one hand, and so the Crown in the sense of government, on the other hand, and
- ii) the Sovereign when he or she is exercising, as a legal person and as our constitutional monarch, prerogative, official, public and personal functions, roles, duties and powers, which we will refer to generically as the Sovereign's functions and powers.

55. These distinctions are also relevant to a consideration of the funding arrangements relating to the Sovereign that have been put in place over the centuries.

56. In short, the distinctions provide the basis for the determination of what the relevant functions, duties, rights and powers are and so whether, on a Community law approach, they are

public administrative functions applying the EIR and the Directive with the guidance given by the CJEU in *Fish Legal EU*.

57. Returning to the Crown in the sense of government, civil servants working in government departments are working for, or as, the Crown and the general position is that the functions and powers are given to the Secretary of State who is the head of a government department and officers and employees of the department make decisions that are treated as decisions of the Secretary of State or of the Crown under the *Carltona* principle (see *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560). Also under the Crown Proceedings Act 1947 (see section 17) the Crown in the sense of government can be sued in the name of government departments.

58. Transposing that to an individual (X) conducting his own business or private affairs he may do so through others (employees, officers or staff) who are acting with his express and/or ostensible authority. But although, like the civil service or a government department, that group of people could be identified by a collective description, the members of that group when acting for X will not, as such, have legal personality or be exercising X's functions or powers as a body or entity with its own separate identity.

#### *The Royal Household*

59. As we have mentioned it became common ground that for our purposes the relevant functions and powers of (i) the Sovereign, and (ii) the individuals who make up the Royal Household and so collectively the Royal Household are co-extensive. We agree with that approach.

60. It is clear that under English law the Royal Household has no separate legal personality and is not an unincorporated association or a partnership. The same can be said of Government Departments and civil servants as a group.

61. A number of groups of people are set up by decisions made by such administrative authorities (eg within Government Departments) to carry out public functions. Some of these are called Non-departmental public bodies ("NDPBs"). Some of those groups of people will be given a legal personality and others will not. Who they are responsible to will depend on who has set them up and their functions. On its own, their source of funding does not show whether they are (a) a part of or a public authority, or (b) responsible to a public authority.

62. The group of individuals that is referred to as the Royal Household (and so its members) serve and so act for and on behalf of the Sovereign as employees and in some cases also as the holders of ancient offices.

63. The members of the Royal Household (and so collectively the Royal Household) do not act for and on behalf of the Crown in the sense of government.

64. It follows that the roles, duties and powers conferred on the members of the Royal Household are directed to the implementation of the Sovereign's functions and powers. Equally the public moneys voted and paid to the Royal Household are provided to promote the ability of the Sovereign to perform the Sovereign's functions and powers. In broad and private law terms when dealing with outsiders the members of the Royal Household are agents for a disclosed principal, namely the Sovereign and the Sovereign is the X referred to in paragraph 58 above.

#### *The Sovereign's functions and powers*

65. In his report Professor Blackburn gives a description of these and says:

“... the Monarch still [personally performs] certain remaining common law Royal Prerogative powers serving as the formal and ceremonial process for their execution and entry into legal effect. Some of these functions are formalities relating to completion of a legislative process notably Royal Assent to Parliamentary Bills and subordinate legislation made by Orders of the Privy Council, and other functions provide the legal and ceremonial method by which public appointments as determined by the Prime Minister or the relevant Minister (and in the case of Prime Ministerial appointment by established convention) are put into effect. Beyond the formal exercise of the Royal Prerogative, the Monarchy as the hereditary titular Head of State performs ancillary de facto public functions in support and encouragement of the government of the day, an apolitical role in fostering international relations, and providing recognition of service to the community. Fundamental to the working of the Monarchy in all respects is the constitutional principle of Ministerial responsibility, meaning that the actions of the Monarch – and his tenure of office – ultimately rests upon conformity with advice tendered to him by the Prime Minister.

66. This description covers what we have referred to as the Sovereign’s functions and powers. Some of them relate to the government of the state and so acts of the Crown in the sense of government. Unsurprisingly, Mrs Cross places weight on them to found the conclusion that their existence and personal exercise make the Sovereign a public authority. In particular, she relied on the Sovereign’s role in making Orders in Council and pointed us to examples of statutes giving this power in connection with matters that clearly have an impact on the environment (eg the Burial Acts of 1853 and 1857).

67. She also pointed out that, although the making of Orders in Council is part of the legislative process and so on the face of it excluded by regulation 2(3) of the EIR, the ruling of the CJEU in *Flachglas Torgau GmbH v Germany* C-204/09, EU:C:2012:71, [2013] QB 212 at 248C and earlier at paragraphs 52 to 58 shows that such a wide approach to that exclusion cannot be taken because that power of exemption is limited to the period that the public authority is acting in the legislative process and so, after that process has come to an end, it cannot be relied on in respect of a request for environmental information made available during the process.

68. So we accept that the regulation 2(3) exemption cannot be relied on to exclude all powers of the Sovereign relating to the legislative process.

69. Helpfully Mrs Cross and the Cabinet Office provided a list of matters they relied on to support their rival contentions. We set them out in Parts 1 and 2 of the Schedule hereto. The dispute related to their effect or classification rather than their existence.

70. A general point applies to all of the matters relied on by Mrs Cross and so to the functions and powers of the Sovereign that are and are not part of the legislative process. Examples of the latter are the appointment and dismissal of the Prime Minister, appointments of a range of office holders (eg judges), dissolving Parliament, opening Parliament, awarding certain classes of Honours, and acting as Head of the Church of England and Head of the Armed Forces. In respect of all of these the Sovereign’s role is symbolic and does not include any executive role in the direction or administration of the relevant body.

71. This general point is that taking the correct approach, namely one based on substance not form (see the decision of the Upper Tribunal in *Fish Legal UK* at [106]), the existence and



exercise of all of the powers, duties and functions of the Sovereign relied on by Mrs Cross and the Sovereign's role as Head of State do not mean that the Sovereign is a part of the government and so a public authority because, as a matter of substance, the Sovereign holds and exercises all of them in a formal, ceremonial or personal capacity and not in an executive or administrative capacity. Put another way, as part of our constitutional law the Sovereign does not have an executive or administrative role to play in exercising the Sovereign's Function and Powers.

72. This conclusion and so the effect to this general point:

- i) is founded on an important aspect of the substance of our system of government under our unwritten constitution and of the role of our constitutional monarch as Head of State in respect of it which we have dealt in paragraphs 51 to 57 above. There we accept a number of the matters relied on by the Cabinet Office set out in Part 2 of the Schedule hereto and the kernel of that part of its case, and
- ii) reflects the distinction between the Crown in the sense of government (ie those carrying out executive and administrative function as part of the central or local government) and the Sovereign when exercising the Sovereign's functions and powers.

73. Mrs Cross sought to rely on the position of other Heads of State who have been made public authorities on their state's implementation of the Directive (eg those of Germany and Bulgaria). This does not assist because, as we have already mentioned in the context of the Historic Royal Palaces Trust it is open to states to provide broader access than required by the Directive and their inclusion (and as it seems to us some of the public authorities listed in Schedule 1 to FOIA) is at least arguably based on that ability. And, in any event, it would be based on that state's conclusion on the extent of the Directive. Also, analogies between a Head of State named as a public authority in one state with one not named in another cannot be validly made without a detailed analysis of the relevant constitutional arrangements.

74. Rather the relevant question is whether the Sovereign's functions and powers generally, or those that are relied on or particularly emphasised by Mrs Cross, mean that, on a Community law approach the Sovereign is acting as an organic or functional administrative authority and so as a public authority (as defined).

*Article 2(2)(a) of the Directive – regulation 2(2)(a) and (b) of the EIR*

75. For the reasons set out above, for present purposes the Sovereign is not the Crown in the sense of government and so is not part of the government at national, regional or other levels.

76. It is also difficult to see how the Sovereign could be included within regulation 2(2)(a) and (b) of the EIR as the Sovereign is clearly not a government department, is not listed or described in Schedule 1 to FOIA and the addition of the Sovereign or the Royal Household to that list would not fit easily with section 37 of FOIA.

*Article 2(2)(b) of the Directive – regulation 2(2)(c) of the EIR*

77. This introduces the functional test that was the subject of the guidance given by the CJEU in *Fish Legal EU*.

78. Mr Eadie for the Cabinet Office argued that:

- i) the CJEU uses the phrase “*services of public interest*”, or the materially identical phrase “*services in the public interest*”, in very many cases,
- ii) virtually without exception, the context for its use carries connotations of services to or for the public that may be provided by a private body but that are of particular importance to citizens; and that would not be supplied (or would be supplied under different conditions) if there were no public intervention, and thus the phrase is typically used in cases which concern matters such as water supply; electricity; gas; waste disposal; railways; postal services; telecommunications; broadcasting or bus services (see for example (apart from *Fish Legal* itself) *Commission v Spain* C-463/00, EU:C:2003:272, [2003] ECR I-4581 at paragraph 66; *Commission v France* C-483/99, EU:C:2002:327, [2002] ECR I-4781 at paragraph 43; *Re Mrozek* C-335/94, EU:C:1996:126, [1996] ECR I-1573, [1996] 2 CMLR 764 at paragraphs 15–16; *Federconsumatori and Associazione Azionariato Diffuso v Comune di Milano* C-463/04 and C-464/04, EU:C:2007:752, [2007] ECR I-10419 at paragraph 41),
- iii) the phrase “*services of public interest*” is closely analogous to the phrase “*services of general economic interest*”, a concept well known in the EU law of procurement and State aid, referring to economic activities that are of particular importance to citizens and that require State intervention for their supply,
- iv) so it is easy to comprehend why the CJEU takes as its starting point a phrase carrying connotations of services provided to or for the public, but often by non-State bodies, and
- v) it is wholly artificial to view the functions performed by the Royal Household as “*services of public interest*” in this sense. They are not services provided to or even for the public at all. They are support functions for the Sovereign. Only in the most strained sense – and not a sense which the CJEU has ever adopted in its case law – could they ever come within the phrase “services of public interest”.

79. Miss Proops, for the Information Commissioner, argued that:

- i) the reference to “*including etc*” in the Directive and so “*inter alia etc*” by the CJEU was by way of example,
- ii) the description “services of public interest” does not have the limited meaning attributed to it by the Cabinet Office and was a description that should be given a wide meaning and one that was wide enough to include the powers, duties and position of the Sovereign relied on by Mrs Cross in this case (including but not limited to those relating to the occupied Royal Palaces) and so what we have called the Sovereign’s functions and powers, but
- iii) the Sovereign had no special powers because all the powers relied on were formal or ceremonial, and
- iv) as we understood that part of her argument, and notwithstanding the common ground referred to in [4] above, in any event none of them related to the environment.

80. Mrs Cross argued that:

- i) the function and position of the Sovereign and the powers and duties she has to fulfil her roles, in particular, (a) as Head of State, in respect of the making of Orders in Council (particularly the need for her personal participation, and her ability to make emergency regulations), and (b) in respect of the occupied Royal Palaces (which she says would be done by the government and so the Crown if the Sovereign gave them up) mean that the Sovereign is a public authority as defined by Article 2(2)(b) because she performs functions of public administration,
- ii) in support of that she relies on the provision of funding of the Sovereign by Parliament to enable her to carry out or to assist her in carrying out the functions and powers she relies on and the provisions that enable the Regent or Counsellors to perform functions of the Sovereign when the Sovereign is unable to do so,
- iii) in agreement with the Information Commissioner that “*services of public interest*” has a wide meaning and that the reference to “*including*” in the Directive and “*inter alia*” in the *Fish Legal EU* judgment were to examples of what public authorities do,
- iv) the special powers referred to in *Fish Legal EU* do not have to relate to the environmental field,
- v) the special powers do not have to be decision-making powers, and
- vi) in any event, some of the powers relate to the making of legislation that has an impact on the environment (eg under the Burial Acts).

81. *Our analysis.* The summary of the arguments shows that we were presented with a wide range of argument on how to interpret and apply the relevant language, or to adopt what was said by the Upper Tribunal in *Fish Legal UK* to “hunt the snark”.

82. Under the heading *Fish Legal* we have set out our views on the approach to be taken to the application of the functional test or description test in paragraph 52 of *Fish Legal EU* (see [34] to [41] above). Additionally, under the heading *the Sovereign’s functions and powers* we have addressed some of the arguments put to us. We now turn to the application of those conclusions to this case and other arguments raised in it by the parties.

83. *The references in Article 2(2)(b) and paragraph 52 of Fish Legal EU to the environment.* Mrs Cross and the Information Commissioner argued that these references are merely examples. We do not agree.

84. We express our views on this argument although it can be said to be academic because (a) as appears below (see [101] below) we accept that the Sovereign performs service of public interest in respect of the occupied Royal palaces, and (b) the common approach before us which we have adopted is that the functional test does not require that she has to have special powers vested in her to do so.

85. As we have said there is a hierarchy to the provisions. This must not be approached too rigidly but it is clear that, at the first tier, the intention was that it did not matter whether entities that are organically administrative authorities were performing functions relating to the environment and that if such entities held environmental information it could be requested under the Directive (see for example the UNECE guide, Recital (11) the Directive and paragraph 50 of *Fish Legal EU*).

86. At the next tier, it seems to us that the natural meaning of the language of Article 2(2)(b) of the Directive “*performing public administrative functions under national law, including specific duties, activities or services relating to the environment*” is not referring to those duties by way of example of what would be public administrative functions. Rather, the meaning (and it seem to us the intention) of that language is that to satisfy the functional test the relevant entity must under national law be performing “*specific duties etc relating to the environment*”.

87. This approach to the language clearly reflects Recital (11) of the Directive and in our view that is the effect of Article 2(2)(b) of the Directive.

88. The purposive argument to the contrary is that it was intended that the Directive was to have and be given a broad application and so the functional test should include any entity that under national law was performing any administrative functions. In support of that Mrs Cross referred us to the sentence in the UNECE guide (cited at [16] above): “*As in subparagraph (a), the particular person does not necessarily have to operate in the environmental field*”. That guide is not binding. But, in any event, it seems us that, if it is read as Mrs Cross suggests, it runs counter to Recital (11) to the Directive. Further, in our view, rather than supporting the proposition that the functional test can be satisfied by an entity that does not have any specific duties etc in relation to the environment (and so in the language of the CJEU is not entrusted with any services of public interest in the environmental field), this sentence of the UNECE guide supports the common ground that in applying the approach set by the CJEU to the functional test the special powers do not have to relate to the services of public interest in the environmental field.

89. If the broad “example approach” argued for by Mrs Cross and the Information Commissioner was intended at the functional stage we see no need for Article 2(2)(b) to refer to specific duties etc in relation to the environment, or for the CJEU to refer to services of public interest *inter alia* (amongst others) in the environmental field as examples of what administrative functions can be, or why such examples would assist in identifying other public administrative functions.

90. Also, if at the functional stage an entity does not have to be performing services of public interest in the environmental field, it is not clear to us why the control test at the next tier must be over functions etc relating to the environment whether it exists only over those functions or arises because of control of the relevant entity.

91. More generally, it seems to us that when you move from an organic description to a functional one, or one based on control, in respect of a Directive designed to give access to environmental information it is natural to provide that, at the second and third stages, the relevant entity has to have relevant public interest functions in the environmental field.

92. Further, in our view the broad “example approach” does not accord with the natural meaning of paragraph 52 of the judgment of the CJEU in *Fish Legal EU*. There “*inter alia*” and so “*amongst others*” describes what the entity has to be entrusted with under the relevant regime and so what has to be included within the “*services of public interest*” so entrusted to the entity and it is not introducing an example of what might be a “*service of public interest*”.

93. *Linkage between organic and functional public authorities.* The opening reference in paragraph 52 of *Fish Legal EU* to “*administrative authorities defined in functional terms*” provides a clear link between a public authority at the second tier of the hierarchy and the entities which, organically, are *administrative authorities* at the first tier of the hierarchy. This is

because it states that this category again concerns *administrative authorities* but defined in functional terms rather than by an organic approach.

94. In our view, this means that what the entity does must have a sufficient connection with what entities that are organically part of the administration or the executive of the state do.

95. In our view, by paragraph 52 of *Fish Legal EU* the CJEU captures the need for this link by referring to entities (a) being entrusted with the performance of services of public interest, and (b) being vested with special powers. That combination is important because it is what makes a service of public interest one that counts or qualifies in determining whether the entity is an administrative authority and so a public authority under the functional definition (see [39] and [40] above).

96. In our view, the use of these combined factors to describe what counts or qualifies for consideration under the functional test means that it is not appropriate to proceed on the basis that the CJEU was referring to *services of public interest* in a way in which it has used that description and “*services of general economic interest*” in other contexts. However, this does not mean that those contexts do not on an application of a Community law approach inform what are and are not the functions and special powers that together mean that the relevant entity is within the functional definition of an administrative authority and of a public authority.

97. It follows that we do not accept the submission made on behalf of the Cabinet Office that “*services of public interest*” was used in a special sense by the CJEU. Rather, it was stating that the combination of what the relevant entity is entrusted to perform (services of public interest) and the special powers given to it to assist it to do so is what has to be considered in determining whether the entity is a public authority.

98. *The applicable legal regime.* As mentioned in [40] above, we consider that both the services of public interest and the special powers must be entrusted to and vested in the relevant entity by the legal regime applicable to that entity. In our view, this linkage points to a conclusion that the combination of the performance of the services entrusted to an entity and the powers vested in it to perform those services (in the words of paragraph 52 “*for this purpose*”) must provide a sufficient connection between what entities that are organically part of the administration or the executive of a state do and what entities that qualify under the functional test do. So here the combination of the functions, services and powers relied on must provide a sufficient link between (a) the Sovereign, and (b) the Crown in the sense of government.

99. *Rigidity / flexibility.* In our view, the general approach to the interpretation of a Directive and Regulations to implement it carries over to the interpretation and application of the functional test as set or described by the CJEU with the result that the CJEU description should not be applied in place of the tests set by the Directive and the EIR. Rather, it is important and binding guidance on what those tests mean and how they are to be applied, and like the test set by the Directive, the test set by the CJEU (which contains concepts and words that have a range of meaning) should be applied so as to give effect to the underlying objectives and purposes of the Directive including those relating to its breadth and the public interest in environmental information being made available to the public.

100. It follows that the CJEU test should not be applied rigidly or without reference to, and a cross check with, both the words of the Directive and the EIR and their underlying objectives and purposes. That cross check involves standing back and asking whether in all the circumstances of the case the combination of what are, or are arguably, the factors identified by

the CJEU in its test result in the relevant entity being a functional public authority. The key issue on that approach is whether taking these factors together there is a sufficient connection between the Sovereign's functions and powers that are relied on and what entities that organically are part of the administration or the executive of a state do.

### **Conclusions applying our analysis**

101. We accept that the relevant functions and powers of the Sovereign include functions and powers in the environmental field in connection with the occupied Royal Palaces and some legislation. We also accept that the public has an interest in their performance that includes a public interest in the environmental issues that they engage being properly addressed and access to that environmental information. The best example of this is the management and upkeep of the occupied Royal Palaces which are held for the nation.

102. However, no special powers were identified that assist the Sovereign in the management and upkeep of the occupied Royal Palaces. She has no powers in respect of them that do not result from the normal rules applicable in relations between persons governed by private law. Sovereign immunity under the Crown Proceedings Act 1947 is not a power but it emphasises that in her personal capacity the Sovereign is not a part of the executive or the administration.

103. Also the receipt of funds voted by Parliament is not a power and its relevance, if any, is confined to the control issue in the next category or tier of the definition of a public authority.

104. The Sovereign's role in respect of that management and upkeep through the Royal Household, and its funding, is the product of our constitutional history and not simply its last step which has had the result that the Sovereign has the responsibility of managing and maintaining these buildings that are held for the nation. That history and final step has no connection, or no connection of any substance, to what the Crown in the sense of government does and so with what administrative authorities do as part of the public administration or the executive of a state. This is so even though that management and function could be done by a government department and might in the future be done by a government department.

105. So, in respect of the Sovereign's Functions relating to the occupied Royal Palaces:

- i) the Sovereign has no special powers and the combination of factors identified by the CJEU for those functions to count or qualify under the functional test does not exist, and in any event
- ii) standing back in the manner and asking the key question suggested above, the Sovereign is not performing such functions as a part of the government or executive of the State (and so as the Crown in the sense of government) even though (a) there is a public interest in the environmental issues that they engage being properly addressed and in the public having access to that environmental information, and (b) in the future, they might be performed by a government department (or other public authority).

106. Turning to the other functions and powers of the Sovereign relied on by Mrs Cross, we repeat that some relate to legislation that has a direct impact on the environment. Many do not relate to the environment but on the common ground before us they could be relied on to satisfy the functional test.

107. We agree that these functions and powers of the Sovereign are of constitutional importance and so, in that sense, they can be classified as services of public interest, because the public is affected by their performance and product (eg by the coming into effect of legislation).

108. Whilst we agree that these Sovereign's functions and powers (including those in respect of legislation) do not result from the normal rules applicable in relations between persons governed by private law this is because they have nothing to do with that aspect of the law.

109. Rather, all of the relevant functions and powers of the Sovereign result from our constitutional law and, applying that regime of law, they are not a part of what the Crown in the sense of government does and so of what administrative authorities do as part of the public administration or the executive of a state. So, in our view they are not powers of a type contemplated by the CJEU when it was referring to special powers in their description of the functional test for determining what is an administrative authority and so a public authority (as defined).

110. Further, as a matter of constitutional law all of the functions and powers of the Sovereign that are relied on are formal, ceremonial or personal and not a part of what our administrative authorities do as part of the public administration or the executive of a state.

111. So in respect of the other functions and powers of the Sovereign that are relied on by Mrs Cross:

- i) the Sovereign has no special powers in the sense in which they are referred to by the CJEU and so the combination of factors identified by the CJEU for those functions to count or qualify under the functional test does not exist, and in any event
- ii) standing back in the manner and asking the key question suggested above, the Sovereign is not performing any such functions as a part of the government or executive of the State (and so as the Crown in the sense of government) even though there is a public interest in them being performed.

112. The point that in certain circumstances the Sovereign's Functions and Power can be exercised by someone else makes no relevant difference to their nature.

*Regulation 2(2)(c) of the EIR*

113. Potentially this is wider than Article 2(2)(b) because it makes no reference to the environment. In this case this does not matter because the Sovereign does have some duties and activities relating to the environment but for the reasons we have given in respect of our conclusion on the application of Article 2(2)(b) of the Directive we have concluded that the Sovereign does not carry out functions of public administration.

*Article 2(2)(c) of the Directive and regulation 2(2)(d) of the EIR*

114. Mrs Cross did not rely on these provisions. In our view, she was correct not to do so.

115. Returning to the initial and abandoned debate on the application of this test to the Royal Household, it is under the control of the Sovereign who, in our view, is not a public authority as defined.

116. Even if it was accepted, which we do not, that the Sovereign was an entity with the environmental functions set out, the Sovereign is not under the control of a public authority.

117. The facts that the Sovereign is funded by public money voted by Parliament and, for example, the Keeper of the Privy Purse has to account to Parliamentary committees do not mean that the Sovereign is under the control of the providers of the moneys be they classified as Parliament, the executive, government or administrative authorities. That office holder, and so indirectly the Sovereign, may be criticised or invited to consider doing something by such a committee and may act on such a criticism or invitation but they do not have to and the Sovereign is not controlled by terms or conditions relating to the provision of public funds or that funding itself.

118. The management and upkeep of the occupied Royal Palaces is therefore not controlled by a public authority.

119. Convention and practice results in the other functions and powers of Sovereign that are relied on by Mrs Cross being exercised on the advice of ministers, and others, who do form part of the government. But, in our view this does not amount to control.

#### *Hybridity*

120. It was argued before us by the Information Commissioner and the Cabinet Office that the conclusion on the application of this principle in *Fish Legal EU* (namely that it did not apply to public authorities under Article 2(2)(b) of the Directive) did not apply to natural persons and so, if the Sovereign was a public authority the hybridity principle would apply to her.

121. If we were to conclude as we have that the Sovereign is not a public authority it was common ground that we need not and should not address this argument; we agree.

## **SCHEDULE**

### **PART 1**

#### **Matters relied on by Mrs Cross**

#### The Royal Household

- The Royal Household provides advice and administrative assistance in support of the official duties of the Sovereign including, advising and assisting the Sovereign in relation to constitutional and governmental matters, dealing with the Sovereign's official correspondence, organising the Sovereign's official programme, supporting the Sovereign in respect of Her duty to receive credentials from foreign Heads of Mission, organising investitures and accounting to Parliament for the use of public funds.
- The Royal Household's support for the Queen's Official Duties and the Maintenance of the Royal Palaces is funded by the Sovereign Grant. Funding for the Sovereign Grant comes from a percentage of the profits of the Crown Estate revenue. The level of the grant is reviewed every five years by the Royal Trustees (the Prime Minister, the Chancellor of the Exchequer and the Keeper of the Privy Purse).



- The Sovereign Grant Act 2011 made the Royal Household to be the subject of the same audit scrutiny as other government expenditure, via the National Audit Office and the Public Accounts Committee. The Keeper of the Privy Purse is required by section 2(1) to prepare annual financial accounts of the Royal Household and to keep proper accounting records relating to the Royal Household.

### The Monarch and the Constitution

- Some prerogative powers may only be exercised and take effect in law by the Sovereign personally and as such, the Sovereign's personal involvement cannot be circumvented. These powers are referred to as direct prerogative powers. Direct prerogative powers include the Royal Assent to legislation, the appointment of the Prime Minister and certain other ministers and members of the Privy Council, the summoning of new Parliaments and the opening of the annual Parliamentary sessions and the making of orders in Council.
- The Monarch, together with the House of Commons and the House of Lords, is one of the three components of Parliament. The Monarch's formal assent to a Bill is required before it can have the force of law.
- The Monarch appoints various senior public officials, mainly by Letters Patent. These include the Lord Chancellor, Lord Privy Seal, Justices of the Supreme Court, Lords Justices of Appeal, High Court Judges, district judges and members of the House of Lords.
- Orders in Council are orders that have been approved at a meeting of the Privy Council personally by the Queen. Statutory Orders are made under any of the numerous powers contained in Acts of Parliament which give Her Majesty a Power to make Orders. Most statutory Orders in Council are Statutory Instruments.
- Oaths of Loyalty are taken by many public office holders to Queen Elizabeth II personally, and to her heirs and successors.
- The Sovereign has the power to make emergency regulations by Order in Council in the event of an emergency as defined by section 1 of the Civil Contingencies Act 2014. Emergency regulations may make any provisions which the person making the regulation is satisfied are appropriate for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made. Emergency regulations may make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative.
- If the Sovereign is judged by reason of "infirmity of mind or body" to be incapable of performing "the Royal functions" in accordance with the Regency Act 1937, then these functions may be performed on behalf of the Sovereign by a Regent. A Regent does not have the power to alter the order of succession.
- If the Sovereign is suffering from some other illness, or is absent from the United Kingdom, then the Sovereign may appoint Counsellors of State in order to prevent delay or difficulty in the dispatch of public business. Counsellors of State are appointed by Letters

Patent under the Great Seal. The powers that are delegated to the Counsellors of State are specified in the Letters Patent.

## PART 2

### Matters relied on by the Cabinet Office

#### The Monarch and the Constitution

- The UK does not have a codified constitution. There is no single document that describes, establishes or regulates the structures of the state, including the monarchy. Instead, the constitutional order has evolved over time and continues to do so.
- There is a distinction under the UK's constitution between the "Crown as executive", describing Ministers of state and the collective structure of central government in the UK and the "Crown as Monarch," describing the personal aspect of the Monarch as Head of State. In general, the rubric "the Crown" as used in English public law refers to the former, fictional, sense of the term.
- Most prerogative powers are in practice exercised by Ministers or officials in the name of The Queen.
- To the extent that The Queen has personal prerogative powers relating to executive or legislative functions, she does not herself decide how to exercise those powers, but acts as the formal or ceremonial conduit for the exercise of the powers. Such prerogative powers are exercised entirely according to established constitutional convention, or on the advice of Ministers. Examples of such functions are the making of Orders in Council; the appointment or dismissal of the Prime Minister; and giving assent to Parliamentary Bills.
- Those prerogative powers that are in substance exercised by The Queen personally are formal or ceremonial: eg the awarding of a small number of personal honours.
- The Queen is Head of the Commonwealth and also the Supreme Governor of the Church of England. The Monarch also holds the symbolic position of Head of the Armed Forces. However, the Monarch does not perform any executive role in the direction or administration of the Church of England or of the Armed Forces.