JUDGMENT OF THE COURT

16 December 2013[*]

(Directive 2003/98/EC on the re-use of public sector information – Principles governing charging – Transparency – Notion of cost – Self-financing requirements)

In Case E-7/13,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), in the case of

Creditinfo Lánstraust hf.

and

Registers Iceland and the Icelandic State

concerning the interpretation of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Creditinfo Lánstraust hf. ("the plaintiff"), represented by Reimar Pétursson, Supreme Court Attorney;

[*] Language of the request: Icelandic.

- Registers Iceland and the Icelandic State ("the defendants"), represented by Einar Karl Hallvarðsson, State Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir and Catherine Howdle, Officers, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Gerald Braun and Nicola Yerrell, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Reimar Pétursson; the defendants, represented by Einar Karl Hallvarðsson; ESA, represented by Catherine Howdle; and the Commission, represented by Nicola Yerrell, at the hearing on 23 October 2013,

gives the following

Judgment

I Legal background

EEA law

1 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ 2003 L 345, p. 90) ("the Directive") was added to point 5k of Annex XI to the EEA Agreement by Decision 105/2005 of 8 July 2005 of the EEA Joint Committee (OJ 2005 L 306, p. 41). The Decision entered into force on 1 September 2006.

2 Recitals 5, 9 and 14 of the preamble to the Directive read:

> *(5) One of the principal aims of the establishment of an internal market is the creation of conditions conducive to the development of Community-wide services. Public sector information is an important primary material for digital content products and services and will become an even more important content resource with the development of wireless content services. Broad cross-border geographical coverage will also be essential in this context. Wider possibilities of re-using public sector information should inter alia allow European companies to exploit its potential and contribute to economic growth and job creation.*

> *(9) This Directive does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned. This*

Directive should apply to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information.

(14) Where charges are made, the total income should not exceed the total costs of collecting, producing, reproducing and disseminating documents, together with a reasonable return on investment, having due regard to the self-financing requirements of the public sector body concerned, where applicable. Production includes creation and collation, and dissemination may also include user support. Recovery of costs, together with a reasonable return on investment, consistent with applicable accounting principles and the relevant cost calculation method of the public sector body concerned, constitutes an upper limit to the charges, as any excessive prices should be precluded. The upper limit for charges set in this Directive is without prejudice to the right of Member States or public sector bodies to apply lower charges or no charges at all, and Member States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs for reproducing and disseminating the documents.

3 According to its Article 1, the Directive establishes a minimum set of rules governing re-use and the practical means of facilitating the re-use of existing documents held by public sector bodies.

4 Article 2(4) of the Directive defines re-use as follows:

the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use.

5 Article 6 of the Directive on principles governing charges reads:

Where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment. Charges should be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the public sector bodies involved.

6 Article 7 of the Directive on transparency reads:

Any applicable conditions and standard charges for the re-use of documents held by public sector bodies shall be pre-established and published, through electronic means where possible and appropriate. On

request, the public sector body shall indicate the calculation basis for the published charge. The public sector body in question shall also indicate which factors will be taken into account in the calculation of charges for atypical cases. Public sector bodies shall ensure that applicants for re-use of documents are informed of available means of redress relating to decisions or practices affecting them.

National law

7 The Directive was implemented into Icelandic law by Act No 161/2006, amending the Information Act No 50/1996 by adding a new chapter (Chapter VIII on the re-use of public information). On 1 January 2013, after the commencement of the proceedings in the present case before the national court, the current Information Act No 140/2012 entered into force. Chapter VII of the current Act, on the re-use of public information, corresponds to Chapter VIII of the previous Act as amended.

8 Pursuant to the sixth paragraph of Article 27 of the Information Act No 50/1996, it is permissible to charge for the provision of access to information from public files. The public authority concerned shall establish a schedule of fees, to be confirmed by the Minister.

9 Registers Iceland is a governmental institution that operates under the supervision of the Minister of the Interior. The tasks carried out by Registers Iceland include registration of a range of information about residents and real properties. Registers Iceland provides services such as assessment, electronic access to its registers and the issuing of certificates, passports and ID cards. Sale prices and the methods of payment for every sale of land are collected in the Land Registry Database, and they are used for the calculation of economic indicators, such as the real estate price index.

10 Pursuant to Article 24, read together with paragraph 2 of Article 9, of Act No 6/2001 on the Registration and Assessment of Property, Registers Iceland may process and disseminate to third parties information from the Land Registry Database.

11 The same provision entitles Registers Iceland to charge fees for such processing and dissemination, in accordance with a special tariff of fees that is approved by the Minister of the Interior. Under Article 9 of Act No 6/2001, the cost of running individual parts of the institution shall be taken into account when deciding the amounts in the tariff, and they must be presented separately in the accounts. It also provides that the tariff of fees shall be reviewed annually.

12 Article 14 of the Additional Treasury Revenue Act No 88/1991 provides for the level of fees that can be charged for information related to registered deeds.

II Facts and procedure before the national court

13 The plaintiff is engaged in recording and communicating information on financial matters and creditworthiness, and related services. In the course of its business, it seeks information and data from public sector bodies, including the first defendant, Registers Iceland.

14 Between 2004 and 2007, the plaintiff entered into a series of contracts with the National Land Registry concerning access to information. In 2010, the National Land Registry merged with the National Registry to form Registers Iceland.

15 Registers Iceland has charged the plaintiff fees for the disclosure of information and data. The plaintiff has brought an action before the national court for the repayment of fees for the period between 11 January 2008 and 31 December 2011. Since the tariffs were approved by the Minister of Finance, the plaintiff also brings its action against the Icelandic State.

16 In its request, registered at the Court on 29 April 2013, Reykjavík District Court has referred the following questions:

1. *Is it compatible with EEA law, and specifically with Article 6 of Council Directive 2003/98/EC, on the re-use of public sector information (cf. the Decision of the EEA Joint Committee, No 105/2005, amending Annex XI (Telecommunication services) to the EEA Agreement), to charge a fee on account of each mechanical enquiry for information from the register if no calculation of the 'total income' and the 'cost', in the sense of Article 6 of the Directive, is available at the time of the determination of the fee?*

2. *Is it compatible with Article 6 of the Directive if, when the 'cost' subject to Article 6 of the Directive is determined, no account is taken of:*

    a. *income accruing to the State when documents are collected, in the form of fees paid by individuals and undertakings for the recording of contracts in the registers of legal deeds, and*

    b. *income accruing to the State when documents are collected, in the form of taxes which are levied as stamp duties on recorded legal deeds at the time when individuals and undertakings apply to have them recorded in the registers of legal deeds?*

3. *Is it compatible with Article 6 of the Directive if, when the 'cost' pursuant to Article 6 of the Directive is determined, account is taken of costs incurred by a public sector body in connection with the collection of documents which it is legally obliged to collect, irrespective of whether or not individuals or undertakings request to re-use them?*

4. *Is it compatible with Article 6 of the Directive if, when the 'cost' pursuant to the article is determined, the legislature sets the amount of the fee in*

legislation without any particular amount being made subject to substantive examination?

5. *Would it be compatible with Article 6 of the Directive if, when the 'cost' pursuant to the Directive is determined, appropriate account were taken of a general requirement in national legislation that public sector bodies be self-financing?*

6. *If the answer to Question No 5 is in the affirmative, what does this involve in further detail and what cost elements in public sector operations may be taken into account in this context?*

17 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The first and fourth questions

18 The first and fourth questions both concern the methods used to calculate charges for the re-use of public sector information, and transparency requirements in this regard under Article 6 of the Directive. By its first question, the national court asks whether it is compatible with that provision to charge a fee for each mechanical enquiry for information if no calculation of the total income or cost is available when the fee is determined. By its fourth question, the national court asks whether it is compatible with the same provision for the legislature to set the amount of the fee in legislation without any particular amount being made subject to substantive examination. The Court finds it appropriate to assess these two questions together.

19 The national court has limited its questions to the interpretation of Article 6 of the Directive. However, in order to provide a useful reply, the Court finds that the references in the first and fourth questions to Article 6 of the Directive should be read as also including a reference to Article 7 of the Directive.

Observations submitted to the Court

20 The plaintiff submits that the first and fourth questions must be answered in the negative. The Directive imposes a duty on Member States to calculate the charges levied for the re-use of information. Pursuant to Article 6 of the Directive, charges shall be calculated in line with the accounting principles applicable to the public sector bodies involved. Thus, determining a charge for re-use without a basis in cost calculations cannot be compatible with Article 6.

21 According to the plaintiff, this view is supported by Article 7 of the Directive. This Article imposes a transparency obligation on the Member States, since standard charges for re-use shall be pre-established. Furthermore, the public sector body involved shall, on request, indicate the calculation basis for the

published charge and also which factors will be taken into account in the calculation of charges for atypical cases.

22 The plaintiff observes that scenarios are conceivable, in particular where digital data are concerned, where EEA States could determine charges on a marginal-cost basis that are manifestly lower than the upper limit set by Article 6. Only in such scenarios would a calculation not be necessary.

23 In the defendants' view, Article 6 stipulates that the total income from supplying and allowing re-use of documents should not exceed the cost incurred in producing the information. The calculation of the cost must to some extent be based on a reasonable estimate, in line with the accounting principles applicable to the public body in question. However, the provision does not state that calculations of the estimated cost and income should be provided to the user or made available at the time of determination of the fee.

24 According to the defendants, there is no doubt that, in the present case, information about the total income from supplying and allowing re-use of the information is readily available and verifiable, that is, the total income from the charges collected for the services in question. In general, the total cost calculations have been based on the estimated financing needs of Registers Iceland. Examination of the cost can be carried out ex-ante by the public authorities, subject to ex-post judicial review. Calculations of the cost of collection, production, reproduction and dissemination of the information are available and have been presented to the national court.

25 ESA asserts that Articles 6 and 7 of the Directive should be read together. Article 6 establishes the limits on the level of fees that may be charged, while Article 7 ensures that the charges made are transparent.

26 In ESA's view, Article 6 precludes a situation in which the total income exceeds the cost of collection, production, reproduction and dissemination of the documents for re-use, together with a reasonable return on investment. The Article must be interpreted as imposing a burden of proof on the public sector body to demonstrate that the charges are compatible with the Directive.

27 Article 7 obliges the State to ensure transparency by two means: first, through the publication of standard charges, and, second, by obliging the public sector body to show how these standard charges are calculated. The calculation basis must be indicated upon request, but it need not have been disclosed before that time.

28 ESA suggests that it would be open to the national court to conclude that the fact that Registers Iceland bases fee levels on provisions that provide exact amounts for specific types of information fulfils the requirement in Article 7 that the fees must be pre-established and published.

29 However, it is clear from the wording of the Directive that, on request, Registers Iceland must be able to specify the calculation basis for the published charges.

The national court does not state whether the defendants have fully explained the calculation basis for the published charges. ESA notes in this connection that the national court may ask Registers Iceland to justify the application of the tariffs in question to its practices and charges.

30 The Commission submits that, by virtue of Article 6, any charges must be calculated in such a way as to ensure that the total income does not exceed the defined ceiling. It follows that, when fixing a charge, a substantive examination must be carried out of the total cost and income over an appropriate accounting period.

31 The Commission admits that this may give rise to certain practical difficulties, particularly in the first accounting period after the release of information for re-use, when there may be very little evidence of how many re-users are likely to be interested in that information. However, an estimate of total income must at least be made in order to comply with the requirements of Article 6. This conclusion is further reinforced by the transparency obligations in Article 7, since this provision requires not only that charges be pre-established, but also that the calculation basis is available upon request – which necessarily implies that a value has been placed upon both the total income and cost. If estimates were used as the basis for the calculation and were later found to be incorrect, Article 6 would require an appropriate adjustment to be made to the charges.

32 Finally, the Commission submits that there must be an appropriate mechanism for revising set charges.

Findings of the Court

33 Recital 5 of the preamble to the Directive states that public sector data are an important primary material for digital content products and services. European companies should be able to exploit their potential and contribute to economic growth and job creation.

34 Public sector information is a key resource for industry in the information society (see the Commission's Green Paper, COM(1998)585). A main goal of the European legislature was to put European firms on an equal footing with their American counterparts, which, since the enactment of the Freedom of Information Act in 1966, have benefited from a highly developed, efficient public information system at all levels of the administration. The Commission has highlighted that the US government's active policy of ensuring both access to and commercial exploitation of public sector information has greatly stimulated the development of the US information industry (see the Commission's Green Paper, cited above, p. 1).

35 According to its Article 1, the Directive establishes a minimum set of rules governing re-use and the practical means of facilitating the re-use of existing documents held by public sector bodies. In Article 2(4) of the Directive, re-use is

defined as use for any commercial or non-commercial purpose other than the initial purpose within the public task for which the documents were produced.

36 It is clear from recital 9 of the preamble that, although the Directive does not contain any obligation to allow re-use, public sector bodies should be encouraged to make any documents held by them available for re-use.

37 Where re-use is authorised, and where charges are made for that purpose, it is an objective of the Directive, as set out in recital 14 of its preamble, to preclude excessive pricing. It must be borne in mind in this context that the public bodies in question are normally monopolies.

38 Article 6 of the Directive therefore states that charges may not exceed the cost of collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment.

39 Pricing is a crucial issue in relation to the exploitation of public sector information by the digital content industries. It largely determines whether they will find an interest in investing in value added products and services based on public sector information. American companies benefit from the fact that they can obtain US public sector information free of charge (the Commission's Green Paper, cited above, p. 14). If European companies are to be put on an equal footing with their competitors in other parts of the world, the cost elements and return on investment cannot be calculated in a way that would put them at a significant disadvantage. It is for the national court to assess the facts in that respect, in particular with regard to the relevant interest level. It must therefore take into account that Article 6 of the Directive does not aim to provide public sector bodies with a profit.

40 Moreover, pursuant to Article 7 of the Directive, standard charges for the re-use of documents shall be pre-established and published. The public sector body shall indicate the calculation basis for the published charge if requested to do so. This should be done in order to enable individuals and economic operators charged for re-use of public information to verify whether the charges in question are compatible with Article 6 of the Directive. The Directive does not require that the calculation basis be made available at the time when the charge is fixed. Nevertheless, the requirement that standard charges within the limit set by Article 6 shall be pre-established presupposes that a substantive examination has been undertaken at the time when the charge is fixed. This must apply irrespective of whether the charge is set in legislation, by the relevant public authority or by other means.

41 As pointed out by the Commission, if the factors relevant to performing a calculation are uncertain, the public body in question must at least make a reasonable estimate, for example in the form of the average cost of enabling re-use. If experience shows that the estimate was incorrect, and if that entails that set charges are incompatible with Article 6 of the Directive, the calculation must be adjusted accordingly.

42 It is for the national court to determine whether the methods used to calculate the charges relevant to the case before it, and the transparency of those methods, comply with the requirements of the Directive. However, the national court must keep in mind that the public sector body bears the burden of proof in this regard.

43 For the sake of completeness, the Court notes that individuals and economic operators are entitled to obtain repayment of charges levied in an EEA State in breach of EEA law provisions. That is a consequence of the rights conferred on them. The EEA State in question is therefore required, in principle, to repay charges levied in breach of EEA law (see, for comparison, most recently, Case C-191/12 *Alakor*, judgment of 16 May 2013, not yet reported, paragraphs 22 and 23, and case law cited).

44 An exception to the repayment obligation applies when repayment entails unjust enrichment. Repayment is not required if it is established that the person required to pay unlawful charges has actually passed them on to other persons (see, for comparison, *Alakor*, cited above, paragraph 25, and case law cited). Such an exception must however be interpreted restrictively (see, for comparison, most recently, Case C-398/09 *Lady & Kid and Others* [2011] ECR I-7375, paragraph 20).

45 It is for the domestic legal system of each EEA State to lay down the procedural rules governing such repayments. However, these rules must not be less favourable than those governing similar domestic actions (the principle of equivalence), and must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (the principle of effectiveness) (compare *Alakor*, cited above, paragraph 26, and case law cited). Consequently, the question of whether a charge levied in violation of EEA law has or has not been passed on is a question of fact to be determined by the national court, taking all relevant circumstances into account.

46 Whether a charge levied in violation of EEA law is passed on, depends on the circumstances of the case, in particular the market structure. For example, a monopoly operator can be expected to pass on the entire charge. If there is competition, an operator may not be able to pass on any part of it (compare with regard to this conclusion the judgment by the Supreme Court of Norway of 28 May 2008 in case 2007/1738, Rt. 2008 p. 738, paragraph 52). Moreover, even where it is established that the charge has been passed on in whole or in part to customers, repayment does not necessarily entail unjust enrichment. The charged person may still suffer a loss, in particular as a result of a fall in the volume of his sales (see, for comparison, *Lady & Kid and Others*, cited above, paragraph 21, and case law cited).

47 As regards the specific situation where a charge for the re-use of public information set out in legislation has proven to be excessive, the court recalls that the national courts must apply the methods of interpretation recognised by national law as far as possible in order to achieve the result sought by the

relevant EEA law rule (see, *inter alia*, Case E-7/11 *Grund* [2012] EFTA Ct. Rep. 191, paragraph 83, and case law cited).

48 The answer to the first and fourth questions must therefore be that Articles 6 and 7 of the Directive require that, when charges are made for the re-use of public sector information, a substantive examination must have been undertaken at the time when the charge was fixed. The examination must show that the total income from such charges does not exceed the cost of collection, production, reproduction and dissemination of documents, plus a reasonable return on investment. If the factors relevant to performing a calculation are uncertain, an estimate must at least be made. However, the calculation basis for the charges need only be made available upon request. This applies irrespective of whether the charge is set in legislation, by the relevant public authority or by other means.

IV The second and third questions

49 The second and third questions both concern the notion of cost in Article 6 of the Directive. By the third question, the national court essentially asks whether, when determining the cost, account may be taken of the cost incurred by a public sector body in connection with the collection of documents it was legally obliged to collect. In its second question, the national court wants to know whether income accruing to the State when documents are collected, through for example fees and taxes such as stamp duties, has any relevance when determining the cost pursuant to Article 6. The Court finds it appropriate to consider these two questions together.

Observations submitted to the Court

50 The plaintiff's primary position is that only cost and income relating to supplying and allowing re-use shall be taken into account when determining the cost pursuant to Article 6. As a result, cost and income generated in the production of existing documents for their original purpose can be disregarded.

51 In the alternative, if the Court finds it compatible with Article 6 to charge for cost incurred prior to the supplying and allowing of re-use, the plaintiff submits that prior generated income must also be taken into account. The cost referred to in Article 6 should thus be construed as net of such income.

52 The defendants submit that Article 6 recognises the cost of collection. Conversely, the levying of taxes, such as stamp duties, has no bearing on the principles enshrined in that Article. Registration taxes and stamp duties are not income from supplying and allowing re-use of documents and should not be taken into account.

53 ESA submits that, when the cost pursuant to Article 6 is determined, account may be taken of cost incurred by a public sector body in connection with the collection of documents which it is legally obliged to collect, irrespective of whether or not individuals or undertakings request to re-use them.

54 Moreover, Article 6 precludes no account being taken of income accruing as a result of the collection of the documents. If income accrues to the State during the course of collection, it will clearly have the effect of reducing or offsetting the cost of collection.

55 The Commission rejects the plaintiff's argument that cost within the meaning of Article 6 must be linked to the production of the documents for the purposes of re-use alone. At the oral hearing, it emphasised that the wording of Article 6 explicitly mentions income from re-use, but, at the same time, the provision refers much more broadly to the cost of collection and production as well as reproduction and dissemination. If the European legislature had wished to circumscribe the relevant cost more narrowly, it would have done so. Article 6 has recently been amended by Directive 2013/37/EU (OJ 2013 L 175, p. 1). Once the new Article 6 has entered into force, the general rule will be that the cost of collection and production cannot be taken into account. In the Commission's view, the Directive makes no distinction between the re-use of information collected as part of a legal obligation and other types of information.

56 Although the text of Article 6 is silent on the relevance of income accruing to the State through fees for registration or stamp duties when documents are collected, it is clear that the total income from charges for re-use cannot exceed the cost of collection, production, reproduction and dissemination of those documents, plus a reasonable return on investment.

57 Therefore, the Commission takes the view that Article 6 precludes a public sector body from fully recovering the total cost through a charge on re-use, and, in addition, collecting separate fees or charges related to the initial collection. Such a situation would not only breach the ceiling laid down by Article 6, it would also be contrary to the objective of keeping the charges for re-use as low as possible in order to foster innovation and the development of digital content services, as stated in Article 1(1) and in recital 5 of the preamble to the Directive.

Findings of the Court

58 As mentioned above, Article 6 of the Directive provides that, where charges are made, they may not exceed the cost of collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment.

59 It follows from the wording that cost within the meaning of this provision is not limited to the cost of facilitating re-use, that is, reproduction and dissemination. Account may be taken of the cost incurred by a public sector body in connection with the initial collection and production of the documents in question. This must apply irrespective of whether the public sector body was legally obliged to collect the documents, as the Directive makes no such distinction.

60 Recital 14 of the preamble emphasises that States should encourage public sector bodies to make documents available at charges that do not exceed the marginal

cost of reproducing and disseminating them. It should also be kept in mind that the Directive has recently been amended by Directive 2013/37/EU. Once the amendment has entered into force, the main rule under the new Article 6 will be that the cost of collection and production cannot be taken into account.

61 However, under the Directive, if account is taken of cost incurred by a public sector body in connection with the initial collection and production of documents, any income accrued in that respect, for example fees or taxes such as stamp duties, which reduce or offset that cost, must also be taken into account. Consequently, the cost within the meaning of Article 6 must be construed as the net cost. If only the cost incurred as a result of collection were to be taken into account and not the income accrued in that connection, this would undermine the effectiveness of the Directive's objective of precluding excessive pricing.

62 It is for the national court to examine the facts of the case before it in order to determine the cost that may, on the basis of the above, be taken into consideration pursuant to Article 6.

63 The answer to the second and third questions must therefore be that, when the cost pursuant to Article 6 of the Directive is determined, account may be taken of the cost incurred by a public sector body in connection with the initial collection and production of the documents in question. In such case, any income accrued in that connection, for example fees or taxes such as stamp duties, which reduce or offset that cost, must also be taken into account.

V The fifth and sixth questions

64 The fifth and sixth questions from the national court concern the issue of whether and, if so, to what extent, a self-financing requirement for public sector bodies, whether general or specific, may be taken into account when determining the cost pursuant to Article 6 of the Directive. The Court finds it appropriate to assess these two questions together.

Observations submitted to the Court

65 The plaintiff submits that self-financing requirements are relevant when determining the required rate of return, provided that such requirements do not lead to charges in excess of the ceiling laid down in Article 6 of the Directive.

66 The defendants observe that appropriate account may be taken of self-financing requirements where they are imposed, and that this is compatible with the Directive. Article 6 does not prescribe to what extent eligible cost shall be recovered and to what extent it is covered by public funds, as long as the upper limit provided for by that provision is estimated.

67 No general self-financing requirement exists under Icelandic law. In Iceland, public sector bodies are financed by public funding, by own revenues or by a mixture of the two. Revenues stemming from charges and other sources of income received by the public body in question can be taken into account unless

they accrue to the Treasury. In the case at hand, a specific self-financing requirement has been imposed on Registers Iceland. The cost of producing the information is thus placed on re-users rather than taxpayers.

68 ESA argues that the Directive does not preclude a general requirement that public sector bodies be self-financing. The purpose of the Directive is to encourage such bodies to disseminate information. These bodies are also given an incentive in the form of a reasonable return on investment in facilitating the re-use of documents. However, self-financing requirements must be related to the handling of the documents themselves. The cost of operating a public sector body as a whole cannot be taken into account.

69 The Commission submits that the ceiling laid down by Article 6 includes a reasonable return on investment. As explained in recital 14 of the preamble to the Directive, this permits due account to be taken of the self-financing requirements of the public sector body concerned, where applicable. A reasonable return on investment must be linked to the cost elements that are directly related to the collection, production, reproduction and dissemination of documents. Any broader interpretation would be contrary to the objective underlying the Directive to promote the creation of digital content services based on information held by public sector bodies, and to facilitate re-use, as set out in Article 1(1) and also in recital 5 of the preamble.

Findings of the Court

70 Article 6 of the Directive provides that charges may not exceed the cost of collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment, having due regard to any self-financing requirements of the public sector body concerned, as stated in recital 14 of the preamble to the Directive.

71 Accordingly, general or specific self-financing requirements for public sector bodies may be taken into account when determining the cost pursuant to Article 6 of the Directive. Nonetheless, as argued by both ESA and the Commission, the cost within the meaning of Article 6, together with a reasonable return on investment, must relate to the handling of documents, either their initial collection or production, or the actual facilitation of re-use through reproduction and dissemination. Consequently, when charges are made, cost elements and investments that are unrelated to the document processing necessary for re-use set out in Article 6 may not be taken into account. These principles governing charging in Article 6 must be the same irrespective of any self-financing requirement to which the public body in question is subject.

72 At the oral hearing, the defendants implied, in response to a question put to them, that the charges for re-use in dispute in the case before the national court are also used to cover the cost of services that the plaintiff itself has not received from Registers Iceland. If it is established that the charges are used to cover cost other than that related to the collection, production, reproduction and dissemination of

the documents in question, together with a reasonable return on investment in the facilitation of re-use, those charges are contrary to Article 6. It is for the national court to make the assessment.

73 The answer to the fifth and sixth questions must therefore be that self-financing requirements for public sector bodies may be taken into account when determining the cost under Article 6 of the Directive. This applies insofar as only cost elements, together with a reasonable return on investment, that are related to the document processing necessary for re-use set out in Article 6 are taken into account.

VI Costs

74 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Reykjavík District Court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

1. **Articles 6 and 7 of Directive 2003/98/EC require that, when charges are made for the re-use of public sector information, a substantive examination must have been undertaken at the time when the charge is fixed. The examination must show that the total income from such charges does not exceed the cost of collection, production, reproduction and dissemination of documents, plus a reasonable return on investment. If the factors relevant to performing a calculation are uncertain, an estimate must at least be made. However, the calculation basis for the charges need only be made available upon request. This applies irrespective of whether the charge is set in legislation, by the relevant public authority or by other means.**

2. **When the cost pursuant to Article 6 of the Directive is determined, account may be taken of the cost incurred by a public sector body in connection with the initial collection and production of the documents in question. In such case, any income accrued in that respect, for example fees or taxes such as stamp duties, which reduce or offset that cost, must also be taken into account.**

3. **Self-financing requirements for public sector bodies may be taken into account when determining the cost under Article 6 of the Directive. This applies insofar as only cost elements, together with a reasonable return on investment, that are related to the document processing necessary for re-use set out in Article 6 are taken into account.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 16 December 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President