REPORT FOR THE HEARING

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

on 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.

I Introduction

1. In a letter of 16 April 2013, registered at the EFTA Court on 29 April 2013, Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between Creditinfo Lánstraust hf., a company registered in Iceland ("the plaintiff"), and Registers Iceland and the Icelandic State ("the defendants").

2. The case concerns which factors can or should be taken into account when calculating the level of fees chargeable by public bodies for the re-use of public sector information.

II Legal background

EEA law

3. 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 incorporated into Annex XI to the EEA Agreement at point 5k 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.

4. Recitals 9 and 14 of the preamble to the Directive read as follows:

(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.

5. In 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.

6. 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.

7. Article 6 of the Directive reads:

Principles governing charging

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.

8. Article 7 of the Directive reads:

Transparency

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[1]

9. 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. However, it appears that it is the Information Act No 50/1996 that is relevant to the case before the national court.

10. The sixth and seventh paragraphs of Article 27 of the Information Act No 50/1996 read as follows:

It is permissible to charge for providing access to information from public files, pursuant to the third and fourth paragraphs of Art. 12. The public authority concerned shall establish a schedule of fees, to be confirmed by the Minister. The schedule of fees shall be advertised in Section B of the Law and Ministerial Gazette, as well as being accessible on the government authority's website.

No more must be paid for re-using information that comes under the provisions of this Chapter and is subject to a copyright of the State or of municipalities than what is indicated in the sixth paragraph, unless specifically dictated by law.

11. The third and fourth paragraphs of Article 12 of the Information Act No 50/1996 read as follows:

When the number of documents is great, the government authority may decide to assign their photocopying to other parties. The same applies when the government authority does not have facilities for photocopying

[1] Translations of national provisions are unofficial and based on those contained in the documents of the case.

documents. In such cases, the requester shall pay the cost entailed in photocopying the documents. The same applies, where relevant, to copies of material other than documents.

By means of a list of fees, the Prime Minister shall decide what is to be paid for copies and photocopies of material provided pursuant to this Act. It is permissible to allow for all of the costs entailed.

12. Registers Iceland is a governmental institution that operates under the supervision of the Minister of the Interior of Iceland. The tasks carried out by Registers Iceland include registration of a range of information on Iceland's 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.

13. In accordance with 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.

14. The same article of Act No 6/2001 entitles Registers Iceland to charge fees in return for such processing and dissemination, in accordance with a special tariff of fees that is approved by the Minister of the Interior.[2] Under Article 9 of Act No 6/2001, the costs 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.

15. Article 14 of the Additional Treasury Revenue Act No 88/1991 provides for the level of fees that can be charged for information from the registration of deeds.

III Facts and procedure

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

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

[2] Tariff of fees No 17/2001 of the National Land Registry (now Registers Iceland) for information from the National Land Registry's database (repealed by Tariff of fees No 1174/2008).

National Land Registry merged with the National Registry, to form Registers Iceland.

18. The essence of the case before the national court is that Registers Iceland has charged the plaintiff fees for the disclosure of information and data, and 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 case against the Icelandic State.

19. Reykjavík District Court has referred the following questions to the Court:

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?**

IV Written observations

20. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiff, represented by Reimar Pétursson, Supreme Court Attorney;
- 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.

V Summary of the arguments submitted

The plaintiff

General remarks/the first question

21. The plaintiff submits that Article 6 of the Directive only concerns costs stemming from supplying and allowing the re-use of documents.

22. First, the wording of Article 6 refers to the activity of supplying and allowing the re-use of documents. Article 6 thus expressly defines income as the measure of revenues generated *from* that activity. However, Article 6 defines the costs without making express reference to an activity.

23. According to the plaintiff the concepts of income and cost are logically related. As concepts they both measure a defined activity: income in terms of revenues generated and cost in terms of costs incurred in connection with that activity. In the plaintiff's view, the cost and income must thus relate to the same

activity. A different reading gives rise to a mismatch, where income is interpreted restrictively and cost is interpreted expansively. Such a reading is unfair and illogical.

24. The plaintiff submits that the former reading conforms to the Directive's scope and structure. It contains no obligation to allow re-use.[3] The Directive thus imposes no financial burden on the Member States to make documents re-usable.

25. Second, Article 2(4) of the Directive defines re-use as the use of documents held by public sector bodies for purposes other than the initial purpose for which the documents were produced. The initial purpose is therefore important in determining whether use constitutes re-use. For instance, the initial purpose of registration of a legal deed is to protect ownership interests.

26. Furthermore, it follows from recital 13 of its preamble that the Directive recognises that the re-use of existing documents may require certain steps to be taken by public sector bodies, *inter alia* digitising paper-based documents or preparing extracts. However, Article 5 of the Directive underlines that this implies neither an obligation to create or adapt documents nor an obligation to provide extracts if that entails more than a simple operation. The plaintiff submits that this shows that the Directive only addresses the production of documents for the purpose of re-use. Consequently, it would be illogical if Article 6 were to be interpreted to include costs incurred outside the process addressed by the Directive.

27. This reading is also supported by the Directive's purpose. According to recital 14 of the preamble to the Directive, its purpose is to set an upper limit on charges. It would be incompatible with this objective to allow re-use to be charged for based on the cost of producing the existing document, prepared for an initial purpose. Such an interpretation would therefore render Article 6 of the Directive devoid of purpose, effectively eliminating the intended upper limit on charges and inviting the Member States to levy excessive prices.

28. The plaintiff stresses that it is not arguing in favour of a marginal-cost approach. Such an approach would only cover the costs of reproducing and disseminating the documents. Rather, it is arguing for a re-use facilitation cost approach. That is a known, but different charging model.[4]

29. In the main proceedings, the Icelandic State has noted the reference to self-financing requirements in recital 14 of the preamble to the Directive in support of its position. The plaintiff considers this to be misguided, as it would effectively eliminate the upper limit on costs intended by the Directive. In its

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[3] Reference is made to Case C-138/11 *Compass-Datenbank*, judgment of 12 July 2012, not yet reported, paragraph 50.

[4] Reference is made to Pricing of Public Sector Information Study, October 2011, p.14 (available at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/11_2012/models.pdf). The models include "profit", "cost", "re-use facilitation cost", "marginal cost", and "zero cost".

view, the self-financing requirements only have relevance when determining the reasonable return on investment. A self-financed public sector body may thus require a higher return than a body financed by the Member State itself.

30. The plaintiff submits that the Directive also imposes a duty on Member States to calculate the charges levied for the re-use of information. Pursuant to Article 6, 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.

31. 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 indicate the calculation basis for the published charge on request, and also which factors will be taken into account in the calculation of charges for atypical cases.

32. The plaintiff submits that the Icelandic State initially determined the fees charged for mechanical inquiries to the registry of local deeds based on the benefit such inquiries brought to the user and a prediction of the expected revenues. Later charge increases were justified by an increase in consumer prices, but took no account of the actual cost involved.

33. According to the plaintiff, such a determination of charges without a basis in a calculation is incompatible with the Directive. It precludes the attainment of the Directive's objective and its full effectiveness. In this regard, the plaintiff refers to the Commission's letter of formal notice to Sweden concerning the implementation of the Directive. The Commission was not satisfied with the implementation, noting, *inter alia*, that certain charges levied were determined in accordance with market judgments rather than on the basis of calculated costs.

34. The plaintiff submits that recital 14 of the preamble to the Directive shows that there is a preference in the Directive for no-cost or marginal-cost charges. This preference is based on the demonstrated superiority of such charging models.[5] In relation to digital data, there is essentially no difference between a no-cost and marginal-cost approach.[6] Consequently, scenarios are conceivable, in particular where digital data are concerned, where Member States could determine charges on a marginal-cost basis that are manifestly lower than the upper limit set by Article 6 of the Directive. Only in such scenarios could a calculation not be necessary.

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[5] Reference is made to the Commission's proposal for a directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, COM(2002) 207 Final, p. 5.

[6] Reference is made to Pricing of Public Sector Information Study, cited above, p.15.

35. Consequently, the plaintiff proposes that the Court should answer the first question as follows:

> *No, unless the proposed charges are none or manifestly lower than the upper limit set by the Directive, Article 6.*

The second and third questions

36. The plaintiff's primary position is that the second and third questions must be answered in the affirmative and negative, respectively. It reiterates that, in its view, only income and costs relating to supplying and allowing re-use shall be taken into account. As a result, cost and income generated in the production of existing documents for their original purpose may be disregarded.

37. In the alternative, if the Court finds it compatible with Article 6 of the Directive to charge for costs 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.

38. The plaintiff observes that all public activities generate information. It submits that disregarding income from such activities, but counting costs, in effect removes the upper limit envisioned by Article 6 of the Directive. Where activities generating information are themselves the source of major public revenues, such revenues must be taken into account.

39. The plaintiff proposes that the Court should answer the second and third questions as follows:

> *2. Yes.*
>
> *In the alternative:*
>
> *No.*
>
> *3. No. Only costs from the supplying and allowing of re-use of documents may be taken into account.*
>
> *In the alternative:*
>
> *Yes.*

The fourth question

40. The plaintiff submits that the fourth question must be answered in the negative.

41. In its view, this follows from the application of two principles of EEA law. First, a national court must as far as possible interpret statutory provisions in conformity with Article 6 of the Directive.[7] This entails that the national court in the main proceedings has a duty to satisfy itself, in the particular circumstances, that Article 6 of the Directive has been complied with.[8] The mere existence of a national statutory provision determining the amount of a particular charge does not remove this duty. The national court must in any event carry out an appropriate examination of the facts to ensure the effectiveness of the relevant directive.[9]

42. Second, the plaintiff recalls that Protocol 35 EEA obliges the EEA EFTA States to introduce, if necessary, a statutory provision to the effect that, under their national legal order, implemented EEA rules prevail in cases of possible conflict with other statutory provisions.[10]

43. In the present case, the Directive has been implemented in Iceland by Article 24(7) of the Information Act No 140/2012. Consequently, the Directive, as an implemented EEA rule, must prevail in cases of conflict with other statutory provisions in Icelandic law.[11]

44. However, as expressly provided for in Article 7 EEA, the Member States are left with the choice of form and method of implementation. Nevertheless, that discretion cannot alleviate the Member States from applying a directive's provisions. This applies, in particular, where a directive lays down an unconditional and sufficiently precise obligation.[12] According to the plaintiff, there is no doubt that Article 6 of the Directive constitutes an obligation of this nature. It lays down a substantive rule fixing an upper limit on charges.

45. The plaintiff proposes that the Court should answer the fourth question as follows:

> *No. The Directive, which has been implemented by reference, must prevail in conflicts with other statutory law. A national court must satisfy itself, in the circumstances of the case, that a statutory provision is compatible with the Directive, Article 6. If a national court finds the statutory provision incompatible with the Directive, it must use the interpretative methods*

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7 Reference is made to Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 39.

8 Reference is made to Case C-287/05 *Hendrix* [2007] ECR I-6934, paragraph 57.

9 Reference is made to Article 3 EEA, and Case E-11/12 *Koch and Others*, judgment of 13 June 2013, not yet reported, paragraph 91.

10 Reference is made to *Criminal Proceedings against A*, cited above, paragraph 38.

11 Reference is made to Cases E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 77, and E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 28.

12 Reference is made to *Ravintoloitsijain Liiton Kustannus Oy Restamark*, cited above, paragraph 77.

recognised by national law as far as possible to achieve the result sought by the Directive.

The fifth question

46. The plaintiff submits that self-financing requirements are relevant in determining the required rate of return. However, such relevance cannot alter the meaning of Article 6 of the Directive.[13]

47. The plaintiff proposes that the Court should answer the fifth question as follows:

Yes, provided that such account does not lead to charges in excess of the cost from supplying and allowing re-use.

The sixth question

48. Given its proposed answers to the previous five questions, the plaintiff does not propose an answer to the sixth question.

The defendants

49. The defendants submit that the wording of the first question is misleading. It follows from the wording of Article 6 of the Directive that calculations in the sense of that provision are calculations that are in line with the accounting principles applicable to the public sector bodies involved.

50. In the view of the defendants, there is no doubt that information about the total income from supplying and allowing re-use of the information is readily available and verifiable, i.e. 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. Calculations of the cost of collection, production, reproduction and dissemination of the information are available and have been presented to the national court.

51. The defendants submit that Article 6 of the Directive stipulates that the total income should not exceed the costs incurred to produce the information. In cases where the calculation of the costs is to some extent based on a reasonable estimate, which is in line with the accounting principles applicable to the public body in charge of the collection and distribution of the information, the article provides that such costs must nevertheless be within the upper limit on charging.

52. The defendants reject the suggestion by the plaintiff that the total income calculation should include stamp duties collected by the State. The defendants take the view that this suggestion has no basis in the provisions of the Directive.

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[13] Reference is made to Case E-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 122.

This is income that is not collected in order to supply and allow re-use of the information in question.

53. Furthermore, the defendants submit that Article 6 does not provide that calculations of the estimated costs and income should be provided to the user or made available at the time of determination of the fee.

54. The defendants have not proposed a reply to the first question.

The second question

55. According to the defendants, the second question clarifies somewhat why the first question has such limited relevance to the proceedings in the case before the national court. In their view, the plaintiff argues that the public revenues described in items a) and b) of the second question should be deducted from the total cost of collection, production, reproduction and dissemination of the information and data in question, before assessing whether the upper limit prescribed by Article 6 of the Directive is exceeded.

56. The defendants submit that the levying of taxes, such as those collected on the basis of the Stamp Duty Act No 36/1978 and Additional Treasury Revenue Act No 88/1991, has no bearing on the principles enshrined in Article 6 of the Directive. Registration taxes and stamp duties are not income from supplying and allowing re-use of documents and should not be taken into account when determining whether the provisions of Article 6 are complied with.

57. The defendants thus propose that the second question should be answered in the affirmative.

The third question

58. The defendants submit that the third question can be answered by direct reference to the purpose of the Directive, i.e. to provide a framework for the conditions governing re-use of public sector documents. As stipulated in recital 8 of the preamble to the Directive, public sector documents are documents collected, produced, reproduced and disseminated by public sector bodies to fulfil their public tasks. The public tasks of public sector bodies in Iceland are prescribed by law, including the task of collecting documents and information.

59. According to the defendants, Article 6 of the Directive implicitly recognises the cost of collection. Consequently, the defendants propose that the question should be answered in the affirmative.

The fourth question

60. The defendants submit that Article 6 provides that the total income from supplying and allowing the re-use of documents and data shall not exceed the cost of collection, production etc. While costs should be calculated in an

appropriate manner, the legislator can estimate the cost and the fee as set out in the Directive. Moreover, the upper limit provided for in the Directive is without prejudice to the right of the public sector body to apply lower charges or no charges at all, as explained in recital 8 of the preamble to the Directive.

61. According to the defendants, the question lacks clarity in that it presumes that the fee determined is not subject to substantive examination. On the contrary, they submit, in the event of the fee being determined by law, examination of the cost can be done ex-ante by the public authorities and the legislator and is subject to ex-post judicial review. This method of fixing the tariff does not preclude charges being cost-oriented and below the upper limit on charges provided for in Article 6.

62. However, the Directive does not impose detailed requirements for the timing and method of calculation, but leaves it to the public sector body to choose the relevant cost calculation method. In the case before the national court, the defendants have demonstrated that charges are based on appropriate estimates of costs, respecting the self-financing requirements imposed on Registers Iceland, and well within the margin of appreciation conferred by the Directive.

63. The defendants thus propose that the fourth question should be answered in the affirmative.

The fifth question

64. The defendants submit that this question is unclear as regards what general requirement is referred to. In their view, no general self-financing requirement exists under Icelandic law. In Iceland, public sector bodies are financed by public funding, by own revenue or by a mixture of the two. The funding of public bodies is prescribed by the State Budget, in which revenues stemming from charges and other sources of income received by the public body in question, not accrued to the Treasury, can be taken into account.

65. It is likewise unclear, they continue, what it would entail to take appropriate account of such general requirements in the determination of what costs are to be recovered and what bearing that would have on the provisions of Article 6 of the Directive. Rather, they submit that appropriate account can be taken of self-financing requirements where they are imposed. 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.

66. With reference to the clear wording of the Directive as regards both the calculation of costs and the scope of the State to determine whether or not charges are applied, the defendants fail to see the relevance of requesting an advisory opinion on the determination of the costs to be recovered.

67. First, the determination of the extent of the costs to be recovered and whether a reasonable return on investment is required relies on a calculation of eligible costs, not on the existence of possible requirements for public sector bodies to finance their operation.

68. Second, the Directive leaves no doubt as to the right of the States or public sector bodies to decide whether to recover all eligible costs, to apply lower charges or to apply no charges at all.

69. Third, recital 14 of the preamble to the Directive prescribes that, where charges are imposed, the total income should not exceed the total costs, having due regard to the self-financing requirements of the public sector body concerned, where applicable. In cases where public sector bodies are required to be self-financing, taking account of such requirements is therefore compatible with the Directive.

70. Consequently, the defendants submit that the answer to the fifth question should be that Article 6 of the Directive does not prescribe to what extent eligible costs are recovered and to what extent they are covered by public funds, as long as the upper limit provided for by the article is estimated.

The sixth question

71. The defendants submit that it follows from the clear wording of the Directive, in particular its Article 6 and recital 14 of the preamble, what cost elements may be taken into account and that it is for the national courts to determine whether cost allocation and calculations are adequate and in line with the accounting principles applicable to the public sector body involved. As previously mentioned, where the public body concerned is required to be self-financing, account can be taken of such requirements when determining the charges.

72. The defendants further submit that the relevant cost elements are not limited to marginal costs, i.e. the costs of reproducing and disseminating. Rather, pursuant to Article 6 and recital 14 of the preamble to the Directive, the costs taken into account shall be the costs incurred in the collection, production, reproduction and dissemination of the information in question.

73. As regards the Directive’s reference to applicable accounting principles, the defendants submit that it is for the national courts to determine whether such principles, and, in the case of Iceland, national law concerning service charges imposed by public sector bodies, are correctly applied and that charges calculated are in accordance with them.

74. The defendants have not proposed an answer to the sixth question.

EFTA Surveillance Authority

Preliminary remarks

75. ESA observes that the national court only makes reference to Article 6 of the Directive. However, ESA considers that the first and fourth questions referred cannot be answered without reference also to Article 7 of the Directive. The Court should thus interpret the references to Article 6 in those questions as referring to Articles 6 and 7.

76. ESA observes that the Directive provides for a minimum harmonisation as regards basic conditions for making public sector information available to re-users, for instance provisions on non-discriminatory charging and transparency. Member States are encouraged, however, to go beyond the minimum level and adopt measures that favour re-use.

77. ESA therefore submits that the Court should interpret the Directive in such a way that the re-use of documents is not unduly restricted.

78. ESA submits that it is clear from Article 6 of the Directive that bodies may charge a fee for access to information which they hold in circumstances falling within the scope of the Directive. However, Article 6 does not set out detailed rules for how much public sector bodies should be allowed to charge in exchange for information.

79. According to ESA, Article 6 sets out a model for the calculation of the maximum levels of charges that may be charged by public sector bodies. This calculation is to be carried out by looking at the documents themselves – on balance, the income from supplying and allowing re-use of documents shall not exceed the cost (to the public body, logically) of collection, production, reproduction and dissemination.

80. ESA submits that this should be the essential reference point for the calculation of permissible charges. It also reflects the principle that the steps involved in supplying documents for re-use should result in neither an advantage nor a disadvantage for public bodies. This interpretation is further borne out in the (non-mandatory) second sentence in Article 6, which provides that a "cost-oriented" model of calculating fees should be used.

81. With regard to how the fees should be calculated, ESA submits that, although Article 6 gives States the possibility of carrying out this calculation on a document-by-document basis, this interpretation could result in a charging system that is too complex to be workable. ESA therefore takes the view that a generally set fee level is not only permitted by the Directive, but is in fact preferable.

82. ESA further submits that the fee levels should be calculated with reference to the process of handling the documents, taking into account all costs and all revenues in that connection.

83. According to ESA, the purpose of this provision (indeed the whole Directive) is to encourage public sector bodies to disseminate information. The logic behind provisions aimed at establishing cost neutrality must be to ensure that public sector bodies are not discouraged from making available documents they have in their possession. These bodies are also given an incentive in the form of a reasonable return on their investment in facilitating the re-use of documents.

84. ESA observes that recital 14 of the preamble to the Directive provides that any excessive prices should be precluded, as this would undermine the effectiveness of the Directive. The recital also emphasises that public sector bodies are entitled to apply lower charges or no charges at all, and that States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs of reproducing and disseminating the documents.

85. ESA contends that, given the minimum levels of harmonisation in the Directive, it must be for the national court to decide what constitutes a reasonable return on investment on the basis of the facts of the case at hand. In assessing these facts, the national court should require the public sector body to show that its fee levels are in compliance with the Directive. Referring to recital 14 of the preamble to the Directive, ESA further submits that the national court should also take account of whether the public sector body in question is required to be self-financing.

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

87. According to ESA, Article 7 of the Directive 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 wording of this article further supports the construal of Article 6 as imposing a burden of proof on the public sector body to demonstrate that the charges are compatible with the Directive. However, Article 7 does not require a public body to indicate or make available, before receiving a request, the details of the way in which the standard charges are calculated.

The first question

88. Based on its interpretation set out above, ESA submits that Article 6 of the Directive 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. It is for the national court to verify that this is the case on the basis of the facts before it.

89. ESA notes that, in the present instance, standard charges are applied for the re-use of the documents concerned. It submits that Article 7 of the Directive obliges the public sector body in question to indicate the calculation basis for the published charges. The calculation basis must be indicated upon request, but it does not have to be disclosed at any time before that point.

90. ESA observes that, according to the request from the national court, the plaintiff has argued that there is nothing to indicate that an examination was carried out of the cost of collecting, producing, reproducing and disseminating the information in question. On the other hand, the defendants have argued that the fees for enquiries to the register of deeds, certificates of ownership status and of ownership history were based on a reasonable estimate of the institution's operating budget and the estimated allocation of costs between individual aspects of operations. They have also referred to the fact that the levy was based on Act No 6/2001. However, the national court does not state whether the defendants have fully explained the calculation basis for the published charges.

91. ESA proposes that the Court should answer the first question as follows:

> *Article 6 of the Directive does not preclude public sector bodies from charging a fee on account of each mechanical enquiry for information from the register, provided that the total income from such charges does not exceed the costs of collection, production, reproduction and dissemination of documents plus a reasonable return on investment. Article 7 requires the calculation basis for standard charges to be indicated upon request.*

The second question

92. ESA submits that Article 6 of the Directive, as interpreted above, precludes circumstances in which no account is taken of income accruing as a result of the collection of the documents. ESA takes the view that, 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.

93. ESA proposes that the Court should answer the second question as follows:

> *When determining the "cost" subject to Article 6 of the Directive, the EEA EFTA States are obliged to take into account:*

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.*

insofar as those income streams reduce or offset the cost of collection of documents to be re-used.

The third question

94. ESA interprets Article 6 as being intended to enable and stimulate public bodies to provide documents in a cost-neutral way. In this light, the Directive should not, ESA submits, be interpreted so as to preclude a calculation that is based on the activities of a public sector body as a whole, balancing total income against total costs. However, the use of the word "documents" in the first sentence of Article 6 implies that this calculation should be based on the activities of the public sector body that relate to the documents themselves.

95. Thus, ESA considers that the Directive, properly interpreted, precludes fees that go beyond the costs related to the documents (together with a reasonable return on the investment made by the public sector body in supplying and allowing the re-use of documents) and instead go towards covering the cost of operating the National Property Registry itself.

96. ESA proposes that the Court should answer the third question as follows

Article 6 of the Directive does not preclude an evaluation made on the basis of the general activities of a particular public sector body. When the "cost" pursuant to Article 6 of the Directive is determined, account may be 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. However, the Directive precludes fees which go above and beyond the costs linked to the documents (together with a reasonable return on investment) and instead go to meet the cost of operating the public sector body itself.

The fourth question

97. ESA submits that it is clear from Article 6 that any legislation setting the fee must first be compatible with the requirements of that article. Furthermore, Article 7 requires standard charges to be pre-established and published. That

article also requires that public sector bodies are able to indicate the calculation basis for the published charge.

98. 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 of the Directive that the fees must be pre-established and published.

99. 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. 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.

100. ESA proposes that the Court should answer the fourth question as follows:

> *Without prejudice to the requirements of Article 6, Article 7 of the Directive permits the legislature to set the amount of the fee in legislation without any particular amount being made subject to substantive examination. Such amounts must be pre-established and published. Moreover, on request the public sector body must indicate the basis of calculation for the published charge.*

The fifth question

101. ESA submits that the answer to the fifth question should plainly be in the affirmative: the Directive does not preclude a general requirement that such bodies be self-financing.

The sixth question

102. ESA submits that it follows that from the interpretation of the Directive set out above that permitted self-financing requirements must be related to the handling of the documents themselves.

103. ESA proposes that the Court should answer the sixth question as follows:

> *It is for the national court to take into account the specific facts of each set of circumstances in determining the "cost" pursuant to Article 6 of the Directive. However, the cost elements in public sector operations which may be taken into account must be connected to the collection, production, reproduction and dissemination of documents. A self-financing obligation which has no connection to these processes cannot be taken into account.*

European Commission

Preliminary remarks

104. The Commission submits that several key principles can be derived from Articles 6 and 7, read in light of recital 14 of the preamble to the Directive. First, public sector bodies can charge for the re-use of information. Second, they are encouraged to fix charges as low as possible. Third, the total amount of revenue a public sector body can collect in a given accounting period through charging re-users is limited to the costs incurred in connection with the collection, processing, reproduction and dissemination of the information during that period, together with a reasonable return on its investment (this latter element being intended to reflect the fact that many public sector bodies have to generate a substantial part of their operating budget from own income). Fourth, public sector bodies must pre-establish and publish charges for re-use, so that potential re-users can assess whether a request for such data is economically interesting. Finally, upon request, public sector bodies must specify the calculation basis for those charges.

The first question

105. The Commission reiterates 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, the public sector body must previously have identified any relevant costs as referred to in Article 6 and also assessed the income it expects to generate thereby.

106. The Commission accepts 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, it takes the view that an estimate of total income must at least be made in order to comply with the requirements of Article 6 of the Directive. This 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 total income and cost.

The second question

107. The Commission submits that although the text of Article 6 is silent on the relevance of income accruing to the State via 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 (as well as a reasonable return on investment).

108. Since the initial collection of the documents is itself part of the overall process referred to in Article 6, the Commission takes the view that it precludes a public sector body from fully recovering total costs through a charge on re-use, and, in addition, collecting separate fees or charges related to initial collection. Such a situation would not only breach the ceiling laid down by Article 6, but

would also be contrary to the objective of keeping 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) of the Directive, and also in recital 5 of the preamble to the Directive.

The third question

109. The Commission submits that the Directive makes no distinction between the re-use of information collected as part of a legal obligation, and other types of information. This is further illustrated by the general definition of re-use set out in Article 2(4) of the Directive.

The fourth question

110. In the Commission's view, the fourth question is very closely linked to the first question, since it asks whether a charge may be fixed in legislation without the amount being subject to substantive examination. As for question 1, the Commission emphasises that charges made for the re-use of information must respect the upper limit laid down in Article 6 of the Directive, and be calculated on the basis of actual costs incurred (as well as a reasonable return on investment). It follows that a substantive examination must be carried out of the total costs and total income over an appropriate accounting period, even though this is necessarily based on estimates. (The Commission would add that, 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, cf. also the duty of loyal cooperation laid down in Article 3 of the EEA Agreement). At the same time, the legal mechanism for the fixing of the charges remains a matter for the EEA States.

The fifth and sixth questions

111. The Commission simply underlines that the ceiling laid down by Article 6 is based not only on the costs of collecting, producing, reproducing and disseminating documents, but also on 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. In other words, Article 6 already envisages the means by which a self-financing requirement may be taken into account in the setting of charges. As a matter of detail, the Commission takes the view that the notion of a reasonable return on investment must be interpreted as being linked to the cost elements that are directly related to the collection, production, reproduction and dissemination of documents, since any broader interpretation would be contrary to the underlying objective of promoting the creation of digital content services based on information held by public sector bodies, and facilitating re-use, as set out in Article 1(1) and also in recital 5 of the preamble to the Directive.

112. The Commission proposes that the Court should answer the questions as follows:

When a charge is made for the re-use of documents held by a public sector body, Article 6 of Directive 2003/98 requires this to be based on a calculation of the costs incurred and of the total income to be generated.

In determining the "cost" for the purposes of Article 6:

i) any fees or charges already imposed in relation to the collection of the relevant documents must be taken into account; and

ii) it is irrelevant that the documents were collected in the context of a legal obligation to do so.

The notion of a "reasonable return on investment" within the meaning of Article 6 permits a self-financing requirement of the public sector body in question to be taken into account. It must however be interpreted as referring to cost elements directly related to the collecting, producing, reproducing and disseminating of documents.

Per Christiansen
Judge-Rapporteur