



EUROPEAN COMMISSION

Brussels, 21 May 2014
sj.h(2014)1771122

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

Observations

submitted pursuant to Article 23 of the Statute of the Court of Justice, by the European Commission, represented by Laura PIGNATARO NOLIN, Legal Advisor, and Lorna ARMATI and Josephine NORRIS-USHER, Members of the Commission's Legal Service, acting as its Agents, with an address for service in Luxembourg at the office of Merete CLAUSEN, also of its Legal Service, Bâtiment BECH, 11 rue A. Weicker, 2721 Luxembourg, who consent to service by e-curia, in

Case C-71/14

East Sussex County Council

in which the First-tier Tribunal of the United Kingdom has posed a series of questions pursuant to Article 267 of the Treaty on the Functioning of the European Union.

The European Commission (hereafter "the Commission") has the honour of presenting the following submissions and arguments to the Court:

1. INTRODUCTION

1. The present reference for a preliminary ruling is the first case in which the Court is called upon to interpret the concept of "reasonable" as it relates to the charges imposed by public authorities for supplying environmental information pursuant to Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (hereafter "Directive 2003/4" or "the Directive").¹

2. BACKGROUND

2.1. International law

2. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was concluded in Aarhus in June 1998 under the auspices of the United Nations Economic Commission for Europe (UN ECE). Article 1 of the Convention provides:

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

As indicated by this provision, the Convention consists of three "pillars": access to information (Articles 4 and 5); the participation of the public in the decision-making process (Articles 6 to 8); and access to justice (Article 9).

3. Article 2(3) defines "environmental information" in broad terms. The text reads as follows:

¹ OJ L 41 of 14.2.2003, p. 26. It appears from the explanatory memorandum of the Commission's proposal Com(2003)402 section 3.3 that the main purpose was to align the EU legislation to the Aarhus Convention.

"any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above".

4. Article 4(8) of the Convention provides that *"Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge."*
5. Article 9(1) of the Convention lays down the principle of access to justice for *"any person who considers that his or her request for information under article 4 [on access to environmental information] has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article"*.
6. The Community ratified this Convention by Council Decision 2005/370. Moreover, the United Kingdom, like all the Member States, is also party to the Convention.

2.2. Union law

7. As mentioned above, the Community ratified the Aarhus Convention by Council Decision 2005/370 and it is therefore part of Union law. Prior to ratification, the Community took various steps to bring its legislation into line with the

Convention. As is clear from recital 5 in its preamble, that was the purpose of Directive 2003/4.

8. Article 3(5) of Directive 2003/4 provides that:

"For the purposes of this Article, Member States shall ensure that:

(a) officials are required to support the public in seeking access to information;

...

(c) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:

- the designation of information officers;*
- the establishment and maintenance of facilities for the examination of the information required,*
- registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found.*

Member States shall ensure that public authorities inform the public adequately of the rights they enjoy as a result of this Directive and to an appropriate extent provide information, guidance and advice to this end."

9. Article 5 of Directive 2003/4 states that:

"1. Access to any public registers or lists established and maintained as mentioned in Article 3(5) and examination in situ of the information requested shall be free of charge.

2. Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount.

3. Where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived."

10. This provision is to be read in light of recital 18 which reads:

"Public authorities should be able to make a charge for supplying environmental information but such a charge should be reasonable. This implies that, as a general rule, charges may not exceed actual costs of producing the material in question. Instances where advance payment will be required should be limited. In particular cases, where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market-based charge is considered to be reasonable; an advance payment may be required. A schedule of charges should be published and made available to applicants together with information on the circumstances in which a charge may be levied or waived".

11. Article 6 concerns access to justice and reads as follows:

"1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse. [...]".

11. Article 7, headed "Dissemination of environmental information", states:

"1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their

functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available.

...

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks."

2.3. National law

13. The Environmental Information Regulations 2004 (or EIR) were adopted to implement Directive 2003/4 into the domestic legal order.²

14. Regulation 8 deals with charging and reads as follows:

"(1) Subject to paragraphs (2) to (8), where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

(2) A public authority shall not make any charge for allowing an applicant -

(a) to access any public registers or lists of environmental information held by the public authority; or

(b) to examine the information requested at the place which the public authority makes available for that examination.

(3) A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount.

...

(8) A public authority shall publish and make available to applicants -

(a) a schedule of its charges; and

(b) information on the circumstances in which a charge may be made or waived."

15. Under regulation 18 of the EIR the "enforcement and appeals" provisions of the Freedom of Information Act 2000 are in effect incorporated into the EIR.

² The EIR apply to all public authorities with the exception of Scottish public authorities for which there are separate regulations.

16. By virtue of that regulation and section 50 of that Act, "*any person ... may apply to the [Information Commissioner] for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Parts 2 and 3 of [the EIR]*". Regulation 8 on charging is to be found in Part 2 of the EIR.
17. Any decision taken by the Information Commissioner may be appealed to the First-tier Tribunal (the referring court in the present case) pursuant to section 57 of the Freedom of Information Act.
18. Section 58 of that Act provides as follows:

"(1) If on an appeal under section 57 the Tribunal considers–

(a) that the [decision] against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the [decision] involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other [decision] as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the [decision] in question was based."

19. By virtue of section 59 of the Freedom of Information Act, an appeal on a point of law may be made to the High Court (of England and Wales, or of Northern Ireland, as appropriate).

2.4. The proceedings in the main case

20. Under legislation going back to 1925 (currently the Local Land Charges Act 1975) local authorities are required to maintain a Local Land Charges Register, which records local land charges (mainly prohibitions and restrictions on the use of land imposed under legislation by public authorities of various sorts) relating to land within their areas. Prior to completing any transaction in relation to real estate, a search of the Local Land Charges Register will be made. However, it is usual for additional enquiries to be made, seeking information held by local authorities but not covered by the land charges system, about, for example, proposed road

schemes near the property or outstanding planning enforcement proceedings in relation to the property. For this purpose, two standard form questionnaires were developed by the Law Society in consultation with local and national government and have been in use in one form or the other for over 50 years. The order for reference states that much of the information likely to be provided in response to the enquiries set out in the questionnaires will be "environmental information" for the purposes of Directive 2003/4.

21. Regulation 8 of the Local Authorities (England) (Charging for Property Searches) Regulations 2008 provides that a local authority may charge a person (including another local authority) in respect of answering enquiries from that person about a property, but requires that any charge, while in the local authority's discretion, must have regard to the costs to the local authority of answering enquiries about the property. Following the introduction of those Regulations and in accordance with the official government guidance on what local authorities could charge³, East Sussex County Council published a charging schedule and accompanying guidance notes. Those documents were annexed to the order for reference. It is the charges shown in that schedule that are in issue in the main proceedings.
22. However, the referring court also notes, at paragraph 6 of the order for reference, that the 2008 Regulations were not intended to apply when a local authority was providing "environmental information", the appropriate regime in such a case being that laid down in the EIR.
23. In the main proceedings, on 3 June 2011 a request for information relating to a specific property was made by PSG Eastbourne (a so-called "personal search company"). The order for reference takes as a given that the request was made so that PSG Eastbourne could pass the information on to the parties to a property transaction and charge a commercial rate for so doing. East Sussex County Council charged PSG Eastbourne GBP 17 for the information requested. It appears not to be in dispute that the information in question was "environmental information".⁴

³ The document, entitled, "Local Authority Property Search Services – Costing and Charging Guidance" is attached to the national court file, at pages 376-406 (referred to in Tab. 5 of the index to the file).

⁴ See paragraph 16 of the Order for reference.

24. PSG Eastbourne requested that the Council review the charge. The latter responded stating that regulation 8 of the EIR entitled it to make the charge.
25. PSG Eastbourne filed a complaint with the Information Commissioner pursuant to section 50 of the Freedom of Information Act 2000. It specifically asked the Information Commissioner to consider the Council's entitlement to charge for the information it provided. On 23 January 2013, the Information Commissioner issued a decision notice stating that the Council had not dealt with the request for information in accordance with regulation 8(3) of the EIR because it had calculated the charge made on a cost recovery basis. The Information Commissioner further held that a 'reasonable amount' within the meaning of the EIR is "*restricted to the disbursement costs associated with making the information available in the specified form i.e. postage and photocopying costs*" (paragraph 17 of the Order for reference).
26. East Sussex County Council appealed that decision to the First-tier Tribunal, who referred the following questions to the Court:
 - (1) What is the meaning to be attributed to Art 5(2) of Directive 2003/4/EC and in particular can a charge of a reasonable amount for supplying a particular type of environmental information include:
 - (a) part of the cost of maintaining a database used by the public authority to answer requests for information of that type;
 - (b) overhead costs attributable to staff time properly taken into account in fixing the charge?
 - (2) Is it consistent with Arts 5(2) and 6 of the Directive for a Member State to provide in its regulations that a public authority may charge an amount for supplying environmental information which does " ... not exceed an amount which *the public authority is satisfied* is a reasonable amount" if the decision of the public authority as to what is a "reasonable amount" is subject to administrative and judicial review as provided under English law?

3. LEGAL ASSESSMENT

3.1. The first question and the first part of the second question

27. By its first question and the first part of its second question, which it is appropriate to deal with together, the national court asks in essence what is a reasonable amount in relation to a charge levied by a public authority for supplying environmental information pursuant to Article 5(2) of Directive 2003/4, and in particular whether an amount is reasonable if the public authority is satisfied that it is so, and whether that charge can include such elements as part of the cost of maintaining a database used by the public authority to answer requests for such information, or overhead costs such as heating, lighting and other internal services like human resources and training.
28. By way of preliminary observations, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by or for public authorities.⁵
29. As recital 5 in the preamble to Directive 2003/4 confirms, in adopting that directive the European Union legislature intended to ensure the consistency of European Union law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest. It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that directive is designed to implement in European Union law.⁶
30. In considering the meaning to be ascribed to Article 5, it must therefore be noted, in the first place, that although the Aarhus Convention, Directive 2003/4 and the preceding Directive 90/313/EEC all refer to the notion of a reasonable charge, none of the texts provides a definition of what costs are to be considered as reasonable.

⁵ Case C-279/12 *Fish Legal*, paragraph 35 (ECLI:EU:C:2013:853).

⁶ Case C-279/12 *Fish Legal*, cited above, paragraphs 36 and 37.

31. In that respect, it is a matter of settled case law that the need for uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question.⁷
32. Article 5(2) of Directive 2003/4 makes no reference to the laws of the Member States and the reference to a reasonable amount in that provision is therefore a matter of Union law.
33. Beyond recognising that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations and considering that, to be able to assert that right and observe that duty, citizens must, among other things, have access to information, the preamble to the Aarhus Convention gives no guidance as to what might be considered to be a reasonable amount in relation to a charge for supplying environmental information.
34. The preamble to Directive 2003/4 is slightly more developed in relation to the right of access to environmental information and the need to ensure that public authorities make available and disseminate environmental information to the widest extent possible (recitals 8 and 9).⁸ Indeed, the objectives of the Directive are identified in Article 1 thereto as being to guarantee the right of access to environmental information and to ensure that such information is progressively made available and disseminated to the public. The preamble to the Directive contains a series of recitals the purpose of which is to emphasise the breadth of what is meant by environmental information and access thereto before conceding,

⁷ Case C-279/12 *Fish Legal*, cited above, paragraph 42; Case C-260/11 *Edwards*, paragraph 29 (ECLI:EU:C:2013:221); Case C-204/09 *Flaschglas Torgau*, paragraph 37 (ECLI:EU:C:2012:71).

⁸ The Court in Case C-216/05 *Commission v Ireland* (ECLI:EU:C:2006:706) held "*both Directive 90/313/EC and Directive 2003/4 note in the sixth and eight recitals in their preambles respectively the necessity to ensure that any natural or legal person in the European, Community has a right to access to environmental information held by or for the public authorities*" (paragraph 40).

in recital 18, that public authorities may make a charge for supplying environmental information, on the proviso that such a charge be reasonable. The recital states specifically that this implies that "*as a general rule, charges may not exceed actual costs of producing the material in question*".

35. Finally, it is useful to note that the Directive explicitly "*expands the existing access granted under Directive 90/313/EEC*" (recital 2).

36. In Case C-217/97 *Commission v Germany*, the Court had the opportunity to rule on the interpretation of Article 5 of Directive 90/313/EEC (which was formulated in a substantially similar manner to Article 5 of Directive 2003/4) in relation to an issue similar to that at stake in the current proceedings⁹ and concluded that "*the term 'reasonable' ... must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search*" (emphasis added).¹⁰

37. The reasoning of the Court, in paragraph 47 of the judgment, focuses on the objectives of Directive 90/313/EEC. The Court says:

"47. ... the purpose of the directive is to confer a right on individuals which assures them freedom of access to information on the environment and to make information effectively available to any natural or legal person at his request, without his or her having to prove an interest. Consequently, any interpretation of what constitutes a reasonable cost for the purposes of Article 5 of the directive which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected".

38. The judgment builds, in that respect, on the Opinion of Advocate General Fennelly in the case, who stated that:

⁹ Art. 5 of Directive 90/313/EEC read: *Member States may make a charge for supplying the information, but such charge may not exceed a reasonable cost.*

¹⁰ Case C-217/97 *Commission v Germany*, paragraph 48 (ECLI:EU:C:1999:395).

*"The notion of what is 'reasonable' must in my view be interpreted in the light of the general scheme and purpose of the Directive, and of the context in which it is used. As already noted, the Directive proceeds upon the basis that access to environmental information will 'improve environmental protection'. Its primary objective is 'to ensure freedom of access to ... [such] information', and it seeks to achieve this end by obliging the Member States to ensure such information is effectively 'made available ... to any natural or legal person at his request without his having to prove an interest'. In the light of this objective and the means chosen to achieve it, the question of whether the charges for the supply of the information are 'reasonable' must be judged from the perspective of the member of the public requesting the information, rather than from that of the public authority. While it does not expressly preclude a Member State levying a charge for the time and effort of public officials, such an approach seems to me to be fundamentally incompatible with the principal features of the Directive."*¹¹

39. The question now being asked is whether the same interpretation can be applied with regard to Article 5 of Directive 2003/4, which as recalled above (paragraph 35) intends to expand the existing access under Directive 90/313/EEC.
40. The Commission suggests that while the above considerations of the Court must naturally inform the debate, the lengthy discussions specifically on the issue of costs that took place between the two legislators in the course of the adoption of the Directive cannot be disregarded.¹² In the submissions that follow, the Commission will therefore take both elements into account.
41. Turning to the specific questions posed by the referring court, two particular categories of costs are identified and the national court asks whether it is open to a Member State to include such costs in the calculation of what is a reasonable amount to charge for supplying environmental information (the first question referred). The referring court also draws attention to a more general issue that arises as a result of the manner in which the national legislation phrases the

¹¹ Opinion of Advocate General Fennelly in Case C-217/97 *Commission v Germany*, cited above, at paragraph 23 (ECLI:EU:C:1999:34).

¹² See, for the discussion during the adoption of the directive, COM(2001) 303 of 6.6.2001 and document SEC (2002)103.

obligation flowing from Article 5(2) of the Directive, creating a link, as it does, with the particularities of English administrative law (the first part of the second question).

42. It should be noted first that Article 5 of the Directive permits Member States to make a charge for "supplying" information and, bearing in mind the purpose of the Directive, the Commission recalls that in addition to guaranteeing a right of access to information, the objective of Directive 2003/4 is to ensure the widest possible systematic availability and dissemination to the public of environmental information in forms or formats that are readily reproducible and accessible electronically (Articles 1, 3(4) and 7(1) of the Directive). The Commission suggests that a database containing details of all environmental information held by a public authority is the natural expression of that objective and concludes, on a purposive construction of the text, that the right to charge under Article 5(2) for supplying information cannot be associated with the costs of maintaining such a database. To hold the contrary would be illogical given that information in the database may be consulted *in situ* free of charge in accordance with the first paragraph of that provision.
43. With reference to letter (a) of the first question referred, the Commission concludes that the notion of "supplying" information must therefore be interpreted more restrictively and a charge for the same cannot include any element of the cost of maintaining a database used by a public authority to answer requests for access to information.
44. As to letter (b), and whether overhead costs attributable to those members of staff involved in replying to requests for information can be included in the charge for supplying that information, the Commission notes that this is an indirect cost.
45. As indicated above, some insight into the meaning of Article 5 and recital 18 can be gained from an examination of the legislative history of Directive 2003/4.¹³ It should be noted, in particular, that the Council did not accept the amendments suggested by the European Parliament explicitly aimed at limiting charges to the

¹³ See footnote 12 above.

direct cost of photocopying etc. Thus, in the conciliation process the word "producing" was inserted into recital 18 instead of "reproducing", the term favoured by the European Parliament. The distinction between direct and indirect costs and whether Directive 90/313/EEC (which also required charges to be "reasonable") allowed Member States to pass on the indirect costs for environmental information to applicants was a key issue in the judgment of the Court of Justice in Case C-217/97 *Commission v Germany* and it may be assumed that, had the legislature intended to preclude such passing on in Directive 2003/4, the language of recital 18 would have been different and clearer.

46. The Commission therefore considers that the phrase "cost of producing" in recital 18 does not provide a sufficient basis for arguing that Member States are precluded as a matter of principle from calculating what is a 'reasonable charge' with reference also to indirect costs. Indeed, on a literal reading, the word "cost" may - especially given that it is intended to "flesh out" the meaning of the broad term "reasonable" in Article 5 - be interpreted as including indirect as well as direct costs. The word "producing" also points in that direction; in order to "produce" material (consisting of information in one of the forms listed in Article 2(1)), a public authority will logically have to employ staff time as well as incur direct costs. A comparison of the different language versions of the Directive does not lead to a different view. On the contrary, some language versions¹⁴ appear to suggest that the "cost of producing" must be understood broadly as covering costs associated with the whole process of "bringing about" the material in question.

¹⁴ See for instance the French version of Art. 5(2) "*Les autorités publiques peuvent subordonner la mise à disposition des informations environnementales au paiement d'une redevance, pourvu que son montant n'excède pas un montant raisonnable*"; the German version "*Die Behörden können für die Bereitstellung von Umweltinformationen eine Gebühr erheben, die jedoch eine angemessene Höhe nicht überschreiten darf*"; the Italian version "*Le autorità pubbliche possono applicare una tassa per la fornitura dell'informazione ambientale, ma tale tassa non supera un importo ragionevole*"; the Spanish version "*Las autoridades públicas podrán aplicar contraprestaciones económicas por el suministro de información medioambiental, pero el importe de las mismas deberá ser razonable*"; the Portuguese version "*As autoridades públicas podem cobrar uma taxa pelo fornecimento de informação sobre o ambiente, desde que não exceda um montante razoável*".

47. However, it does not follow from the above that Member States are free to include any and all indirect costs in charges for supplying environmental information.¹⁵
48. According to recital 1 of Directive 2003/4 "*increased public access to environmental information and the dissemination of such information contribute to ... a better environment*". Mindful of that connection between transparency and protection of the environment, the legislature stated (in recital 8) that it is "*necessary to ensure that any ... person has a right of access ... without his having to state an interest*" and (in recital 15) that the practical arrangements laid down by Member States to implement the Directive should "*guarantee that the information is effectively and easily accessible*". As is clear from those recitals, the purpose of the Directive is to ensure environmental protection by granting persons with a general, as opposed to a personal or specific, interest in the environment a right of access to information, which they must be able to exercise effectively. Article 5 of the Directive cannot be interpreted in a manner which would jeopardise that purpose.
49. Dissuasive charges cannot be regarded as reasonable.
50. In view of the above, the Commission considers in light of the objectives of the Directive that Article 5 can be interpreted as not precluding Member States from including indirect costs in the charges for the supply of environmental information provided that they are not of such magnitude as to dissuade persons with a general interest from exercising their rights under the Directive. Indeed, the obligation laid down in paragraph 3 of Article 5 of Directive 2003/4, to publish and make available to applicants a schedule of such charges, is a procedural guarantee intended to strengthen the ability of members of the public to access information by virtue of ensuring that they know in advance what the process will cost.
51. The Commission notes in this respect that the referring court has made the following finding in fact: given the context in which the information in question is sought, namely as part of a property transaction typically worth thousands of

¹⁵ In fact, the judgment in Case C-217/97 *Commission v Germany*, cited above, may even be read as saying as much: "*the term 'reasonable' ... does not authorise Member States to pass on ... the entire*

- pounds, the charges levied by East Sussex County Council are not likely to dissuade anyone from seeking that type of information or in any substantial way restrict their access to it (paragraph 22 of the Order for reference, emphasis added). And yet, as indicated above, the Directive grants rights to all members of the public, irrespective of the context in which the environmental information in question is sought. The question therefore is whether the charges are likely to dissuade an interested member of the public, independently of any intention to purchase a property.
52. What is more, knowing what you will be charged does not make the charge "reasonable".
53. The Commission notes that, according to the referring court, the schedule of charges at issue in the present case was developed by East Sussex County Council on the basis of the government guidance entitled "Local Authority Property Search Services – Costing and Charging Guidance".¹⁶ Neither of those documents make any reference to an overarching requirement that the outcome of the calculations they prescribe be "reasonable".¹⁷
54. On the contrary, the guidance document emphasises on a number of occasions that the charging model it describes is based on a "cost recovery" principle.¹⁸ The application of that model without any adaptation in view of the nature (as environmental) of the information to which it relates cannot be said to properly transpose the obligation laid down in Article 5(2) of Directive 2003/4 that a charge be "reasonable".
55. What is more, the same conclusion must be reached in relation to the legislation identified by the national court as implementing the Directive: the EIR.
56. The Directive requires that any charge be "reasonable" and it appears consistent with the foregoing considerations that the notion of what is a reasonable charge

amount of the costs, in particular indirect ones, actually incurred" (paragraph 48 of the judgment, emphasis added).

¹⁶ See footnote 3 above.

¹⁷ See, by analogy, Case C-530/11 *Commission v UK*, paragraph 45 (ECLI:EU:C:2014:67).

¹⁸ Indeed, it notes specifically that it does not apply to environmental information, that information being governed by the EIR regime.

must be an objective one.¹⁹ Criteria that the public authority might consider could include cost calculations such as those set out in the guidance document referred to above. However, the public authority should also consider both the interest of the person requesting the information and the public interest in the protection of the environment and, with those interests in mind, assess whether the outcome of any "cost recovery" calculations is reasonable. Without prejudice to any assessment by a national court of the reasonableness of the charge in any particular case, the EIR does not do that.

57. National rules such as that laid down in regulation 8(3) of the EIR limiting the obligation of reasonableness to the perspective of the public authority in question, which is not only subjective but one-sided, cannot be said to properly transpose the requirement set out in Article 5 of the Directive that the charge itself must be reasonable.
58. The manner in which the obligation has been transposed is particularly prejudicial to the effectiveness of the Directive given the consequences it has on the possibilities for review: "*any challenge ... should only succeed if the decision of the public authority about what was a reasonable amount was itself 'unreasonable' in an administrative law sense (ie irrational, illegal or unfair)*" (paragraph 24 of the Order for reference). The Commission will return to that issue in the context of the reply to the second part of the second question.
59. The Commission therefore suggests that the answer to the first question and the first part of the second question must be that national legislation permitting the inclusion of indirect costs in the calculation of what constitutes a reasonable charge is not contrary to Article 5 of Directive 2003/4 provided that as part of that calculation the public authority in question must satisfy itself that the charge resulting therefrom is reasonable, taking into account both the interest of the person requesting the information and the public interest in the protection of the environment, and provided that the obligation imposed on public authorities is that the charge itself is reasonable, and not that the charge does not exceed an amount

¹⁹ See, by analogy, Case C-530/11 *Commission v UK*, cited above, paragraph 47.

which the public authority is satisfied is a reasonable amount. Whether that is the case in the present circumstances is a matter for the national judge to assess.

3.2. The second part of the second question

60. By the second part of its second question, the national court asks in essence whether national legislation providing for administrative and judicial review of the decision of a public authority as to what is a reasonable amount to charge for supplying environmental information is consistent with the requirements of Article 6 of Directive 2003/4.
61. Article 6 of the Directive, entitled "Access to justice", requires a Member State to put in place both an administrative procedure (paragraph 1) and a judicial procedure (paragraph 2) by which the acts and omissions of the public authority may be challenged.
62. Before considering the interpretation to be given to that provision, the Commission would make two preliminary observations.
63. First, it is a matter of settled case law that the spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions.²⁰ And yet the referring court notes specifically that "*it is not clear if [the question] will make any practical difference in [the case at hand] but it could affect the approach of the Tribunal and the Commissioner in the future*". The Commission therefore invites the Court to consider whether an answer to the second part of the second question is necessary in order to allow the national judge to resolve the proceedings pending before him.
64. Second, the national court makes reference to the system of judicial review under English law and notes that on a strict interpretation of the wording of regulation 8(3) of the EIR, a challenge to that provision should only succeed if the decision of the public authority about what was a reasonable amount was itself

²⁰ Case C-62/06 *ZF Zefeser*, paragraph 15 (ECLI:EU:C:2007:811).

'unreasonable' in an English administrative law sense (i.e. irrational, illegal or unfair).

65. As noted above in the context of the reply to the first question and the first part of the second question (paragraph 31), it is a matter of settled case law that the need for uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purposes of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question.
66. Article 6 of the Directive contains no such reference to the laws of the Member States and the procedures envisaged therefore cannot be limited to previously existing categories of remedy under national law.
67. On the contrary, the wording, the overall scheme and the objectives of the Convention and Directive 2003/4 must be considered. As indicated in Article 1 thereof, the Convention consists of three "pillars": access to information (Articles 4 and 5); the participation of the public in the decision-making process (Articles 6 to 8); and access to justice (Article 9). The importance of the first of these pillars is based on the idea that access to environmental information will improve environmental protection. The third pillar is correspondingly predicated upon the advantages, in terms of the objectives of the Convention, of ensuring as wide an access to justice as possible.
68. The wording of Article 6 in the English version of the Directive refers to the fact that acts or omissions are to be "reconsidered" by that or another public authority or reviewed administratively by an independent and impartial body established by law (paragraph 1). This is confirmed by other linguistic versions.²¹
69. The use of the term "reconsideration" implies that a full analysis of the relevant facts and law is required under Article 6 of the Directive.

²¹ In French the term used is "*reexaminé*", in German "*geprüft*", in Italian "*riesaminati*", in Spanish and in Portuguese "*reconsiderados*".

70. This interpretation is supported by the very aim of the Directive, which is to ensure wide access to information, access to justice being intrinsically linked to the achievement of that aim.
71. Article 6(2) of the Directive provides that in addition to the review procedure referred to in the first paragraph, Member States must ensure access to a review procedure before a court of law. It is interesting to note the variations between the language versions in this respect: for example, the English and the Spanish versions present the same sequence (reconsideration/review/review and *reconsiderados/recurridos/recurrirse*), while in Italian, the same single verb is used in both the first and the second paragraphs (*riesaminare*) and in Portuguese there is no link between the two paragraphs and no further explanation of the procedure (*recurso*) in the second paragraph, other than to note that it must be before a court of law. In German, the words used all have the same root (*geprüft/überprüft/überprüft*). The Commission therefore suggests that no particular importance should be placed on the reference in the English version to a notion which implies a very precise meaning in English law (administrative review).²²
72. A narrow interpretation of the notion of "review" in Article 6 of the Directive would run counter the very objective of the Directive. In other words, Article 6 must be interpreted as imposing upon the Member State an obligation to ensure that a decision by a public authority as to the reasonableness of a charge should be subject to a full reconsideration, both on facts and law. It is not open to a Member State, when transposing the obligations stemming from Article 6(1) and (2) to limit the review by a court to narrowly defined categories of unreasonableness (not of the charge, but of the decision itself). To hold to the contrary would unduly restrict the access to justice envisaged by the Directive.
73. With those considerations in mind, the Commission notes that according to the information contained in the Order for reference, the Information Commissioner can investigate a complaint and can issue a decision in accordance with which the

²² Joined cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, paragraph 54 (ECLI:EU:C:2009:648).

public authority in question is required to take the necessary steps to comply with the EIR. The national court notes specifically that "*it is confident that the Commissioner is an 'independent and impartial body established by law' for the purposes of Article 6(1) of the Directive*" (paragraph 15 of the Order for reference). The decision of the Information Commissioner can be appealed to the First-tier Tribunal and the latter may uphold the appeal or substitute the decision being challenged with a new decision. The referring court considers that it displays the characteristics required of the body referred to in Article 6(2). It also notes that "*the First-tier Tribunal is entitled to (and frequently does) review findings of fact [...] and receive new evidence for that purpose*".²³

74. The extent to which there has been a full review in this case is a matter for the national judge to assess in light of the facts and the characteristics of the case. Equally, it is for the national court to assess whether the remedies available under national law do indeed lead necessarily and in all cases to an effective judicial process for challenging (in fact and in law) the acts or omissions of the public authority concerned in accordance with Article 6 of the Directive. The considerations set out above in relation to the manner in which the obligation in Article 5(2) of the Directive has been transposed should be taken into account in this respect (see, in particular, paragraphs 56 to 58).
75. The Commission therefore suggests that the answer to the second part of the second question must be that national legislation which limits the scope of reconsideration of an act or omission to review only if it is irrational, illegal or unfair and which does not provide that any decision or omission adopted pursuant to Article 5 of that Directive is fully reconsidered on the facts and in law before becoming final is contrary to Article 6 of Directive 2003/4. Whether that is the case in the present circumstances is a matter for the national judge to assess.

²³ This is somewhat contradicted by the statement in paragraph 24 of the Order for reference to the effect that, on a strict interpretation of the law, the review by the court is limited to checking for "unreasonableness" in an administrative law sense i.e. irrational illegal or unfair. The Commission suggests that the solution to this tension in the text might lie in the drafting of the obligation in regulation 8(3) EIR, rather than in system itself: it is clear that, in general, the First-tier Tribunal functions as a judge of both fact and law (see paragraph 18 above).

4. CONCLUSION

76. In the light of these considerations, the Commission respectfully submits that the questions referred by the First-tier Tribunal should be answered as follows:

– Article 5 of Directive 2003/4 must be interpreted as not precluding national legislation permitting the inclusion of indirect costs in the calculation of what constitutes a reasonable charge, provided that as part of that calculation the public authority in question must satisfy itself that the charge resulting therefrom is reasonable, taking into account both the interest of the person requesting the information and the public interest in the protection of the environment, and provided that the obligation imposed on public authorities is that the charge itself is reasonable, and not that the charge does not exceed an amount which the public authority is satisfied is a reasonable amount. Whether that is the case in the present circumstances is a matter for the national judge to assess.

– Article 6 of Directive 2003/4 must be interpreted as precluding national legislation which limits the scope of reconsideration of an act or omission to review only if it is irrational, illegal or unfair and which does not provide that any decision or omission adopted pursuant to Article 5 of that Directive is fully reconsidered on the facts and in law before becoming final. Whether that is the case in the present circumstances is a matter for the national judge to assess.

Laura PIGNATARO NOLIN

Lorna ARMATI

Josephine NORRIS-USHER

Agents for the Commission