JUDGMENT OF THE COURT

23 May 2024*

(*Consumer protection – Directive 2014/17/EU – Variable interest rates – Mortgage loans – Transparency requirements – Directive 93/13/EEC – Directive 2008/48/EC – Unfair contract terms*)

In Joined Cases E-13/22 and E-1/23,

REQUESTS 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 Reykjavík District Court (*Héraðsdómur Reykjavíkur*) and Reykjanes District Court (*Héraðsdómur Reykjaness*), in the cases between

Birgir Þór Gylfason and Jórunn S. Gröndal

and

Landsbankinn hf.,

and

Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson

and

Íslandsbanki hf.,

concerning, inter alia, the interpretation and application of Article 24 of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and of Article 10(2)(f) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers,

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* Language of the requests: Icelandic. Translations of national provisions are unofficial and based on those contained in the documents of the case.

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann, and Ola Mestad (ad hoc) (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations in Case E-13/22, submitted on behalf of:

– Birgir Þór Gylfason and Jórunn S. Gröndal, represented by Ingvi Hrafn Óskarsson, advocate;

– Landsbankinn hf. ("Landsbankinn"), represented by Andri Árnason and Andri Andrason, advocates;

– the Norwegian Government, represented by Sverre Runde and Ingeborg Collett, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Ingibjörg Ólöf Vilhjálmsdóttir, Marte Brathovde and Melpo-Menie Joséphidès, acting as Agents; and

– the European Commission ("the Commission"), represented by Hélène Tserepa-Lacombe, Gaëtane Goddin and Julie Samnadda, acting as Agents;

having regard to the Report for the Hearing in Case E-13/22,

having heard oral arguments on behalf of Birgir Þór Gylfason and Jórunn S. Gröndal, represented by Ingvi Hrafn Óskarsson; Landsbankinn hf., represented by Stefán Andrew Svensson; the Norwegian Government, represented by Sverre Runde; ESA, represented by Ingibjörg Ólöf Vilhjálmsdóttir and Marte Brathovde; and the Commission, represented by Julie Samnadda, at the hearing in Case E-13/22 on 23 March 2023; and

having considered the written observations in Case E-1/23 submitted on behalf of:

– Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson, represented by Ingvi Hrafn Óskarsson, advocate;

– Íslandsbanki hf. ("Íslandsbanki"), represented by Áslaug Árnadóttir, advocate;

– the Icelandic Government, represented by Inga Þórey Óskarsdóttir and Eggert Páll Ólason, acting as Agents;

– the Norwegian Government, represented by Sverre Runde and Ingeborg Collett, acting as Agents;

– ESA, represented by Ingibjörg Ólöf Vilhjálmsdóttir, Marte Brathovde and Melpo-Menie Joséphidès, acting as Agents; and

– the Commission, represented by Hélène Tserepa-Lacombe, Julie Samnadda, Napoleón Ruiz García and Corneliu Hoedlmayr, acting as Agents;

having regard to the Report for the Hearing in Case E-1/23,

having heard oral arguments on behalf of Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson, represented by Ingvi Hrafn Óskarsson; Íslandsbanki, represented by Áslaug Árnadóttir; the Icelandic Government, represented by Inga Þórey Óskarsdóttir and Eggert Páll Ólason; the Norwegian Government, represented by Sverre Runde; ESA, represented by Ingibjörg Ólöf Vilhjálmsdóttir and Marte Brathovde; and the Commission, represented by Napoleón Ruiz García, at the hearing in Case E-1/23 on 13 June 2023,

gives the following

Judgment

I Legal background

EEA law

1 The twelfth recital of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") states that the Contracting Parties are:

> *DETERMINED to promote the interests of consumers and to strengthen their position in the market place, aiming at a high level of consumer protection.*

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 7/94 of 21 March 1994 (OJ 1994 L 160, p. 1; and Icelandic EEA Supplement 1994 No 17, p. 1) ("the Unfair Contract Terms Directive"). The Unfair Contract Terms Directive is referred to at point 7a of Annex XIX (Consumer protection) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Norway. The requirements were fulfilled by 23 June 1994 and the decision entered into force on 1 July 1994.

3 The Unfair Contract Terms Directive was amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64; and Icelandic EEA Supplement 2014 No 54, p. 1047) ("Directive 2011/83/EU"). Directive 2011/83/EU was incorporated into the EEA Agreement by Decision of the

EEA Joint Committee No 181/2012 of 28 September 2012 (OJ 2012 L 341, p. 35; and Icelandic EEA Supplement 2012 No 70, p. 42) and is referred to at point 7a and i of Annex XIX (Consumer protection) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 13 December 2013 and the decision entered into force on 1 February 2014.

4 The sixteenth recital of the Unfair Contract Terms Directive reads:

> *Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;*

5 Article 1(1) of the Unfair Contract Terms Directive reads:

> *The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.*

6 Article 2 of the Unfair Contract Terms Directive reads:

> *For the purposes of this Directive:*
>
> *(a) 'unfair terms' means the contractual terms defined in Article 3;*
>
> *(b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;*
>
> *(c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.*

7 Article 3 of the Unfair Contract Terms Directive reads:

> *1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a*

significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. *A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre formulated standard contract.*

   The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

   Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. *The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.*

8 Article 4 of the Unfair Contract Terms Directive reads:

1. *Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*

2. *Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language*.

9 Article 5 of the Unfair Contract Terms Directive reads:

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).

10 Article 6 of the Unfair Contract Terms Directive reads:

1. *Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their*

national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2. *Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.*

11 Article 7 of the Unfair Contract Terms Directive reads:

1. *Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.*

2. *The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.*

3. *With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.*

12 Article 8 of the Unfair Contract Terms Directive reads:

Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.

13 Article 8a of the Unfair Contract Terms Directive reads:

1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:

— extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or,

— contain lists of contractual terms which shall be considered as unfair,

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.

3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.

14 The Annex to the Unfair Contract Terms Directive entitled "terms referred to in Article 3(3)", reads in extract:

1. Terms which have the object or effect of:

…

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

…

2. Scope of subparagraphs (g), (j) and (l)

….

(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Subparagraphs (g), (j) and (l) do not apply to:

- *transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;*

- *contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;*

...

15 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66; and Icelandic EEA Supplement 2012 No 54, p. 36) ("the Consumer Credit Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 16/2009 of 5 February 2009 (OJ 2009 L 73, p. 53; and Icelandic EEA Supplement 2009 No 16, p. 24). The Consumer Credit Directive is referred to at point 7h of Annex XIX (Consumer protection) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 1 September 2011 and the decision entered into force on 1 November 2011.

16 Article 1 of the Consumer Credit Directive, entitled "Subject matter", reads:

> *The purpose of this Directive is to harmonise certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers.*

17 Article 2 of the Consumer Credit Directive, entitled "Scope", reads, in extract:

> *1. This Directive shall apply to credit agreements.*
>
> *2. This Directive shall not apply to the following:*
>
> *(a) credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property;*
>
> *...*

18 Article 3 of the Consumer Credit Directive, entitled "Definitions", reads, in extract:

> *For the purposes of this Directive, the following definitions shall apply:*
>
> *(a) 'consumer' means a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession;*
>
> *...*
>
> *(h) 'total amount payable by the consumer' means the sum of the total amount of the credit and the total cost of the credit to the consumer;*
>
> *...*
>
> *(j) 'borrowing rate' means the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down;*

...

19 Article 10(2)(f) of the Consumer Credit Directive, entitled "Information to be included in credit agreements", reads:

> *2. The credit agreement shall specify in a clear and concise manner:*
>
> *(f) the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates;*

20 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34; and Icelandic EEA Supplement 2019 No 92, p. 4), as corrected by OJ 2015 L 246, p. 11, ("the Mortgage Credit Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 125/2019 of 8 May 2019 (OJ 2019 L 321, p. 176; and Icelandic EEA Supplement 2019 No 99, p. 8) ("Joint Committee Decision 125/2019"). The Mortgage Credit Directive is referred to at points 31g and 31j of Annex IX (Financial services) and point 7h of Annex XIX (Consumer protection) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 23 September 2021 and the decision entered into force on 1 November 2021.

21 The Mortgage Credit Directive was amended by Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ("Regulation 2016/1011") (OJ 2016 L 171, p. 1; and Icelandic EEA Supplement 2020 No 16, p. 72). Regulation 2016/1011 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 190/2019 of 12 September 2019 (OJ 2019 L 235, p. 9; and Icelandic EEA Supplement 2019 No 73, p. 5). Regulation 2016/1011 is referred to at point 31 l of Annex IX (Financial services) and point 7h of Annex XIX (Consumer protection) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 17 December 2019 and the decision entered into force on 18 December 2019.

22 Recitals 15, 19 and 22 of the Mortgage Credit Directive read:

> *(15) The objective of this Directive is to ensure that consumers entering into credit agreements relating to immovable property benefit from a high level of protection. It should therefore apply to credits secured by immovable property regardless of the purpose of the credit, refinancing agreements or other credit*

agreements that would help an owner or part owner continue to retain rights in immovable property or land and credits which are used to purchase an immovable property in some Member States including credits that do not require the reimbursement of the capital or, unless Member States have an adequate alternative framework in place, those whose purpose is to provide temporary financing between the sale of one immovable property and the purchase of another, and to secured credits for the renovation of residential immovable property.

(19) For reasons of legal certainty, the Union legal framework in the area of credit agreements relating to residential immovable property should be consistent with and complementary to other Union acts, particularly in the areas of consumer protection and prudential supervision. Certain essential definitions including the definition of 'consumer', and 'durable medium', as well as key concepts used in standard information to designate the financial characteristics of the credit, including 'total amount payable by the consumer' and 'borrowing rate' should be in line with those set out in Directive 2008/48/EC so that the same terminology refers to the same type of facts irrespective of whether the credit is a consumer credit or a credit relating to residential immovable property. Member States should therefore ensure, in the transposition of this Directive, that there is consistency of application and interpretation in relation to those essential definitions and key concepts.

(22) At the same time, it is important to take into consideration the specificities of credit agreements relating to residential immovable property, which justify a differentiated approach. Given the nature and the possible consequences of a credit agreement relating to residential immovable property for the consumer, advertising materials and personalised pre-contractual information should include adequate specific risk warnings, for instance about the potential impact of exchange rate fluctuations on what the consumer has to repay and, where assessed as appropriate by the Member States, the nature and implications of taking out a security. Following what already existed as a voluntary approach by the industry concerning home loans, general pre-contractual information should be made available at all times in addition to the personalised pre-contractual information. Furthermore, a differentiated approach is justified in order to take into consideration the lessons learnt from the financial crisis and in order to ensure that credit origination takes place in a sound manner. In this respect, the provisions on the creditworthiness assessment should be strengthened in comparison to consumer credit, more precise information should be provided by credit intermediaries on their status and relationship with the creditors in order to disclose potential conflicts of interest, and all actors involved in the origination of credit agreements relating to immovable property should be adequately admitted and supervised.

23 Article 1 of the Mortgage Credit Directive, entitled "Subject matter", reads:

This Directive lays down a common framework for certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property, including an obligation to carry out a creditworthiness assessment before granting a credit, as a basis for the development of effective underwriting standards in relation to residential immovable property in the Member States, and for certain prudential and supervisory requirements, including for the establishment and supervision of credit intermediaries, appointed representatives and non-credit institutions.

24 Article 2 of the Mortgage Credit Directive, entitled "Level of harmonisation", reads:

1. This Directive shall not preclude Member States from maintaining or introducing more stringent provisions in order to protect consumers, provided that such provisions are consistent with their obligations under Union law.

2. Notwithstanding paragraph 1, Member States shall not maintain or introduce in their national law provisions diverging from those laid down in Article 14(2) and Annex II Part A with regard to standard pre-contractual information through a European Standardised Information Sheet (ESIS) and Article 17(1) to (5), (7) and (8) and Annex I with regard to a common, consistent Union standard for the calculation of the annual percentage rate of charge (APRC).

25 Article 3(1)(a) of the Mortgage Credit Directive, entitled "Scope", reads:

1. This Directive shall apply to:

(a) credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on residential immovable property or secured by a right related to residential immovable property;

26 Article 4 of the Mortgage Credit Directive, entitled "Definitions", reads, in extract:

For the purposes of this Directive, the following definitions shall apply:

(1) 'Consumer' means a consumer as defined in point (a) of Article 3 of Directive 2008/48/EC.

(2) 'Creditor' means a natural or legal person who grants or promises to grant credit falling within the scope of Article 3 in the course of his trade, business or profession.

(3) 'Credit agreement' means an agreement whereby a creditor grants or promises to grant, to a consumer, a credit falling within the scope of Article 3 in the form of a deferred payment, loan or other similar financial accommodation.

...

(14) 'Total amount payable by the consumer' means the total amount payable by the consumer as defined in point (h) of Article 3 of Directive 2008/48/EC.

...

(16) 'Borrowing rate' means the borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC.

...

27 Article 7(1) of the Mortgage Credit Directive, entitled "Conduct of business obligations when providing credit to consumers", reads, in extract:

Member States shall require that when manufacturing credit products or granting, intermediating or providing advisory services on credit and, where appropriate, ancillary services to consumers or when executing a credit agreement, the creditor, credit intermediary or appointed representative acts honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers. ...

28 Article 11 of the Mortgage Credit Directive, entitled "Standard information to be included in advertising" reads, in extract:

1. Member States shall ensure that any advertising concerning credit agreements which indicates an interest rate or any figures relating to the cost of the credit to the consumer includes the standard information in accordance with this Article.

...

2. The standard information shall specify in a clear, concise and prominent way:

...

(c) the borrowing rate, indicating whether this is fixed or variable or a combination of both, together with particulars of any charges included in the total cost of the credit to the consumer;

(d) the total amount of credit;

(e) the APRC which shall be included in the advertisement at least as prominently as any interest rate;

...

29 Article 14 of the Mortgage Credit Directive, entitled "Pre-contractual information" reads, in extract:

> *1. Member States shall ensure that the creditor and, where applicable, the credit intermediary or appointed representative, provides the consumer with the personalised information needed to compare the credits available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement:*
>
> *(a) without undue delay after the consumer has given the necessary information on his needs, financial situation and preferences in accordance with Article 20; and*
>
> *(b) in good time before the consumer is bound by any credit agreement or offer.*
>
> *2. The personalised information referred to in paragraph 1, on paper or on another durable medium, shall be provided by means of the ESIS, as set out in Annex II.*
>
> *...*

30 Article 17(6) of the Mortgage Credit Directive, entitled "Calculation of the APRC" (annual percentage rate of charge), reads:

> *Where the credit agreement allows for variations in the borrowing rate, Member States shall ensure that the consumer is informed of the possible impacts of variations on the amounts payable and on the APRC at least by means of the ESIS. This shall be done by providing the consumer with an additional APRC which illustrates the possible risks linked to a significant increase in the borrowing rate. Where the borrowing rate is not capped, this information shall be accompanied by a warning highlighting that the total cost of the credit to the consumer, shown by the APRC, may change. This provision shall not apply to credit agreements where the borrowing rate is fixed for an initial period of at least five years, at the end of which a negotiation on the borrowing rate takes place in order to agree on a new fixed rate for a further material period, for which an additional, illustrative APRC is provided for in the ESIS.*

31 Article 24 of the Mortgage Credit Directive, entitled "Variable rate credits", reads:

> *Where the credit agreement is a variable rate credit, Member States shall ensure that:*
>
> *(a) any indexes or reference rates used to calculate the borrowing rate are clear, accessible, objective and verifiable by the parties to the credit agreement and the competent authorities; and*
> *(b) historical records of indexes for calculating the borrowing rates are maintained either by the providers of these indexes or the creditors.*

32 Article 27(1) and (2) of the Mortgage Credit Directive, entitled "Information concerning changes in the borrowing rate", reads:

> *1. Member States shall ensure that the creditor informs the consumer of any change in the borrowing rate, on paper or another durable medium, before the change takes effect. The information shall at least state the amount of the payments to be made after the new borrowing rate takes effect and, in cases where the number or frequency of the payments changes, particulars thereof.*
>
> *2. However, the Member States may allow the parties to agree in the credit agreement that the information referred to in paragraph 1 is to be given to the consumer periodically where the change in the borrowing rate is correlated with a change in a reference rate, the new reference rate is made publicly available by appropriate means and the information concerning the new reference rate is kept available in the premises of the creditor and communicated personally to the consumer together with the amount of new periodic instalments.*

33 Article 43(1) of the Mortgage Credit Directive, as adapted by Joint Committee Decision 125/2019, reads:

> *This Directive shall not apply to credit agreements existing before the date of entry into force of Decision of the EEA Joint Committee No 125/2019 of 8 May 2019.*

34 Annex II to the Mortgage Credit Directive, entitled "European Standardised Information Sheet (ESIS)", reads, in extract:

> *PART A*
>
> *The text in this model shall be reproduced as such in the ESIS. Indications between square brackets shall be replaced with the corresponding information. Instructions for the creditor or, where applicable, credit intermediary on how to complete the ESIS are provided in Part B.*
>
> *…*
>
> ***3. Main features of the loan***
>
> *Amount and currency of the loan to be granted: [value][currency]*
>
> *(Where applicable) This loan is not in [national currency of the borrower].*
>
> *(Where applicable) The value of your loan in [national currency of the borrower] could change.*

(Where applicable) For example, if the value of [national currency of the borrower] fell by 20 % relative to [credit currency], the value of your loan would increase to [insert amount in national currency of the borrower]. However, it could be more than this if the value of [national currency of the borrower] falls by more than 20 %.

(Where applicable) The maximum value of your loan will be [insert amount in national currency of the borrower]. (Where applicable) You will receive a warning if the credit amount reaches [insert amount in national currency of the borrower]. (Where applicable) You will have the opportunity to [insert right to renegotiate foreign currency loan or right to convert loan into [relevant currency] and conditions].

Duration of the loan: [duration]

[Type of loan]

[Type of applicable interest rate]

Total amount to be reimbursed:

This means that you will pay back [amount] for every [unit of the currency] borrowed.

(Where applicable) [This/Part of this] is an interest-only loan. You will still owe [insert amount of loan on an interest-only basis] at the end of the mortgage term.

(Where applicable) Value of the property assumed to prepare this information sheet: [insert amount]

(Where applicable) Maximum available loan amount relative to the value of the property [insert ratio] or Minimum value of the property required to borrow the illustrated amount [insert amount]

(Where applicable) [Security]

4. Interest rate and other costs

The annual percentage rate of charge (APRC) is the total cost of the loan expressed as an annual percentage. The APRC is provided to help you to compare different offers.

The APRC applicable to your loan is [APRC].

It comprises:

Interest rate [value in percentage or, where applicable, indication of a reference rate and percentage value of creditor's spread]

[Other components of the APRC]

Costs to be paid on a one-off basis

(Where applicable) You will need to pay a fee to register the mortgage. [Insert amount of fee where known or basis for calculation.]

Costs to be paid regularly

(Where applicable) This APRC is calculated using assumptions regarding the interest rate.

(Where applicable) Because [part of] your loan is a variable interest rate loan, the actual APRC could be different from this APRC if the interest rate for your loan changes. For example, if the interest rate rose to [scenario as described in Part B], the APRC could increase to [insert illustrative APRC corresponding to the scenario].

(Where applicable) Please note that this APRC is calculated on the basis that the interest rate remains at the level fixed for the initial period throughout the duration of the contract.

(Where applicable) The following costs are not known to the lender and are therefore not included in the APRC: [Costs]

(Where applicable) You will need to pay a fee to register the mortgage.

Please make sure that you are aware of all other taxes and costs associated with your loan.

…

PART B

Instructions to complete the ESIS

In completing the ESIS, at least the following instructions shall be followed. Member States may however elaborate or further specify the instructions for completing the ESIS.

…

Section '3. Main features of the loan'

(1) This section shall clearly explain the main characteristics of the credit, including the value and currency and the potential risks associated with the borrowing rate, including the ones referred to in point (8), and amortisation structure.

…

(6) This section shall explain whether the borrowing rate is fixed or variable and, where applicable, the periods during which it will remain fixed; the frequency of subsequent revisions and the existence of limits to the borrowing rate variability, such as caps or floors.

The formula used to revise the borrowing rate and its different components (e.g. reference rate, interest rate spread) shall be explained. The creditor shall indicate, e.g. by means of a web address, where further information on the indices or rates used in the formula can be found, e.g. Euribor or central bank reference rate.

…

Section '4. Interest rate' and other costs

(1) The reference to 'interest rate' corresponds to the borrowing rate or rates.

(2) The borrowing rate shall be mentioned as a percentage value. Where the borrowing rate is variable and based on a reference rate the creditor may indicate the borrowing rate by stating a reference rate and a percentage value of creditor's spread. The creditor shall however indicate the value of the reference rate valid on the day of issuing the ESIS.

Where the borrowing rate is variable the information shall include: (a) the assumptions used to calculate the APRC; (b) where relevant, the applicable caps and floors and (c) a warning that the variability could affect the actual level of the APRC. In order to attract the consumer's attention the font size used for the warning shall be bigger and shall figure prominently in the main body of the ESIS. The warning shall be accompanied by an illustrative example on the APRC. Where there is a cap on the borrowing rate, the example shall assume that the borrowing rate rises at the earliest possible opportunity to the highest level foreseen in the credit agreement. Where there is no cap the example shall illustrate the APRC at the highest borrowing rate in at least the last 20 years, or where the underlying data for the calculation of the borrowing rate is available for a period of less than 20 years the longest period for which such data is available, based on the highest value of any external reference rate used in calculating the borrowing rate where applicable or the highest value of a benchmark rate specified by a competent authority or EBA where the creditor does not use an external reference rate. Such requirement shall not apply to credit agreements where the borrowing rate is fixed for a material initial period of several years and may then be fixed for a further period following negotiation

between the creditor and the consumer. For credit agreements where the borrowing rate is fixed for a material initial period of several years and may then be fixed for a further period following negotiation between the creditor and the consumer, the information shall include a warning that the APRC is calculated on the basis of the borrowing rate for the initial period. The warning shall be accompanied by an additional, illustrative APRC calculated in accordance with Article 17(5). Where credits are multi-part credits (e.g. concurrently part fixed rate, part variable rate), the information shall be given for each part of the credit.

(3) In the section on 'other components of the APRC' all the other costs contained in the APRC shall be listed, including one-off costs such as administration fees, and regular costs, such as annual administration fees. The creditor shall list each of the costs by category (costs to be paid on a one-off basis, costs to be paid regularly and included in the instalments, costs to be paid regularly but not included in the instalments), indicating their amount, to whom they are to be paid and when. This does not have to include costs incurred for breaches of contractual obligations. Where the amount is not known, the creditor shall provide an indication of the amount if possible, or if not possible, how the amount will be calculated and specify that the amount provided is indicative only. Where certain costs are not included in the APRC because they are unknown to the creditor, this shall be highlighted.

Where the consumer has informed the creditor of one or more components of his preferred credit, such as the duration of the credit agreement and the total amount of credit, the creditor shall, where possible, use those components; if a credit agreement provides different ways of drawdown with different charges or borrowing rates and the creditor uses the assumptions set out in Part II of Annex I, it shall indicate that other drawdown mechanisms for this type of credit agreement may result in a higher APRC. Where the conditions for drawdown are used for calculating the APRC, the creditor shall highlight the charges associated with other drawdown mechanisms that are not necessarily the ones used in calculating the APRC.

(4) Where a fee is payable for registration of the mortgage or comparable security that shall be disclosed in this section with the amount, where known, or where this is not possible the basis for determining the amount. Where the fees are known and included in the APRC the existence and amount of the fee shall be listed under 'Costs to be paid on a one-off basis'. Where the fees are not known to the creditor and therefore not included in the APRC the existence of the fee shall be clearly mentioned in the list of costs which are not known to the creditor. In either case the standardised wording in Part A shall be used under the appropriate heading.

…

National law

35 The Unfair Contract Terms Directive was implemented into Icelandic law by Act No 14/1995, which amended Act No 7/1936 on Contracts, Agency and Void Legal Instruments (*Lög nr. 7/1936 um samningsgerð, umboð og ógilda löggerninga*).

36 Article 36 of the Contracts, Agency and Void Legal Instruments Act reads:

> *A contract may be set aside, in full or in part, or amended if it would be considered unfair or contrary to good business practices to invoke the contract, subject, however, to Article 36(c). The same applies to other legal instruments.*
>
> *Any assessment pursuant to paragraph 1 shall take account of the substance of the contract, the position of the parties to the contract, the circumstances of the making of the contract and subsequent circumstances.*

37 Article 36(c) of the Contracts, Agency and Void Legal Instruments Act reads:

> *The provisions of Article 36 apply to contracts pursuant to paragraph 1 of Article 36, but with the changes resulting from paragraphs 2 and 3.*
>
> *In assessing whether a contract pursuant to paragraph 1 is unfair, account should be taken of the factors and circumstances referred to in paragraph 2 of Article 36, including the terms of other linked contracts. However, no account shall be taken of circumstances that arose subsequently, to the disadvantage of the consumer.*
>
> *A contract is unfair if it is contrary to good business practices and materially distorts the balance between the rights and obligations of the contracting parties, to the disadvantage of the consumer. If a term of this kind is set aside, in full or in part, or amended, the contract shall, at the request of the consumer, remain valid in other respects without change if it can be performed without the term.*

38 The Consumer Credit Directive was incorporated into Icelandic law by the Consumer Credit Act No 33/2013 (*Lög nr. 33/2013 um neytendalán*) ("the Consumer Credit Act"). Article 7(4) of the Consumer Credit Act reads, in extract:

> *The information shall contain the following:*
>
> *…*
>
> *f. the borrowing rate, the conditions for its application and, if appropriate, any index or reference interest rate that may affect the initial borrowing rate, and also the period, conditions, and procedure for changing the borrowing rate; if various borrowing rates apply under various circumstances, the aforementioned information shall be provided on them all, …*

39 The Mortgage Credit Directive has been incorporated into Icelandic law by the Consumer Property Mortgage Act No 118/2016 (*Lög nr. 118/2016 um fasteignalán til neytenda*) ("the Consumer Property Mortgage Act").

40 Article 12 of the Consumer Property Mortgage Act specifies the information that the creditor is required to give consumers regarding interest rates. The article states, among other things, that the creditor is to ensure that consumers have, at all times, access to clear and comprehensible information on available credit, including the types of borrowing rates, together with illustrative examples and a short account of the characteristics of fixed and variable interest rates and their significance for the consumer. The conditions and procedure for adjusting interest rates must be specified.

41 Article 34(1) of the Consumer Property Mortgage Act reads:

> *If a property mortgage agreement contains a provision stating that reference values, indexes or reference index rates are to be used for determining variable interest rates, the creditor may only use reference values, indexes or reference interest rates that are clear, accessible, objective and verifiable, both by the parties to the agreement and by the Consumers' Agency (Neytendastofa). If a decision on the adjustment of the interest rate is not based on a reference value, indexes or a reference interest rate, then the mortgage credit agreement shall state the conditions and procedure for adjustment of the interest rate.*

II Facts and procedure

Case E-13/22

42 On 4 July 2019, Mr Gylfason and Ms Gröndal entered into a mortgage agreement with Landsbankinn covering a non-indexed supplementary loan (*viðbótarlán*) with variable interest. The principal amount of the loan was ISK 6 500 000. It was to be repaid in monthly instalments over a period of 15 years, with the first repayment due on 1 August 2019. The interest was payable from the disbursement date of the loan. According to the request, the loan was disbursed on 22 July 2019. The interest rate was 6.60 per cent when the mortgage loan was entered into and 6.40 per cent at the first repayment date.

43 It follows from the request that, under the provisions of the mortgage loan agreement, Landsbankinn "may, at any time during the loan period, raise or lower the aforementioned interest rate in accordance with Landsbankinn's interest-rate decisions at any given time. Interest rate decisions shall take account, amongst other things, of the Central Bank of Iceland's interest rate, interest rates on the market and other financing terms available to Landsbankinn."

44 Mr Gylfason and Ms Gröndal lodged an application before Reykjavík District Court claiming that Landsbankinn be ordered to pay ISK 83 627 with penalty interest and legal costs. They argue that Landsbankinn neglected its obligation to define, clearly and accurately, the conditions and procedure for adjusting the interest rate in accordance

with the Icelandic Consumer Property Mortgage Act, which is based on the Mortgage Credit Directive and the Consumer Credit Directive.

45 Against this background, Reykjavík District Court decided to request an Advisory Opinion. The request, dated 4 November 2022, was registered at the Court on 10 November 2022. Reykjavík District Court has referred the following question to the Court:

> *Is it compatible with Directive 2014/17/EU, in particular, Article 24 of the Directive, and, as appropriate, Article 10(2)(f) of Directive 2008/48/EC (cf. recital 19 of the Preamble to Directive 2014/17/EU), that the terms of a consumer property mortgage, in which the interest rate is variable, state that adjustments of the interest rate are to take account of, amongst other things, the Central Bank of Iceland's interest rate, interest rates on the market and other terms of finance available to the creditor?*

Case E-1/23

46 On 21 January 2021, Ms Sverrisdóttir and Mr Sigurðsson entered into a mortgage agreement with Íslandsbanki covering a non-indexed property mortgage loan with variable interest. The principal amount of the loan was ISK 57 610 000. The loan was to be repaid in equal instalments for a term of 480 months, with the first repayment due on 1 March 2021.

47 According to the request, Article 1 of the terms of the loan agreement states that the debt was to be repaid with equal payments of interest. Since the interest rate was variable, Íslandsbanki reserved the right to recalculate the loan at every adjustment of the interest rate and/or amend the terms based on changed circumstances, and repayment instalments were to take account of the interest rate as it was on the date on which the recalculation was based. Interest rate adjustments could therefore result in an increase or a decrease of each instalment, and it would consequently have an impact on the total amount repaid. Under Article 2 of the terms of the loan agreement, the variable non-indexed mortgage interest was to apply as determined at any given time and published on the index chart of Íslandsbanki. The adjustments to the interest rate were to take account of, amongst other things, changes in Íslandsbanki's financing costs, its operating costs, public levies and/or other unforeseen costs, the Central Bank of Iceland's prime rate, changes in the consumer price index, etc.

48 Ms Sverrisdóttir and Mr Sigurðsson lodged an application before Reykjanes District Court. They claim that the terms for adjusting the interest rate are unlawful and invalid. In their view, Íslandsbanki was not entitled to raise the borrowing rate applying to the loan in three interest rate adjustments during 2021, and they have been paying a higher amount of interest than they ought to have paid. They argue that the reference values taken into account by Íslandsbanki when deciding to increase the interest rate are unclear and not defined in such a manner that the consumer is able to obtain definitive information regarding all the premises on which interest rates are set.

49 Against this background, Reykjanes District Court requested an advisory opinion from the Court by letter of 1 February 2023, registered at the Court on 22 February 2023. Reykjanes District Court has referred the following question:

> *Is it compatible with Directive 2014/17/EU (see, in particular, Article 24 thereof) and, as appropriate, with Article 10(2)(f) of Directive 2008/48/EC (cf. recital 19 of Directive 2014/17/EU), that the terms of a consumer property mortgage with variable interest state that adjustments of the borrowing rate will take account of factors including operating costs and other unforeseen costs?*

50 On 10 July 2023, pursuant to Article 46 of the Rules of Procedure and after having heard the views of the parties, the Court joined Case E-13/22 and Case E-1/23 for the purposes of the judgment.

51 Reference is made to the Reports for the Hearing in Case E-13/22 and Case E-1/23, respectively, for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as it is necessary for the reasoning of the Court.

III Answer of the Court

Preliminary remarks

52 The referring courts have asked, in essence, whether the Mortgage Credit Directive, in particular Article 24, and, as appropriate, Article 10(2)(f) of the Consumer Credit Directive, preclude certain variable interest rate clauses in consumer property mortgages, such as those at issue in the main proceedings. That is, terms providing that the lender may adjust the interest rate taking into account (in Case E-13/22) amongst other things, the Central Bank of Iceland's interest rate, interest rates on the market and other terms of finance available to the creditor, and (in Case E-1/23) amongst other things, changes in the lender's financing costs, its operating costs, public levies and/or other unforeseen costs, the Central Bank of Iceland's prime rate, and changes in the consumer price index. etc.

53 As a preliminary point, the Court observes that neither the Consumer Credit Directive nor the Mortgage Credit Directive is applicable in the cases in the main proceedings.

54 First, regarding the Consumer Credit Directive, that directive does not, pursuant to Article 2(2)(a), apply to agreements that are secured either by a mortgage or by another comparable security commonly used in an EEA State on immovable property or secured by a right related to immovable property. Accordingly, mortgage agreements, such as the agreements at issue, fall outside the scope of that directive (compare the judgment in *SC Volksbank România*, C-602/10, EU:C:2012:443, paragraphs 41 and 42).

55 That said, as also follows from recital 10 of the Consumer Credit Directive, EEA States may, in accordance with EEA law, maintain or introduce national legislation

corresponding to the provisions of that directive or certain of its provisions on credit agreements outside the scope of that directive (compare the judgment in *Kreissparkasse Saarlouis*, C-66/19, EU:C:2020:242, paragraph 26 and case law cited).

56 The Court observes that the Consumer Credit Act, which transposed the Consumer Credit Directive into Icelandic law, did not apply to mortgages for immovable property from 1 April 2017. However, it appears from the requests that the Icelandic legislature decided to apply a rule reflecting that of Article 10(2)(f) of the Consumer Credit Directive to agreements such as those at issue in the circumstances set out in Article 34(1) of the Consumer Property Mortgage Act.

57 Second, regarding the Mortgage Credit Directive, the Court observes that, according to the requests, Mr Gylfason and Ms Gröndal entered into their mortgage agreement with Landsbankinn on 4 July 2019, and Ms Sverrisdóttir and Mr Sigurðsson entered into their mortgage agreement with Íslandsbanki on 21 January 2021. The Mortgage Credit Directive was incorporated into the EEA Agreement by Joint Committee Decision No 125/2019. However, that decision, and consequently the Mortgage Credit Directive, did not enter into force and did not become applicable as EEA law until 1 November 2021.

58 The Court observes that, pursuant to Article 43 of the Mortgage Credit Directive, as adapted by Joint Committee Decision No 125/2019, that directive shall not apply to credit agreements that existed prior to the date of entry into force of that decision. Consequently, the Mortgage Credit Directive does not apply to the mortgage agreements at issue in the main proceedings.

59 However, according to the requests, the Mortgage Credit Directive was incorporated into Icelandic law by the Consumer Property Mortgage Act, which entered into force on 1 April 2017, prior to the Mortgage Credit Directive's entry into force in the EEA. However, as also follows from recitals 9 and 13 of that directive, it is in principle for the EEA States to determine the conditions under which they propose to extend their national set of rules transposing that directive to credit agreements that do not fall within the areas not covered by the Mortgage Credit Directive.

60 EEA States may introduce in national legislation designed to transpose the Mortgage Credit Directive a rule corresponding specifically to the transitional measure laid down in Article 43(1) of that directive. They may in principle also, in compliance with the rules of the EEA Agreement and without prejudice to other measures of EEA law that may be relevant, lay down a different transitional measure the consequence of which is that that legislation also applies to agreements existing on the date of its entry into force (compare the judgment in *SC Volksbank România*, cited above, paragraph 53).

61 Under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment. The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be a means of ensuring a homogenous interpretation of

EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-9/22 *Verkfræðingafélag Íslands and Others*, judgment of 19 April 2023, paragraph 22 and case law cited).

62 It is settled case law that questions concerning the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may only refuse to rule on a question referred by a national court where it obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions referred (see *Verkfræðingafélag Íslands and Others*, cited above, paragraph 23 and case law cited).

63 In this context, the Court notes that, during the oral hearings, both sets of applicants and respondents, and the Icelandic Government, emphasised the need for clarification by the Court of the Mortgage Credit Directive.

64 At the oral hearing in Case E-13/22, the Norwegian Government argued that, since the Court's jurisdiction is confined to interpreting provisions of EEA law, it does not have jurisdiction to interpret the Mortgage Credit Directive which did not constitute EEA law when the mortgage agreements in question were concluded.

65 It is settled case law that where domestic legislation, in regulating purely internal situations not governed by EEA law, adopts the same or similar solutions as those adopted in EEA law, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national courts to assess the precise scope of that reference to EEA law in national law (see *Verkfræðingafélag Íslands and Others*, cited above, paragraph 25 and case law cited).

66 Contrary to the Norwegian Government's argument, however, the referring courts consider the interpretation of the Mortgage Credit Directive to be relevant for the application of national law. It is for the referring courts to interpret national law and to define and assess the accuracy of the factual and legislative context in the case before them, including the interpretation of the Consumer Property Mortgage Act and the relevance of the Mortgage Credit Directive and Consumer Credit Directive for that interpretation. Any other conclusion would undermine the purpose of the judicial dialogue envisaged by Article 34 SCA and the presumption of relevance of the questions referred (see *Verkfræðingafélag Íslands and Others*, cited above, paragraph 26).

67 Finally, the Court notes that, by their requests, the referring courts have limited their questions to the interpretation of the Mortgage Credit Directive and the Consumer

Credit Directive. However, according to settled case law, the aim of the special means of judicial cooperation established by Article 34 SCA is to provide national courts with the necessary interpretation of elements of EEA law to decide the cases before them. In order to give the national courts or tribunals a useful answer, the Court may, in the spirit of cooperation, provide them with all the guidance that it deems necessary. Thus, it is incumbent on the Court to give as complete and as useful a reply as possible and it does not preclude the Court from providing the referring courts with all the elements of interpretation of EEA law which may be of assistance in adjudicating in the cases pending before them (see Case E-16/20 *Q and Others*, judgment of 23 November 2021, paragraphs 33 and 35 and case law cited, and Case E-7/19 *Tak-Malbik*, judgment of 16 July 2020, paragraph 45 and case law cited).

68 In the circumstances of the present joined cases the Court finds it appropriate to examine the questions and the interpretation of the Mortgage Credit Directive and the Consumer Credit Directive in the context of EEA law on consumer protection, including the Unfair Contract Terms Directive.

The Unfair Contract Terms Directive and requirements of transparency

69 The Court recalls that, in accordance with the twelfth recital of the EEA Agreement, the EEA States are determined to promote the interests of consumers and to strengthen their position in the marketplace, aiming at a high level of consumer protection.

70 The Unfair Contract Terms Directive is the starting point of consumer protection under EEA law, the purpose of which, pursuant to Article 1(1), is to approximate the laws of the EEA States relating to unfair terms in contracts concluded between a seller or supplier and a consumer. It is accordingly a general directive for consumer protection, intended to apply in all sectors of economic activity (compare the judgment in *Air Berlin*, C-290/16, EU:C:2017:523, paragraph 44). It is not in dispute that the agreements at issue in the main proceedings constitute a contract concluded between a consumer and a seller or supplier, within the meaning of the Unfair Contract Terms Directive. Thus, the Court will start by considering the position in relation to that directive.

71 According to settled case law, the system of protection introduced by the Unfair Contract Terms Directive is based on the idea that consumers are in a position of weakness vis-à-vis sellers or suppliers, as regards both their bargaining power and their level of knowledge. This leads to consumers agreeing to terms drawn up in advance by sellers or suppliers without being able to influence the content of those terms (compare the judgment in *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 43 and case law cited).

72 It is in the light of this position of weakness that the Unfair Contract Terms Directive requires EEA States to provide for a mechanism ensuring that every contractual term that has not been individually negotiated may be reviewed in order to assess whether or not it is unfair. In that context, it is for the national courts to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of the directive, whether, having regard to the particular circumstances of the case, such a term meets the requirements

of good faith, balance and transparency laid down by that directive (compare the judgment in *Gómez del Moral Guasch*, cited above, paragraph 44 and case law cited).

73 In that regard, it should be recalled that Article 4(2) of the Unfair Contract Terms Directive lays down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, and that that provision must therefore be interpreted strictly (compare the judgment in *D.V. (Lawyers' fees – Principle of an hourly rate)*, C-395/21, EU:C:2023:14, paragraph 30 and case law cited). However, the Court has already held that a term relating to a mechanism for amending the prices of the services provided to the consumer does not fall within that exception (see Case E-25/13 *Engilbertsson* [2014] EFTA Ct. Rep. 524, paragraph 96, and compare the judgment in *Invitel*, C-472/10, EU:C:2012:242, paragraph 23).

74 Terms authorising the lender unilaterally to alter the rate of interest are expressly mentioned in paragraph 1(j) of the annex to the Unfair Contract Terms Directive, which in accordance with Article 3(3) of that directive, includes an indicative and non-exhaustive list of the terms which may be declared unfair. Taking account of the objective of that list, the inclusion in that list of terms such as those enabling the lender unilaterally to alter the interest rate would to a large extent be deprived of effectiveness if they were excluded from the outset from an assessment of their unfairness pursuant to Article 4(2) (compare the judgment in *Matei*, C-143/13, EU:C:2015:127, paragraphs 59 to 60 and case law cited).

75 Pursuant to Article 5 of the Unfair Contract Terms Directive, which has the same transparency requirements as referred to in Article 4(2), terms of a contract where certain terms are offered to consumers in writing must "always" be drafted in plain, intelligible language. It is settled case law that information provided before the conclusion of a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he or she wishes to be contractually bound to a seller or supplier by the terms previously drawn up by the latter (compare the judgments in *Gómez del Moral Guasch*, cited above, paragraph 49 and case law cited, and *Kiss and CIB Bank*, C-621/17, EU:C:2019:820, paragraph 36 and case law cited).

76 It follows that the transparency requirement for contractual terms set out in Article 5 of the Unfair Contract Terms Directive cannot be reduced merely to those contractual terms being formally and grammatically intelligible. As the system of protection introduced by the directive is based on the idea that consumers are in a position of weakness vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, the requirement, laid down by the directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent must be understood in a broad sense (compare the judgment in *Gómez del Moral Guasch*, cited above, paragraph 50 and case law cited).

77 In particular, in the context of a variable interest rate clause in a mortgage agreement, the transparency requirement must be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but that an average consumer, who is reasonably well-informed and reasonably observant and circumspect, is in a position to understand the specific functioning of the method used for calculating that rate and thus to evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations (see Case E-4/23 *Neytendastofa*, judgment of 23 May 2024, paragraph 48, and compare the judgment in *Banco Santander (Référence à un indice officiel)*, C-265/22, EU:C:2023:578, paragraph 55 and case law cited).

78 The relevant factors which the referring courts must take into account when carrying out the necessary checks in that regard include not only the content of the information provided by the lender, but also the fact that the main elements relating to the calculation of that rate are easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate (see *Neytendastofa*, cited above, paragraph 48, and compare the judgment in *Banco Santander (Référence à un indice officiel)*, cited above, paragraph 56 and case law cited).

79 Thus, the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms, so that the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from the contract (see *Neytendastofa*, cited above, paragraph 48, and compare the judgments in *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470, paragraph 65 and case law cited, and *Kiss and CIB Bank*, cited above, paragraph 43).

Assessment of unfairness under the Unfair Contract Terms Directive

80 Under Article 3(1) of the Unfair Contract Terms Directive, a term of a contract concluded between a consumer and a seller or supplier that has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (compare the judgment in *BNP Paribas Personal Finance*, cited above, paragraph 91).

81 It should also be noted that, according to settled case law, the jurisdiction of the Court extends to the interpretation of the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the Unfair Contract Terms Directive, and in particular when examining whether a term is unfair within the meaning of Article 3(1) of that directive, whereby it is for that national court to determine whether a particular contractual term is actually unfair in the circumstances of the case. It is thus clear that the Court must limit itself to providing the referring courts with guidance which the latter must take into account in order to assess whether

the term at issue is unfair (compare the judgment in *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 91 and case law cited).

82 As regards the assessment of whether a contractual term is unfair, it is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of the Unfair Contract Terms Directive, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive (compare the judgment in *Profi Credit Polska*, cited above, paragraph 93 and case law cited).

83 Compliance with the requirement, laid down in Article 5 of the Unfair Contract Terms Directive, that a contractual term must be plain and intelligible is one of the factors to be taken into account in the assessment of whether that term is unfair. In that context, it is for the national court to assess, having regard to all the circumstances of the case, first, the possible failure to observe the requirement of good faith and, second, the possible existence of a significant imbalance to the detriment of the consumer within the meaning of Article 3(1) (compare the judgment in *A. S.A.*, C-212/20, EU:C:2021:934, paragraph 58 and case law cited).

84 As to whether the requirement of good faith, within the meaning of Article 3(1) of the Unfair Contract Terms Directive, is satisfied, it is important to note that, regard being had to the recital 16 thereof, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations (compare the judgment in *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 74 and case law cited).

85 As regards the assessment of a term that allows the bank to unilaterally adjust the interest rate, it is of fundamental importance for that purpose, first, whether any adjustments to that rate would be carried out in a manner that would permit an average consumer to foresee with a sufficient degree of predictability, the conditions and procedure for such adjustment, and, secondly, whether consumers have the right to terminate the contract if the rate is in fact adjusted (compare the judgment in *Invitel*, cited above, paragraphs 24, 26 and 28).

86 In order to ascertain whether a term causes a “significant imbalance” in the parties’ rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national courts to evaluate whether and to what extent the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. Similarly, it is appropriate, to that end, to carry out an assessment of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms (compare the judgment in *Banco Primus*, C-421/14, EU:C:2017:60, paragraph 59 and case law cited).

87 Moreover, the assessment of whether any "significant imbalance" exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract, and the costs charged to the consumer under that clause. A significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules (compare the judgment in *Kiss and CIB Bank*, cited above, paragraph 51 and case law cited).

88 In that regard, it must be borne in mind that, as the referring court has stated in its request in Case E-1/23, Article 34 of the Consumer Property Mortgage Act provides that creditors must, pursuant to that provision, only use reference values, indexes or reference rates that are clear, accessible, objective and verifiable. Further, if the adjustment of the interest rate is not based on a reference value, index or reference rate, the mortgage credit agreement shall state the conditions and procedure for adjustment of the interest rate. It follows that terms which do not meet such requirements of being "clear, accessible, objective and verifiable" could, subject to verification by the referring court in the light of all the terms of the agreement, impair the legal situation of the consumer and, consequently, create a significant imbalance to the detriment of that consumer, contrary to the requirement of good faith.

89 As regards a term relating to the calculation of interest on a loan contract, it is also relevant to compare the method of calculation of the rate of ordinary interest laid down in that term and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market at the date of conclusion of the agreements at issue in the cases in the main proceedings for a loan of a comparable sum and term to those of the loan agreement under consideration (compare the judgment in *Banco Primus*, cited above, paragraph 65).

90 Concerning the consumer's right to terminate the contract he has concluded in the event of a unilateral alteration of the rate of interest by the lender, it is of fundamental importance that the right of termination given to the consumer is not purely formal but can actually be exercised. That would not be the case if, for reasons connected with the method of exercise of the right of termination or the conditions of the market concerned, the consumer has no real possibility of realising his right to terminate, such as when a termination would make the outstanding balance of the loan due in proportions likely to exceed the financial capacities of the consumer and, as a result, tend to penalise the consumer (compare the judgments in *Invitel*, cited above, paragraphs 26 and 28; *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 54; and *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 84). Thus, the existence of such a right cannot on its own rectify the imbalances between the consumer and the mortgage provider.

91 The Court also observes that, pursuant to Article 4(1) of the Unfair Contract Terms Directive, the assessment of unfairness must be made while taking into account the

nature of the goods or services for which the contract was concluded (compare the judgment in *Kiss and CIB Bank*, cited above, paragraph 52). Thus, in their assessment of unfairness, the referring courts must take into account the specificities of mortgage agreements and the high level of consumer protection thus warranted, as expressed both in the case law under the Unfair Contract Terms Directive and through the requirements of transparency under the Mortgage Credit Directive. Consequently, it is for the referring courts to determine, taking into account the criteria laid down in Articles 3(1), 4 and 5 of the Unfair Contract Terms Directive, having regard to the particular circumstances of the case, whether the terms at issue meet the requirements of good faith, balance and transparency laid down by the directive.

The variable interest rate clauses at issue

92 The Court notes that the variable interest rate clauses at issue in the main proceedings set out several elements to be taken into account when determining the borrowing rate. In Case E-13/22, the relevant term provides for, amongst other things, the Central Bank of Iceland's interest rate, interest rates on the market and other terms of finance available to the creditor. In Case E-1/23, the relevant term provides for amongst other things, changes in the lender's financing costs, its operating costs, public levies and/or other unforeseen costs, the Central Bank of Iceland's prime rate, and changes in the consumer price index, etc.

93 The Court will begin by looking at the individual elements of these clauses which the national court would have to examine. As noted by ESA, these elements must be assessed not only individually but also collectively. The Court adds that similar contractual terms for adjusting a variable interest rate are also addressed in paragraphs 51 to 56 of the judgment in *Neytendastofa*, cited above, which was delivered on the same date as the present judgment.

94 Firstly, as regards a variable interest rate term which follows the Central Bank of Iceland's interest rate, the Court observes that since this is a legally valid official rate, freely available on the Central Bank of Iceland's website, the reference to the central Bank of Iceland's interest rate may be considered sufficient to enable the average consumer – who, one must assume, is reasonably well informed and attentive – to understand by whom, where, and when this rate is published.

95 However, according to the written observations of the applicants in Case E-1/23, the mortgage's interest rate does not correlate directly to changes in the interest rate of the Central Bank of Iceland. Rather, decisions regarding the adjustment of the interest rate are taken by a committee within the bank and each change can be based on one or more factors, and the factors upon which it is based may differ. The Court notes that, if that is the case, this could lead to uncertainty on the part of the consumer as to the functioning of the method employed for calculating the rate (compare the judgment in *Constructora Principado*, C-226/12, EU:C:2014:10, paragraph 26). Furthermore, as regards Case E-13/22, ESA observed in its written observation that it is unspecified which of the Central Bank of Iceland's various different interest rates is to be taken into account.

96 Secondly, in Case E-1/23, the variable interest rate clause refers to changes relating to "operating costs", "public levies" and "other unforeseen costs". The Court observes that such general references to unforeseen potential increases in the creditor's costs are, by definition, unverifiable by an average consumer. As such, the inclusion of such elements will render it impossible for a consumer who is reasonably circumspect to determine the economic consequences of the term for his or her financial obligations. Subject to the verifications to be carried out by the referring court, such contractual terms seem liable to cause a significant imbalance in the parties' rights and obligations.

97 Thirdly, the Court observes that in Case E-13/22 and Case E-1/23 the inclusion of terms such as "interest rates on the market" and "changes in the bank's financing costs" are *prima facie* not transparent, even if such formulations are in themselves grammatically plain and intelligible (compare the judgment in *Matei*, cited above, paragraph 76 and case law cited). Subject to the verifications to be carried out by the referring courts, such contractual terms seem liable to cause a significant imbalance in the parties' rights and obligations.

98 Fourthly, as is clear from the arguments presented at the oral hearings in both Case E-13/22 and Case E-1/23, the doubts as to the lack of clarity of the terms at issue in the main proceedings are reinforced by the inclusion of the term "amongst other things". By its nature, the term allows for the inclusion of factors not known by the consumer when the contract is concluded. With respect to the term "etc.", the Court observes that it is important to determine whether the level of detail and specificity of the information provided to the consumer is such that the objective of Article 5 of the Unfair Contract Terms Directive is achieved, as the Court has further addressed in paragraphs 55 and 56 of the judgment in *Neytendastofa*, cited above, delivered on the same date as the present judgment.

99 The Court observes that, in examining the variable interest rate clauses in both Case E-13/22 and Case E-1/23 in their entirety, neither of the respective clauses appears to meet the requirements of good faith, balance and transparency laid down by the Unfair Contract Terms Directive. It is for the referring courts to verify, taking account of the criteria laid down in Article 3(1) and Article 5 of that directive, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive. Clauses such as those at issue in the main proceedings must be regarded as unfair in accordance with Article 3(1) where they cause a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer, which is for the referring courts to ascertain.

Article 24 of the Mortgage Credit Directive

100 The referring courts have asked, in particular, whether Article 24 of the Mortgage Credit Directive precludes terms of mortgage agreements such as those at issue in the main proceedings.

101 The Mortgage Credit Directive was introduced specifically to further protect and empower consumers in the case of credit for the purchase of residential immovable

property. Pursuant to Article 1 of the directive, read in the light of recital 15, the directive lays down a common framework to ensure that agreements covering credit for consumers secured by a mortgage or other credit relating to immovable property for residential use enjoy a high level of protection (compare the judgment in *UniCredit Bank Austria*, C-555/21, EU:C:2023:78, paragraph 29).

102 The Mortgage Credit Directive complements the protection conferred by the Unfair Contract Terms Directive. The terms of a consumer property mortgage for adjusting the variable interest under the agreement, such as those at issue for the referring courts, should therefore also be assessed under the Mortgage Credit Directive.

103 It follows from recital 3 of the Mortgage Credit Directive that the directive was adopted following the international financial crisis which showed that irresponsible behaviour by market participants can undermine the foundations of the financial system, and demonstrates the desire of the legislature to strengthen the protection of consumers (compare the judgment in *Schyns*, C-58/18, EU:C:2019:467, paragraph 46).

104 Further, the Mortgage Credit Directive must be read and applied in its broader context. It is apparent from recitals 19 and 20 of the directive that, for reasons of legal certainty, it is necessary to ensure that the directive is consistent with and complementary to other acts adopted in the area of consumer protection. Nevertheless, it is also apparent from recital 22 of the directive that it is important to take into consideration the specificities of credit agreements relating to residential immovable property, which justify a differentiated approach (compare the judgment in *UniCredit Bank Austria*, cited above, paragraph 28).

105 Recital 19 of the Mortgage Credit Directive refers to certain "essential definitions" and key concepts used in standard information to designate the financial characteristics of the credit, including "total amount payable by the consumer" and "borrowing rate", which are included in the Consumer Credit Directive. As it also is apparent from that recital, such terms should be interpreted in line with that directive in relation to the Mortgage Credit Directive.

106 Pursuant to Article 24 of the Mortgage Credit Directive, EEA States shall ensure that any indexes or reference rates used to calculate the borrowing rate of a variable rate credit are clear, accessible, objective, and verifiable by the parties to the credit agreement and the competent authorities. Thus, Article 24 contains specific requirements for any index and reference on which the calculation of variable interest rate may be based.

107 In this regard, Advocate General Hogan has observed (Opinion of Advocate General Hogan in *Volkswagen Bank*, C-33/20, C-155/20 and C-187/20, EU:C:2021:629, point 54), albeit in the context of the Consumer Credit Directive, that according to the definition generally given to the term interest rate, it refers to a percentage. However, the formula, benchmark or reference index used to calculate a rate, is not the rate itself. In particular, it may be observed that there is a difference between an interest rate and a reference rate: while the former refers to the percentage used to calculate a sum to be

paid in return for a service or as compensation for damage, the latter refers to the use of a benchmark taking the form of a rate to calculate this remuneration.

108 The Court observes that the terms "indexes" and "reference rates" are not defined in the Mortgage Credit Directive. It is settled case law that, in such circumstances, following from the need for uniform application, such terms must be regarded as containing autonomous concepts of EEA law which must be interpreted in a uniform manner throughout the EEA. Their scope cannot therefore be determined by reference either to concepts known to the laws of the EEA States or to classifications made at national level (see Case E-2/21 *Norep*, judgment of 14 December 2021, paragraph 30).

109 In accordance with settled case law, in interpreting autonomous concepts of EEA law, the Court must take into account the context of the provision and the purpose of the legislation of which it forms part. It is clear in this regard that the objective of the directive is a high level of consumer protection and the protection of the ability of consumers to make informed choices (compare the judgment in *Association française des usagers de banques*, C-778/18, EU:C:2020:831, paragraph 51).

110 As noted by the Commission, "clear" implies a threshold that is higher than merely understandable to the consumer and the competent authority, and which provides clarity as to the outcomes that may flow from the usage of the indexes and reference rates in question.

111 With respect to the meaning of "accessible" in Article 24, this should be understood as being made available to the consumer and the competent authority in a way in which the indexes or reference rates employed can be consulted. It follows that the consumer should be able to readily and independently access the information that constitutes the indexes or reference rates that are used to calculate the borrowing rate at any time, including the impact of any changes in such rates (compare the judgment in *Banco Santander (Référence à un indice officiel)*, cited above, paragraph 56 and case law cited).

112 With respect to "objective", this term, as observed by the Commission, must be interpreted to the effect that the indexes or reference rates employed must be determined in a manner that is without bias or distortion that favours the lender.

113 The final limb of the test set out by Article 24 of the Mortgage Credit Directive in this regard provides that the indexes and reference rates should be "verifiable by the parties to the credit agreement and the competent authorities". This indicates that, not only the parties to the contract, but also the competent authority, should be in a position to determine that what has been presented can be checked or demonstrated to be correct and accurate.

114 The Norwegian Government has argued that contractual terms that base changes to the borrowing rate not on an external factor, but, rather on an internal decision by the creditor are excluded from the transparency requirements of Article 24 of the Mortgage Credit Directive. However, as stressed by ESA and the Commission, such an

interpretation would render the transparency requirement ineffective and thereby directly contravenes the aim of the directive, and of EEA consumer protection law more generally, as it would encourage the employment of internal factors which are liable to be less transparent than external ones such as widely applicable indexes or reference rates.

115 The Norwegian Government further contends that the terms must be understood in accordance with how they are commonly defined within the finance and credit sector and applicable in related legislation, and refers to Article 4(28) of Directive (EU) 2015/2366 on payment services which defines reference interest rates as any "interest rate which is used as the basis for calculating any interest to be applied and which comes from a publicly available source which can be verified by both parties to a payment service contract". In this sense, reference rates may be both external to the bank, and internal. The Norwegian Government also refers to Article 3(1) of Regulation (EU) 2016/1011, which defines "interest rate benchmark" as a benchmark "determined on the basis of the rate at which banks may lend to, or borrow from, other banks or agents other than banks, in the money market".

116 ESA has, in essence, argued that all the factors at issue for adjusting the borrowing rate in the present cases constitute index or reference rates within the meaning of Article 24 of the Mortgage Credit Directive. As a consequence, all contractual clauses containing factors for adjusting the variable interest rate would be subject to the requirement of that provision.

117 As noted by ESA and the Commission, Article 24 of the Mortgage Credit Directive must be interpreted in the light of other provisions in the directive. The Court observes that the above considerations and requirements on transparency following from the Unfair Contract Terms Directive must inform the information requirements following from the Mortgage Credit Directive.

118 Article 11(2)(c) and (e) of the Mortgage Credit Directive requires that information regarding the borrowing rate and the annual percentage rate of charge must be specified in a clear, concise, and prominent manner in any advertising concerning credit arrangements which indicates an interest rate or any figures relating to the cost of the credit. Under Article 13, clear and comprehensible general information about credit agreements shall be made available at all times, including, according to point (e) of the second subparagraph of Article 13(1), information concerning the types of available borrowing rate and a short description of the characteristics of the variable rate, including related implications for the consumer. These provisions indicate that information provided to the consumer must be clear and comprehensible, allowing the consumer to make informed choices, inter alia, about factors that would affect the cost of the mortgage loan to him or her.

119 Article 7(1) of the Mortgage Credit Directive provides that when granting credit or executing a credit agreement, the creditor is to act honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers. In relation to the granting, intermediating or provision of advisory services on credit and, where

appropriate, of ancillary services, creditors' activities shall be based on information about the consumer's circumstances and any specific requirement made known by a consumer and on reasonable assumptions about risks to the consumer's situation over the term of the credit agreement (compare the judgment in *FBF*, C-911/19, EU:C:2021:599, paragraphs 117 and 118). The requirement to act honestly, fairly, and transparently militates against the usage of terms that provide for changes to the cost of the mortgage loan to the consumer that the latter could not reasonably expect to understand or anticipate.

120 Pursuant to Article 14 of the Mortgage Credit Directive, creditors must, prior to the conclusion of the contract, provide consumers with personalised information necessary to compare the credits available on the market, assess their implications and make an informed decision concerning whether to conclude a credit agreement. That information shall, in accordance with Article 14(2), be provided by means of the European Standardised Information Sheet, as set out in Annex II to the Mortgage Credit Directive. Whilst the Mortgage Credit Directive, in accordance with Article 2(1), does not preclude EEA States from maintaining or introducing more stringent provisions in order to protect consumers, provided that such provisions are consistent with their obligations under EEA law, it follows from Article 2(2) that EEA States may not maintain or introduce provisions diverging from those laid down in Article 14(2) and Annex II Part A with regard to the standard of pre-contractual information provided via the European Standardised Information Sheet.

121 The Court observes that the European Standardised Information Sheet is a pre-contractual disclosure document, by which the lender is obliged to provide all the legal information relating to the loan. Its purpose is to provide consumers with relevant information, taking into account their financial situation, needs, and financing preferences. Given the objective of this document, it is clear that relevant information must include explaining clearly the means and extent to which the borrowing rate may change during the course of the mortgage term. Allowing for indeterminate factors that are unknown – and unknowable – to the consumer would defeat the purpose of such a document.

122 Further, the Court observes that pursuant to points 3 and 4 of Part A of Annex II to the Mortgage Credit Directive, the pre-contractual information shall include the type of applicable interest, the annual percentage rate of charge, and the applicable interest rate. Part B of that annex sets out the minimum instructions for completing the standard information sheet for the information listed in Part A. In line with the transparency requirements under the Unfair Contract Terms Directive, it follows from point (6) of section 3, "Main features of the loan", that the pre-contractual information shall explain whether the borrowing rate is fixed or variable, and the formula used to revise the borrowing rate and its different components.

123 Therefore, the Court observes that the Mortgage Credit Directive primarily protects consumers by empowering them by way of information requirements, allowing them to compare credit offers on the market, assess their implications, and make an informed decision whether to conclude a credit agreement.

124 The Court recalls that information about the borrowing rate is of fundamental importance. In order for a consumer to predict and apprise himself of his rights and obligations under the credit agreement, both at the pre-contractual stage and at the contractual stage, the information must be exhaustive and provided in a clear and concise manner. Where the conditions for adjusting the rate are not sufficiently clear, for example because they are referred to in a too generic or open-ended manner, they will not provide the transparency which is necessary for the consumer to be able to compare different offers and take an informed decision on whether to conclude the agreement. Indeed, the consumer must be placed in a position whereby he or she genuinely can apprise himself or herself of all his rights and obligations (see *Neytendastofa*, cited above, paragraph 47, and compare the judgment in *Home Credit Slovakia*, C-42/15, EU:C:2016:842, paragraph 34).

125 Consequently, it is incompatible with the Mortgage Credit Directive if the variable interest rate clause is not formally and grammatically intelligible, or does not enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to understand the specific functioning of the method employed for calculating that rate, and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms so that the consumer is in a position to evaluate, on the basis of clear, objective and intelligible criteria, the economic consequences for him or her which derive from the contract.

126 The Court observes that the same considerations also apply to the Consumer Credit Directive and the requirements pursuant to Article 10(2)(f) of that directive to specify in a clear and concise manner the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates.

127 Also under the Consumer Credit Directive the requirement to provide information in a clear and concise manner requires that the term in question is formally and grammatically intelligible so that the method of calculation is set out in a way which is readily understood by an average consumer who does not have specialist knowledge in the financial field and which enables him or her to calculate the rate of interest based on the information provided in the pre-contractual information and in the credit agreement. The consumer must be provided with sufficient information to enable him or her to apprise himself or herself of the specific functioning of the method used for calculating the rate and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms (compare the judgments in *Volkswagen Bank*, cited above, paragraph 94 and case law cited; *Gómez del Moral Guasch*, cited above, paragraphs 51 to 53; *Kiss and CIB Bank*, cited above, paragraph 36; and *BNP Paribas Personal Finance*, cited above, paragraph 65).

128 It follows from the wording of Article 24 of the Mortgage Credit Directive, that, where a variable interest rate clause includes in whole or in part an index or reference rate, the EEA State must ensure that all such indexes or reference rates themselves are clear,

accessible, objective, and verifiable by the parties to the credit agreement and the competent authorities.

129 In that regard, Article 24 of the Mortgage Credit Directive would be deprived of its effectiveness if other elements used in addition to indexes or reference rates to calculate the borrowing rate are excluded from the outset from an assessment of transparency. It would impede or preclude the transparency sought by Article 24 if elements could be added to the index or reference rate which would make the clause as a whole, or that are in and of themselves, not clear, accessible, objective and verifiable by the parties or the competent authorities. Were unclear, inaccessible, subjective or unverifiable elements to be included in a variable interest rate clause, which contains a reference rate or index, this would, when examined as a whole, be unclear and result in a significant imbalance between the parties. Therefore, the requirements of Article 24 as to clarity, accessibility, objectivity and verifiability apply whenever an index or a reference rate is used to calculate the borrowing rate.

Legal consequences

130 In order to provide the referring courts with as complete an answer as possible, the Court finds it necessary to make observations on the legal consequences of a lack of transparency contrary to the Mortgage Credit Directive.

131 The Court observes that, while Article 38 of the Mortgage Credit Directive requires EEA States to adopt sanctions that are effective, proportionate, and dissuasive for breaches of national provisions adopted on the basis thereof, the Mortgage Credit Directive does not provide any specific contractual remedy or consequence in the case of a breach of the transparency requirements inherent in the directive's information obligations. However, as observed above in context of the assessment of a term that allows the bank to unilaterally adjust the interest rate under the Unfair Contract Terms Directive, it follows from Articles 3 and 5 of that directive that it is of fundamental importance that any adjustments to that rate are specified in a manner that permits an average consumer to foresee with a sufficient degree of predictability, the conditions and procedure for such adjustment (compare the judgment in *Burcura*, C-348/14, EU:C:2015:447, paragraph 60 and case law cited).

132 Consequently, in situations such as those in the main proceedings, the failure to fulfil the information requirements regarding variable interest rate clauses under the Mortgage Credit Directive may be a decisive factor in the assessment by a national court of whether a term of a credit agreement is drafted in plain, intelligible language within the meaning of Article 5 of the Unfair Contract Terms Directive, which is one of the factors to be taken into account in the assessment of whether that term is unfair (compare the order in *Pohotovost'*, C-76/10, EU:C:2010:685, paragraphs 71 and 72 and case law cited).

133 Pursuant to Article 6(1) of the Unfair Contract Terms Directive, EEA States shall ensure that unfair terms shall, as provided for under their national law, not be binding on the

consumer, and that the contract shall continue to bind the parties if it is capable of continuing without the unfair terms.

134 In this context, the Court recalls that the referring courts must, in their assessment of unfairness under the Unfair Contract Terms Directive, take into account the high level of consumer protection warranted in the area of consumer credit specific to mortgage agreements as expressed through the requirements of transparency under the Mortgage Credit Directive. A lack of transparency may by itself be decisive for whether a contract term must be considered as unfair.

135 National courts are to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer. A contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have, or have had, any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in if that term had not existed (compare the judgment in *Bank M*, C-520/21, EU:C:2023:478, paragraphs 56 and 57 and case law cited).

136 In this regard, the Court recalls that the system of protection introduced by the Unfair Contract Terms Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. As regards such a position of weakness, that directive requires EEA States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair (compare the judgment in *Dziubak*, C-260/18, EU:C:2019:819, paragraph 37 and case law cited).

137 In that context, under Article 6(1) of the Unfair Contract Terms Directive, it is for the national court to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer, unless the consumer objects. However, the contract must continue in existence, in principle, without any amendment other than that resulting from the removal of the unfair terms, in so far as, in accordance with the rules of national law, such continuity of the contract is legally possible (compare the judgment in *Banca B.*, C-269/19, EU:C:2020:954, paragraph 29 and case law cited).

138 As a result, where the national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, that court cannot modify the contract by revising the content of that term (compare the judgment in *Banca B.*, cited above, paragraph 30 and case law cited).

139 Were it open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of the Unfair Contract Terms Directive. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in

so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (compare the judgment in *Abanca Corporación Bancaria and Bankia*, C-70/17 and C-179/17, EU:C:2019:250, paragraph 54 and case law cited).

140 However, where a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, Articles 6(1) and 7(1) of the Unfair Contract Terms Directive do not preclude the national court from removing, in accordance with the principles of contract law, the unfair term and replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences, so that the consumer would thus be penalised (compare the judgments in *Banca B.*, cited above, paragraph 32 and case law cited, and *Gómez del Moral Guasch*, cited above, paragraphs 64 and 67 and case law cited).

141 Such a substitution is justified in view of the purpose of the Unfair Contract Terms Directive. Indeed, it is consistent with the objective of Article 6(1) of the Directive, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties a real balance re-establishing equality between them, not to annul all contracts containing unfair terms (compare the judgment in *Banca B.*, cited above, paragraph 33 and case law cited).

142 If, in a situation such as that described above, the national court was unable to replace an unfair term with a supplementary provision of national law and was obliged to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised. In general, the consequence of such an annulment with regard to a loan agreement would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, would not be dissuaded from inserting such terms in its contracts (compare the judgment in *Banca B.*, cited above, paragraph 34 and case law cited).

143 It is for the referring courts to determine whether, in the cases in the main proceedings, the invalidity of any terms held to be unfair in the mortgage agreements in question would be likely to prevent the contracts from continuing in existence. Should the annulment of such terms prevent the contracts from continuing in existence, it will be for the referring courts, who are not precluded by Article 7(1) of the Unfair Contract Terms Directive from doing so, to replace the unfair terms with provisions of national law of a supplementary nature. However, if the contracts in question can continue to exist without the terms in question, Article 6(1) of the directive does not permit the referring courts to substitute an unfair term in a loan agreement with a supplementary provision of national law.

IV Costs

144 Since these proceedings are a step in the proceedings pending before the national courts, any decision on costs for the parties to those proceedings is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Reykjavík District Court and Reykjanes District Court gives the following Advisory Opinion:

1. **Article 24(a) of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property would be deprived of its effectiveness if other elements used in addition to indexes or reference rates to calculate the borrowing rate are excluded from the outset from an assessment of transparency. Therefore, the requirements of Article 24 as to clarity, accessibility, objectivity and verifiability apply whenever an index or a reference rate is used to calculate the borrowing rate.**

2. **It is incompatible with Article 24 of Directive 2014/17 if contract terms and the information provided to a consumer under a mortgage credit agreement are not formally and grammatically intelligible, or do not enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to understand the specific functioning of the method used for calculating the borrowing rate, and, where appropriate the relationship between that mechanism and that provided for by other contractual terms so that the consumer is in a position to evaluate the economic consequences for him or her which derive from the contract.**

3. **Article 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that, with a view to complying with the transparency requirement for a contractual term setting a variable interest rate under a mortgage loan agreement, that term must not only be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus to evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations. It is for the national court to determine whether the financial institution has provided the consumer with sufficient information to enable him or her to apprise himself or herself of the specific functioning of the method used for calculating the rate, and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms.**

4. **It is for the national court to determine, taking account of the criteria laid down in Article 3(1) and Article 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, a term in a variable-rate mortgage loan agreement meets the requirements of good faith, balance and transparency laid down by that directive. The assessment of unfairness must be made taking into account the nature of the goods or services for which the contract was concluded, which includes the high level of consumer protection warranted in the area of consumer credit specific to mortgage agreements, as expressed both in the case law under Directive 93/13 and through the requirements of transparency under Directive 2014/17.**

5. **Terms such as those disputed in the main proceedings must be declared unfair in accordance with Article 3(1) of Directive 93/13 where such terms cause a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer, which is for the referring courts to ascertain.**

6. **It is for the referring courts to determine whether, in the cases in the main proceedings, the invalidity of any terms held to be unfair in the mortgage agreements in question would be likely to prevent the contracts from continuing in existence. Should the annulment of such terms prevent the contracts from continuing in existence, it will be for the referring courts, who are not precluded by Article 7(1) of Directive 93/13 from doing so, to replace the unfair terms with provisions of national law of a supplementary nature. However, if the contracts in question can continue to exist without the terms in question, Article 6(1) of the directive does not permit the referring courts to substitute an unfair term in a loan agreement with a supplementary provision of national law.**

Páll Hreinsson Bernd Hammermann Ola Mestad

Delivered in open court in Luxembourg on 23 May 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President