



REPORT FOR THE HEARING

in Case E-1/23

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

Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson

and

Íslandsbanki hf.,

concerning 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 (the Mortgage Credit Directive) 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 (the Consumer Credit Directive).

I Introduction

1. By letter of 1 February 2023, registered at the Court on 22 February 2023, Reykjanes District Court made a request for an advisory opinion in the case pending before it between Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson and Íslandsbanki hf. (“Íslandsbanki”). At issue in the case is whether the consumer property mortgage agreement between Sverrisdóttir and Sigurðsson and their mortgage provider, Íslandsbanki, fulfils the requirements of Article 24 of the Mortgage Credit Directive, and the corresponding Icelandic legislation. According to Article 24 of the Mortgage Credit Directive, “any indexes or reference rates used to calculate the borrowing rate [shall be] clear, accessible, objective and verifiable by the parties to the credit agreement and the competent authorities”. Under the terms of the loan agreement, Íslandsbanki may adjust the loan’s interest rate taking account of, amongst other things, the operating costs and other unforeseen costs of the bank.

II Legal background

EEA law

2. 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 EEA Supplement 2019 No 92, p. 4) (“the Mortgage Credit Directive”) was incorporated into the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by Decision of the EEA Joint Committee No 125/2019 of 8 May 2019 (OJ 2019 L 321, p. 176; and EEA Supplement 2019 No 99, p. 8). 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.

3. Recital 19 of the Mortgage Credit Directive reads:

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.

4. Recital 22 of the Mortgage Credit Directive reads, in extract:

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. ...

5. 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.

6. Article 2(1) of the Mortgage Credit Directive, entitled “Level of harmonisation”, reads:

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.

7. 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;

8. 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.*

...

9. 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. ...

10. 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 [European standardised information sheet]. 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.

11. 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.

12. 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.

13. Article 43(1) of the Mortgage Credit Directive, entitled “Transitional provisions”, as adapted by point (2)(h) of Article 1 of Decision of the EEA Joint Committee No 125/2019 of 8 May 2019, reads:

1. 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.

14. 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 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 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.

15. 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.

16. 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;*

...

17. 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;*

...

18. 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;*

19. 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 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,

Liechtenstein and Norway. The requirements were fulfilled by 23 June 1994 and the decision entered into force on 1 July 1994.

20. 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.

21. 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.

22. Article 3 of the Unfair Contract Terms Directive reads, in extract:

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.

...

23. 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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language.

24. 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).

25. 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.

National law¹

26. The Mortgage Credit Directive was incorporated into Icelandic law by the Consumer Property Mortgage Act No 118/2016 (“the Consumer Property Mortgage Act”).

27. 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 are to be set out.

¹ All translations of national law are unofficial.

28. 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.

29. The Consumer Credit Directive was incorporated into Icelandic law by the Consumer Credit Act No 33/2013. Article 7(4) of that 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, ...

30. The Unfair Contract Terms Directive was incorporated into Icelandic law by Act No 7/1936 on Contracts, Agency and Void Legal Instruments.

31. Article 36 of Act No 7/1936 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.

32. Article 36(c) of Act No 7/1936 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.

III Facts and procedure

33. On 21 January 2021, Sverrisdóttir and 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.

34. According to the request, Article 1 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 on the date of recalculation. 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 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, among 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, and changes in the consumer price index.

35. Sverrisdóttir and Sigurðsson lodged an application before the District Court. They claim that the terms for adjusting the interest rate are unlawful and invalid. Íslandsbanki was not entitled to raise the borrowing rate applying to the loan in three interest rate adjustments during 2021, and that 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.

36. Against this background, the District Court requested an advisory opinion from the Court by letter of 1 February 2023, registered at the Court on 22 February 2023. The 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?

IV Written observations

37. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson, represented by Ingvi Hrafn Óskarsson, advocate;
- Íslandsbanki hf., 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;
- 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, Julie Samnadda, Napoleón Ruiz García and Corneliu Hoedlmayr, acting as Agents.

V Proposed answers submitted

Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson

38. Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson propose that the question referred be answered as follows:

Article 24 of Directive 2014/17 must be interpreted to apply to any rate or value utilized, according to the terms of a credit agreement, as a benchmark to determine variable interest rates. Consequently, the reference in a mortgage credit agreement to “operating costs” and “other unforeseen costs” as benchmarks for the determination of a variable interest rate must satisfy the requirements of Article 24. As the terms do not stipulate clear, accessible, objective and verifiable reference rates or indexes, the terms are in principle not compatible with Article 24.

Article 10(2)(f) of Directive 2008/48 must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term setting a variable interest rate under a mortgage loan agreement, a credit agreement must:

- *state, in a clear and concise manner, all relevant conditions or factors that may affect the interest rate, and*
- *enable an average consumer who does not have specialist knowledge in the financial field to understand the specific functioning of the method for determining the rate and thus evaluate, based on clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations.*

As the terms “operating cost” and “other unforeseen costs” can neither be considered to be clear and concise nor criteria that enables an average consumer to evaluate the financial consequences of his/her obligations, the terms are in principle not compatible with Article 10(2)(f).

A contractual term in a mortgage loan agreement, which provides the lender unilateral right to vary the borrowing rate, and neither sets out in transparent fashion the reasons for nor the method of variation, so that the customer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to the borrowing rate, is not drafted in plain, intelligible language within the meaning of Article 5 of Directive 93/13/EEC.

If a contractual term is not drafted in plain, intelligible language, the provisions of Directive 93/13/EEC require a national court to examine the unfairness of the term. To establish whether a term creates a significant imbalance, contrary to good faith, within the meaning of Article 3(1), the national court must ascertain that a term, having regard to the interaction with the other terms that form part of the contract, does not result in very unequal sharing of the risks borne by the parties to the contract. While it is for the national court to determine the facts of the case before it, in principle a contractual term, setting a variable interest rate under a mortgage loan agreement, which allows a lender to unilaterally adjust, without a defined limit or other restrictions, the rate on account of factors such as “among other things”, “operating costs” and “other unforeseen costs” can significantly impair the legal situation of the consumer and create unequal and unfair allocation of the risk inherent in, or related to, a variable credit.

Íslandsbanki

39. *Íslandsbanki proposes that the question referred be answered as follows:*

Directive 2014/17/EU Article 24 and Directive 2008/48/EF Article 10(2)(f) do not restrict lenders from using terms in consumer mortgage loans with variable interest where the adjustments of the borrowing rate take into account factors including operating costs and other unforeseen costs.

The Icelandic Government

40. The Icelandic Government proposes that the question referred be answered as follows:

Directive 2014/17/EU does not preclude that the terms of a consumer property mortgage with variable interest rate state that adjustments of the borrowing rate will take account of factors including operating costs and other unforeseen costs.

The Norwegian Government

41. The Norwegian Government proposes that the question referred be answered as follows:

Directive 2014/17/EU is inapplicable, as the mortgage agreement in question was entered into before the directive became part of the EEA Agreement. Directive 2008/48/EF Article 10 (2) (f) is inapplicable, as the provision does not apply to mortgage agreements.

Should the EFTA Court consider itself competent to provide an interpretation of the directives, the Norwegian Government submits the following answer to the question by the referring court:

Directive 2014/17/EU and Directive 2008/48/EF Article 10 (2) (f) do not restrict the use of terms in a consumer property mortgage agreement which entail that changes in the borrowing rate can be decided by the creditor with reference to other factors than indexes and reference rates, provided that the terms of the agreement regarding such changes are described to the consumer in a satisfactory manner.

ESA

42. ESA proposes that the question referred be answered as follows:

1. The terms “clear, accessible, objective and verifiable” for the purposes of Article 24 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property must be interpreted as requiring that the mortgage credit agreement sets out a transparent mechanism for altering the interest rate which puts the consumer in a position to understand the specific functioning of the term, and, to evaluate the potential economic consequences of the specific term for his or her financial obligations.

2. While it is for the national court to determine the facts of the case before it, a term in a consumer mortgage credit agreement which states that the adjustment of a variable interest rate should take account of “operating costs” and “other unforeseen costs”, cannot be considered to be “clear, accessible, objective and verifiable” as required by Article 24 of Directive 2014/17/EU.

The Commission

43. The Commission proposes that the question referred be answered as follows:

A term such as the one disputed in the main proceedings, according to which the adjustments of the borrowing rate will take account of factors including operating costs and other unforeseen costs, may be declared unfair in accordance with Article 3(1) of the Unfair Contract Terms Directive where that term causes a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer, and provided that that same term does not fall within the exception provided for in Article 4(2) of the Directive, which it is for the national court to verify.

The examination of unfairness must be carried out by the District Court in the light of national rules which, in the absence of an agreement between the parties, are applicable, the means which the consumer has at his disposal under national law to bring an end to the use of that type of term, the nature of the goods or services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract.

Ola Mestad
Judge-Rapporteur