

Reykjanes District Court

EFTA Court
Registry
1 Rue du Fort Thüngen
L-1499 Luxembourg
Luxembourg

1 February 2023

Re: Advisory opinion in Reykjanes District Court Case No E-2539/2021: Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson v Íslandsbanki hf.

1. Introduction

In accordance with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, an advisory opinion is hereby sought from the EFTA Court in connection with the abovementioned case brought by Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson (the plaintiffs) against Íslandsbanki hf. (the defendant).

The dispute between the parties concerns whether the provision on variable interest in a mortgage deed issued by the plaintiffs when they received a loan from the defendant should be declared invalid and whether the defendant was entitled to raise the borrowing rate applying to the amount owed by the plaintiffs under the bond in three interest-rate adjustments during 2021.

The District Court has approved the plaintiffs' request that an advisory opinion be sought from the EFTA Court as to whether it is compatible with Directive 2014/17/EU (see, in particular, Article 24 of that 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, in the terms of a consumer property mortgage, in which the interest rate is variable, it is stated that adjustments of the rate will take account of, amongst other things, "operating costs" and "other unforeseen costs".

2. Facts of the case

As stated above, this case concerns the terms of a mortgage deed signed by the plaintiffs in January 2021 in connection with a loan they took from the defendant. The mortgage deed, dated 21 January 2021, states that the plaintiffs acknowledge that they have received a loan of ISK 57 610 000 from the defendant for a term of 480 months, with the first repayment date set for 1 March 2021. This was a non-indexed property mortgage loan, to be repaid in equal instalments, with variable interest. Article 1 of the terms of the mortgage bond states that the debt was to be repaid with equal payments of interest; however, as the interest rate was variable, the lender 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 result in an increase or a decrease of each instalment, and would consequently have an impact on the total amount repaid. Article 2 of the terms then stated that

variable non-indexed mortgage interest was to apply, as determined at any given time and published on the index chart of Íslandsbanki hf. Adjustments to the interest rate were to take account of, amongst other things, changes in the bank'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.

In their pleading, the plaintiffs state that in spring 2021 they realised there was something wrong with the terms described above and the manner in which the defendant was implementing the interest-rate adjustments. Consequently, they state that they paid a greater amount of interest on their loan than ought to have been the case. The substance of the dispute in this case centres on the aforementioned interest-rate adjustments; the plaintiffs argue that the terms of the aforementioned bond regarding adjustments of the interest rate applying to the loan were at variance with the provisions of the Consumer Property Mortgage Act No 118/2016, and with Article 36 of Act No 7/1936 on Contracts, Mandates and Invalid Legal Instruments, as these provisions are to be interpreted in accordance with EU directives, which the plaintiffs specify in further detail. The plaintiffs argue that this is because the reference values taken into account by the defendant when deciding increases in the interest rate are unclear and are not defined in such a manner that the consumer is able to obtain definitive information regarding all of the premises on which the determinations of the interest rate are based. The plaintiffs argue that the term which granted the defendant a unilateral right to change the interest rate applying to the loan is unlawful and invalid, as it states the premises for interest-rate adjustments in an unfair and unsatisfactory manner and fails to prescribe a specific method or formula for adjusting the interest rate.

3. The plaintiffs' pleas

The plaintiffs base their claims in this case on the argument that the creditor is obliged to explain precisely the terms of reference that influence interest-rate adjustments and the method, or formula, applied to determine interest rates on the basis of these terms of reference. They argue that the terms stated in the mortgage deed between the parties do not meet this requirement.

More specifically, the plaintiffs point out, firstly, that in the agreement between the parties, the defendant fails to state the terms of reference on which the variable interest applying to the loan is based in the manner stipulated in Article 34 of the Consumer Property Mortgage Act No 118/2016. This provision (they point out) is based on Article 24 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and prescribes that reference rates, i.e. reference interest rates and indices used to determine borrowing rates, must be "verifiable". In this connection, the plaintiffs point out that Annex II to Directive 2014/17/EU specifies that the information sheet relating to a property mortgage is to explain the "formula" used to revise the borrowing rate and its different components. The plaintiffs argue that it is not possible to set out such a formula if the reference values for interest-rate revisions are unclear, vague, inaccessible and non-verifiable. Neither in the standard information sheet from the defendant nor in the terms of the mortgage deed covering variable interest, state the plaintiffs, was any definition of the formula to be found.

The plaintiffs refer to the fact that the defendant, in its observations, argues that Article 34(1) of Act No 118/2016 consists of two parts and that the requirement that the reference values for an interest-rate revision are to be clear, accessible, objective and verifiable applies only when a revision of the interest rate is based on a reference interest rate or on indices. Since the defendant's terms regarding variable interest are based, in part, on factors other than reference interest rates and indices, in the defendant's view, the requirement of the first sentence of Article 34(1) of the Act does not apply. In this connection, the defendant refers to the second sentence of the paragraph, which reads: "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." The plaintiffs point out that the sentence quoted here has no direct counterpart in Directive 2014/17/EU and that its wording is not to be found in the provisions regarding variable interest rates in the directive. They argue that the provision in the Icelandic act differs, in this respect, from the directive. They also note that it is emphasised in the preamble to the directive that it is important to ensure that sufficient transparency exists to provide clarity for consumers on the nature of commitments, and that Member States should be able to introduce restrictions or prohibitions on "unilateral changes" to the borrowing rate by the creditor. The present case (argue the plaintiffs) hinges on the interpretation of the substantive content of Article 34 of Act No 118/2016, which should be made with reference to Article 24 of the directive; consequently, it is of significance whether it is compatible with the directive if, when determining changes to the borrowing rate, a creditor applies criteria that are unclear, not even stated in the agreement between the parties, not accessible and not objective, and which only the creditor is able to verify.

Secondly, the plaintiffs consider that the defendant has neglected its obligation to explain, clearly and concisely, the conditions and procedure for adjustment of the borrowing rate in the terms covering variable interest and, consequently, that it is unclear what method the defendant has applied in order to determine adjustments of the interest applying to the loan. The requirements regarding the contents of terms in consumer credit agreements covering variable interest are stated in point f of Article 12(2) of Act No 33/2013 and in the second sentence of Article 34(1) of the Consumer Credit Act No 118/2016. These provisions (the plaintiffs note) are derived from Directive 2008/48/EC on credit agreements for consumers (Article 10(2)(f)). The plaintiffs are of the opinion that it is necessary, in a credit agreement, to state in a clear and transparent manner all of the conditions that must be met for an amendment of the interest rate, and that the creditor must explain how it employs the criteria and the variables identified in the credit agreement in order to determine or calculate interest. Thus, the method of determining interest is (the plaintiffs argue) part of the procedure employed when adjusting the borrowing rate. The plaintiffs point out that guidance on how to interpret the term *procedure* in this context can be found in the judgment of the European Court of Justice of 9 September 2021 in Joined Cases C-33/20, C-155/20 and C-817/20 (*Volkswagen Bank GmbH and Others*). The plaintiffs consider that the Court's conclusion and its interpretation of a comparable term in the directive, in which the Court discussed the substance of Article 10(2)(1) of Directive 2008/48/EC, indicates unequivocally that the wording "conditions and procedure" involves far more extensive obligations for the creditor than the defendant maintains. In any event (the plaintiffs argue), the interpretation of these provisions is of substantial significance in the case and thus there is full reason to obtain the opinion of the EFTA Court as to what is

meant by the requirement that the creditor is to state, in the credit agreement, the conditions and procedure applying to adjustments to the borrowing rate.

Thirdly, the plaintiffs consider that the criteria stated by the defendant in the terms that are the subject of dispute are unlawful and unfair because they grant the creditor a unilateral right to change the interest rate in the event of any type of setback in its operations, unfavourable changes in its operating costs and if it encounters other unforeseen costs of any type. Moreover, the terms contain criteria which are so imprecise that it is not clear when or how they would be applied. These arbitrary criteria skew the balance in the contractual relationship and are contrary to good commercial practice; consequently, they cannot be regarded as valid reasons within the meaning of that term as used in Directive 93/13/EEC. The arbitrary criteria in the defendant's terms go much further than what is permitted under Directive 93/13/EEC (in the plaintiffs' view), as they substantially aggravate the inequality between the parties to the agreement. There is good reason (in the plaintiffs' view) to request an advisory opinion from the EFTA Court as to whether a creditor may reserve the right to change the interest rate on the basis of such criteria and on the basis of criteria that are not stated in the agreement between the parties.

Fourthly, the plaintiffs point out that there is a disagreement in the present case as to what requirements regarding clarity and transparency follow from Directive 93/13/EEC on unfair terms in consumer contracts. Reference is made in the plaintiffs' application to, amongst other things, the judgment of the European Court of Justice of 3 March 2020 in Case C-125/18 (*Gómez del Moral Guash*) and other judgments of the Court showing that in order to meet the requirement regarding transparency in contract terms on variable interest, Directive 93/13/EEC, and particularly Articles 4 and 5 thereof, must be interpreted as meaning that the creditor must explain accurately the method used to calculate the interest rate. The plaintiffs note also that reference is made in their application to the annex to the directive, which contains criteria (the so-called "grey list") that are to be borne in mind when assessing whether the terms of an agreement are to be considered unlawful or unfair.

The plaintiffs argue that the defendant's position, which is based on the view that unclear presentation of a term on variable interest cannot result in the term being deemed invalid, is at variance with the case-law of the European Court of Justice, which has repeatedly stated that when an assessment is made as to whether a term is to be considered just, a fundamental consideration is whether the term is stated in clear and comprehensible language, and that the "grey list" in the annex to Directive 93/13/EEC is to be used as a guide for this purpose. In this connection, the plaintiffs refer, by way of example, to the judgment of the European Court of Justice in Case C-472/10 (*Invitel*). In the present case, it is necessary, for the reasons presented above, to adopt a position as to how Articles 36 a-d of Act No 7/1936, which transpose Directive 93/13/EEC into Icelandic law, are to be applied correctly, including determining what conditions applying to variable interest must be met in order to be considered just and fair, what is meant by the requirement that terms must be stated in clear and comprehensible language and what consequences follow if this requirement is not met.

4. The defendant's pleas

The defendant rejects the assertion that the variable interest term in the mortgage deed between the parties is unlawful. It maintains that its provision of information, both prior to the actual granting of credit and in the bond itself, was in all respects in conformity with the Consumer Property Mortgage Act No 118/2016. It is clear from Article [34] of the act (in the defendant's view) that a distinction [is] made between whether changes are based on reference values, indices or reference interest rates which can be verified or on a decision by the creditor. It is clear from the bond between the parties that the defendant was entitled to change the borrowing rate on the basis of factors other than a reference value, index or reference interest rate. The preparatory works of the aforementioned Act state, regarding Article 34, that there is nothing to prevent adjustments of the interest rate being determined with reference to, e.g., financing costs or operating costs. The preparatory works state furthermore that the sentence [the final sentence of Article 34(1)] is based on point f of Article 7(4) of the Consumer Credit Act No 33/2013, and that it was being proposed that the same rules should apply as applied under that act regarding the information that creditors were to give consumers concerning the conditions for changing the interest rate. This last point (in the defendant's view) is fully comparable with Article 5[(1)](f) of Directive 2008/48/EC. This states that information is to be provided to the consumer regarding the borrowing rate and the changes that may be made to the borrowing rate and, consequently, to payments. The defendant argues that there is no basis in the act or in the directives to support the plaintiffs' assertions that the conditions for revision of the borrowing rate are to be listed exhaustively in the creditor's terms.

The bond between the parties lists the factors on which changes in the borrowing rate are based. These are (notes the defendant), on the one hand, the prime rate and the consumer price index and, on the other, factors that are not related to these, in which changes are unforeseeable. Under this heading come changes in the bank's financing costs, its operating costs, public levies and /or other unforeseen costs. The defendant argues that the plaintiffs were fully apprised of the factors determining changes in the borrowing rate, and that this provision of information was completely in accordance with Article 34 of Act No 118/2016. In its judgments (notes the defendant), the Supreme Court of Iceland has stressed that information supplied by creditors must be designed in such a manner that the ordinary consumer can easily grasp what conditions apply to a loan (*cf.* Supreme Court Case No 243/2015). In the present case (in the defendant's view), the plaintiffs were fully in a position to understand the terms of the mortgage.

The defendant also rejects the assertion that the bond between the parties is at variance with the provisions of the Contracts Act No 7/1936, thus opening the way to a declaration of invalidity. The defendant notes that Act No 118/2016 does not specify that a contractual provision that does not meet the requirements of the act is to be regarded as invalid. The defendant claims that the conditions in the bond between the parties are in full conformity with Article 34 of the aforementioned act and therefore cannot be set aside on the basis of contract law principles.

The defendant also refers to other matters relating to Act No 7/1936 and to Directive 93/13/EEC, but there is no need to describe these in further detail for the purpose of this request.

5. Legislation at issue in the case

Article 34 of the Consumer Property Mortgage Act No 118/2016 provides as follows: “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, index or reference interest rate, then the mortgage credit agreement shall state the conditions and procedure for adjustment of the interest rate.” The first sentence of this article comprises the transposition into Icelandic law of point (a) of Article 24 of Directive 2014/17/EU, which states that all indexes or reference rates used to calculate the borrowing rate are to be clear, accessible, objective and verifiable by the parties to the credit agreement. The preparatory works to Act No 118/2016 state, regarding this provision, that it did not prevent creditors from being able to state, in the property mortgage agreement, that adjustment of the interest rate was to be decided by the creditor with reference, e.g., to its financing costs or operating costs. If an interest-rate adjustment were based on such factors, the creditor is obliged to state this clearly and to explain under what circumstances the interest rate might be adjusted.

The second sentence of Article 34(1) then stipulates that the mortgage credit agreement is to explain the conditions and procedure for the adjustment of the interest rate if the change is not based on a reference interest rate. This sentence is based on point f of Article 7(4) of the Consumer Credit Act No 33/2013; the act constituted the transposition into Icelandic law of Directive 2008/48/EC on credit agreements for consumers. Article 10[(2)](f) of that directive includes the provision that the credit agreement is 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.

Article 12 of Act No 118/2016 also specifies the information that the creditor is required to give consumers regarding interest rates. This 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. This provision is based on Article 13 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, which provides that Member States shall ensure that clear and comprehensible general information concerning credit agreements is at all times available to the consumer, including as regards the types of available borrowing rate and a short description of the characteristics of a fixed and variable rate, including related implications for the consumer.

Finally, the plaintiffs invoke Articles 36 and 36 c of Act No 7/1936; the latter of these constituted the transposition into Icelandic law of Article 6 of Directive 93/13/EEC, on unfair terms in consumer contracts. This states that Member States are to 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. The annex to this directive lists examples

of terms that may be regarded as unfair; point 1(j) of the annex covers terms enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract. Point 2(b) of the annex specifies that subparagraph (j) [of point 1] is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable unilaterally where there is a valid reason.

6. The question posed to the EFTA Court

As described above, the dispute in this case concerns whether the terms of a mortgage deed regarding the calculation of variable interest rates are compatible with Articles 12 and 34 of the Consumer Property Mortgages Act No 118/2016, and Article 36 (*cf.* Article 36 c) of Act No 7/1936, on Contracts, Mandates and Invalid Legal Instruments, as these provisions are to be interpreted in accordance with Directives 2014/17/EU and 2008/48/EC, of the European Parliament and of the Council, and Council Directive 93/13/EEC.

By its ruling in this case dated 13 December last, the District Court agreed to grant in part the plaintiffs' request that an advisory opinion be sought from the EFTA Court. Reference was made in the ruling to the fact that the pleas in the case indicated that its resolution would involve the interpretation of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and of Directive 2008/48/EC on credit agreements for consumers, as these concerned the application of, on the one hand, the first sentence of Article 34(1) of Act No 118/2016 and, on the other, the second sentence of the same provision (see the discussion above). Reference was made to what was stated in the ruling by the Court of Appeal of 31 October 2022 in Case No 558/2022, to the effect that the case-law of the European Court of Justice and the EFTA Court [had] not in all respects determined the interpretation of the aforementioned directives and the interplay between them as regards the term "reference interest rate" in the first sentence of Article 34(1) of Act No 118/2016 and the terms "conditions and procedure" in the second sentence. With reference to the aforementioned ruling by the Court of Appeal, the pleas of the parties and the aims of the EEA Agreement regarding homogeneity, the District Court concurs with the plaintiffs that the provisions of the aforementioned directives and the clarification of their terms could be of substantial significance for the resolution of the case.

With reference to the foregoing, an advisory opinion is requested from the EFTA Court regarding 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?

Halldóra Þorsteinsdóttir, District Court Judge

Enclosed:

Ruling by the Reykjanes District Court of 13 December 2022 in Case No E-2539/2021