



## REPORT FOR THE HEARING

in Case E-13/22

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 Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in the case between

**Birgir Þór Gylfason and Jórunn S. Gröndal**

and

**Landsbankinn 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 4 November 2022, registered at the Court on 10 November 2022, Reykjavík District Court made a request for an advisory opinion in the case pending before it between Birgir Þór Gylfason and Jórunn S. Gröndal and Landsbankinn hf. (“Landsbankinn”). At issue in the case is whether the mortgage agreement between Gylfason and Gröndal and their mortgage provider, Landsbankinn, fulfils the requirement under Article 24 of the Mortgage Credit Directive, as incorporated into Icelandic law. Under 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 agreement, the bank may at any time during the loan period adjust the loan’s interest rate, taking account of, amongst other things, the Central Bank of Iceland’s interest rate, interest rates on the market and other financing terms available to Landsbankinn.

## 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”). 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. 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.

14. 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.*

15. 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;*

...

16. 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;*

...

17. 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;*

18. 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.

19. 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.*

20. 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.*

21. 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.*

...

22. 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.*

23. 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).*

24. 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 law*<sup>1</sup>

25. The Mortgage Credit Directive was incorporated into Icelandic law by the Consumer Property Mortgage Act No 118/2016. Article 34(1) of that 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.*

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<sup>1</sup> All translations of national law are unofficial.



26. 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, ...*

### **III Facts and procedure**

27. On 4 July 2019, Gylfason and 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, it can be deduced from the payment slip for the first repayment that the loan was disbursed on 22 July 2019. The interest rate was 6.60% when the mortgage bond was drawn and 6.40% at the first repayment date.

28. It follows from the request that, under the provisions of the mortgage 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.”

29. Gylfason and Gröndal lodged an application before the 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.

30. Against this background, the District Court requested an advisory opinion from the Court by letter of 4 November 2022, registered at the Court on 10 November 2022. The District Court has referred the following question:

**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?**

#### **IV Written observations**

31. 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:

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

#### **V Proposed answers submitted**

*Birgir Þór Gylfason and Jórunn S. Gröndal*

32. Birgir Þór Gylfason and Jórunn S. Gröndal propose that the question referred be answered as follows:

*Article 24 of Directive 2014/17 must be interpreted to apply to any interest rate 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 “the interest of the Central Bank of Iceland, interest rates on the market, and other financing terms available to Landsbankinn” as benchmarks for the determination of a variable interest rate must satisfy the requirements of Article 24. As the term does not stipulate clear, accessible, objective, and verifiable reference rates or indexes, the term is not compatible with Article 24.*

*Article 10(2)(f) 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 used 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.*

*Consequently, a consumer credit agreement that only informs the consumer that “interest-rate decisions shall take account, amongst other things, of the interest rates of the Central Bank of Iceland, interest rates on the market, and other financing terms available for Landsbankinn”, and thereby does explicitly not state all relevant conditions and contains no description of the method used to determine the rate, is not compatible with Article 10(2)(f).*

#### *Landsbankinn*

33. Landsbankinn proposes that the question referred be answered as follows:

*... Directive 2014/17, including Article 24 thereof, and Directive 2008/48, do not restrict the criteria, factors, or circumstances, that may be taken into account when adjusting the interest rate under a credit agreement with variable interest rates.*

*Therefore, ... it is 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 of 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.*

#### *The Norwegian Government*

34. The Norwegian Government 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 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

35. 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 the 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, in principle the terms of a consumer property mortgage in which the interest rate is variable, which 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, cannot be considered to be “clear, accessible, objective and verifiable” as set out in Article 24 of Directive 2014/17/EU.*

*The Commission*

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

*Article 24 of the Mortgage Credit Directive, read in the light of recital 19 must be interpreted to the effect that national legislation should preclude a credit agreement for a mortgage or comparable security with a variable rate credit which states 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 unless the 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.*

Ola Mestad  
Judge-Rapporteur