Reykjavík District Court

Case No E-5932/2021:

Birgir Þór Gylfason and Jórunn S. Gröndal

(Ingvi Hrafn Óskarsson, Attorney at Law)

v

Landsbankinn hf.

(Andri Árnason, Attorney at Law)

Judge: Björn L. Bergsson, District Court Judge

In the substantive part of the action stated above, the plaintiffs present the principal claim that the defendant be ordered to pay them ISK 83 627 with penalty interest in accordance with Article 6(1) of Act No 38/2001 on Interest and Indexation, on that sum from 2 February 2021 until the date of payment. The plaintiffs claim that the defendant be ordered to pay their legal costs.

The defendant's submission is that it be acquitted of all the plaintiffs' claims and that they pay its legal costs.

Facts of the case

On 4 July 2019, the plaintiffs signed a mortgage deed form prepared by the defendant covering a loan they took from the defendant. The heading of the form stated that this was a non-indexed bridge loan (*viðbótarlán*) with variable interest. The principal of the loan was ISK 6 500 000, the loan period was 15 years, and the loan was to be repaid in monthly instalments. The first repayment date was 1 August 2019, and interest was to be paid as from the disbursement date of the loan, which was not stated in the mortgage deed; however, a copy of the payment slip for the first repayment date shows that the principal bore interest as from 22 July 2019; thus, it can be deduced that it was on that date that the loan was disbursed.

It was stated in the mortgage deed that variable mortgage interest was to apply; this was recorded at 6.60% when the mortgage bond was drawn, and it has been demonstrated that the interest rate applying on the first repayment date was 6.4%. The mortgage deed contained

special provisions covering the defendant's authorisation to adjust the interest rate. These read as follows:

Variable mortgage interest shall be paid on this loan in accordance with the interest determined by Landsbankinn on non-indexed bridge loans at any given time. Interest shall be paid retrospectively, on the same dates as the repayment instalments, unless another arrangement is agreed.

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. Changes to the interest rate shall be announced on paper or via another durable medium, e.g. in an on-line bank, and shall take effect 30 days after the date of the announcement. The aforementioned 30-day notice period may be changed in accordance with the relevant provisions of law. An adjustment involving a lowering of the interest rate may be scheduled to take effect on the date of the announcement, but this is not obligatory.

If the drawer (mortgagor) is not willing to accept adjustments as provided for in item 2, he or she may repay the outstanding balance on the terms that were in effect prior to the adjustment, provided that the entire outstanding balance is repaid within 30 days of the date of the announcement from Landsbankinn.

At a session of the court on 17 March 2022, a request was submitted on behalf of the plaintiffs that an advisory opinion on the case be requested from the EFTA Court; pleadings concerning the differing views of the parties on this issue took place on 20 May 2022 and then again on 10 June 2022.

In this part of the case, the plaintiffs have submitted to the court a motion that an advisory opinion be obtained from the EFTA Court regarding the interpretation of legal provisions on variable interest which are derived from the EEA Agreement – specifically, in Directive 93/13/EEC on unfair terms in consumer contracts, Directive 2008/48/EC on credit agreements for consumers and Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property. In particular, they request that an advisory opinion be sought regarding the following four questions:

i. Should the provisions of Directive 2008/48/EC on credit agreements for consumers, and specifically those of Article 10(2)(f), be interpreted as meaning that the creditor is obliged to explain exactly, in the credit agreement, the method applied to calculate variable rates of

interest? On what fundamental considerations is a court to base its assessment of whether the provision on variable interest, in a consumer credit agreement, states in a satisfactory manner the conditions and procedure for changing the borrowing rate?

ii. Is it compatible with Article 24 of Directive 2014/17/EU if a variable rate credit agreement states reference values in such a general manner (for example, *interest rates on the market*) that it is not clear what reference rates of interest are meant or what effect they will have on adjustments of the rate? Can a reference in a provision on variable interest to an unspecified rate of interest on the market, an unspecified rate of interest charged by the Central Bank of Iceland or unspecified financing terms available to the defendant be considered as meeting the requirement of the Directive stating that reference rates of interest are to be verifiable?

iii. Should Directive 93/13/EEC, and specifically the provisions of Articles 4 and 5 thereof, be interpreted as meaning that the creditor is to explain, in the credit agreement, exactly how adjustments of the interest rate are determined and how their calculation is carried out so that a consumer who has no special knowledge of finance is able to understand, with reference to a clear frame of reference, the financial implications of the terms? On what fundamental considerations is a court to base its assessment of whether a term on variable interest in a consumer credit agreement meets the requirements of the Directive regarding transparency and clarity?

iv. Is it compatible with Article 6 of Directive 93/13/EEC, and the aims of the Directive regarding adequate and effective means available to consumers (see Article 7 of the Directive), that the initial borrowing rate in a credit agreement may remain in force throughout the loan period when the term covering the review of the rate is annulled and the interest rate can no longer be adjusted under that provision? Is it compatible with Article 6 of the Directive that a loan bear interest in accordance with Article 18 of Act No 38/2001 on Interest and Indexation, i.e., at a rate determined by the Central Bank of Iceland, taking into account the lowest interest rates on ordinary loans made by the commercial banks (see Article 4 of the same Act)?

The defendant opposes the obtaining of an advisory opinion from the EFTA Court. It maintains that the degree of doubt regarding the interpretation of the substantive rules bearing on the case is not sufficient as to occasion the seeking of such an opinion.

Plaintiffs' arguments:

The plaintiffs consider there are cogent reasons for obtaining an advisory opinion from the EFTA Court regarding the interpretation of legal rules which concern variable interest rates

and which stem from the EEA Agreement and, in particular, from Directive 93/13/EEC on unfair terms in consumer contracts, Directive 2008/48/EC on credit agreements for consumers and Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property. They argue that these rules are intended to ensure that creditors explain, in detail, in consumer credit agreements, how the borrowing rate will be adjusted in cases where variable interest applies. The plaintiffs consider that the creditor must explain, in detail, the reference values and variables that have an influence on variable interest rates, and the method applied to determine interest rates, and that all the aforementioned points must be stated in plain and intelligible language in the agreement between the parties.

Conditions and procedure

The plaintiffs argue that the defendant neglected its obligation to define, clearly and accurately, the *conditions and procedure* for changing the borrowing rate in the provision on variable interest in the mortgage that is at the centre of this dispute. Thus, they argue, it is not clear what method the defendant uses when determining adjustments of the borrowing rate.

The plaintiffs note that the rule referred to above regarding the conditions in a consumer credit agreement with variable interest is stated in Article 34(1) of the Consumer Property Mortgage Act No 118/2016. They state that this provision is based on Article 10(2)(f) of Directive 2008/48/EC, on credit agreements for consumers, and on Article 24 of Directive 2014/17/EU, on credit agreements for consumers relating to residential immovable property.

The defendant argues that the rule referred to above does not mean that it is necessary, in a credit agreement, to enumerate, exhaustively, the factors or considerations that may be of significance for the determination of the borrowing rate. Nor, it argues, is it forbidden, in the light of the second sentence of Article 34 [of Act No 118/2016], to employ frames of reference other than those covered in the first sentence of Article 34 [of Act No 118/2016].

The plaintiffs consider that the creditor must explain how he applies the reference values and variables specified in the credit agreement in order to determine or calculate the interest rate – i.e., that the method of determining the interest rate constitutes part of the procedure employed when adjusting the borrowing rate. The plaintiffs also argue that all relevant conditions for adjustment of the interest rate must be stated in the credit agreement. They point out that in a recent judgment of 9 September 2021 in Joined Cases C-33/20, C-155/20 and C-[187/20], the European Court of Justice came to the conclusion that the comparable provision in Article 10(2)(l) of Directive 2008/48/EC, which states that a credit agreement is to specify

the arrangements for the adjustment of penalty interest, meant that the method used for calculating interest must be explained in the credit agreement in such a manner that ordinary consumers without special knowledge of finance would be able to calculate the interest themselves. The Court's conclusion indicates unequivocally that the wording *conditions and procedure* implies a broader obligation on the part of the creditor than the defendant maintains. In any event, the interpretation of this provision is of substantial significance in the case and therefore (in the plaintiffs' view) there is full reason to obtain an advisory opinion from the EFTA Court regarding the implications of the requirement that the creditor specify in the credit agreement the conditions and procedure for changing the borrowing rate.

Reference interest rates

The plaintiffs invoke the rule stated in the first sentence of Article 34(1) of the Consumer Property Mortgages Act, which states that creditors may only use reference interest rates that are clear, accessible, objective, and verifiable by the parties to the agreement. The plaintiffs consider that the reference values stated in the defendant's terms, i.e., the Central Bank of Iceland's interest rate, interest rates on the market and other terms of finance available to Landsbankinn, are reference interest rates in the sense of this provision, but that the frame of reference is not stated in the manner required in the first sentence of Article 34.

The provision in the first sentence of Article 34(1) is based on Article 24 of Directive 2014/17/EU, which states that where the credit agreement is a variable rate credit, Member States shall ensure that any indexes or reference rates used to calculate the borrowing rate are clear, accessible, objective, and verifiable. The plaintiffs point out that the Directive contains no exemptions that could permit the creditor to calculate the rate using an interest rate that was not clearly stated in the credit agreement between the parties and that could not be verified. In fact (the plaintiffs argue), no provision can be found in the Directive allowing the creditor to use, when adjusting the interest rate, reference values that are subject to unilateral assessment by the creditor, which cannot be verified.

In the light of the foregoing (in the plaintiffs' view), it is necessary in this case to adopt a position on how the creditor is to state, in a variable rate credit agreement, the reference values when the frame of reference involves reference to a rate of interest on which the calculation, or determination, of rate adjustments is to be based and on whether it is permissible, under the Directive, to use reference values other than those stated there. It is clear, they argue, that Article 34 of Act No 118/2016 must be interpreted with reference to the provisions of Directive 2014/17/EU.

Directive 93/13/EEC – method of calculating interest rates

It is disputed which requirements regarding clarity and transparency follow from Directive 93/13/EEC on unfair terms in consumer contracts. The plaintiffs refer, amongst other things, to the judgment of the European Court of Justice of 3 March 2020 in Case C-125/18, and to many other judgments by the Court, which indicate that Articles 4 and 5 of Directive 93/13/EEC must be interpreted in such a way that the requirements regarding transparency in the terms in a variable rate mortgage are met. In such terms, argue the plaintiffs, the creditor must explain in detail the method used to calculate the interest rate. The plaintiffs also refer to the Annex to the Directive, which they state contains reference criteria (in the so-called 'grey list') that are to be borne in mind when an assessment is made of whether a contractual term is to be considered unlawful or unfair.

The defendant, on the other hand, argues that the case-law of the European Court of Justice referred to above does not have the significance claimed by the plaintiff; it proposes another interpretation of the European Court of Justice's case-law. It argues that these judgments cannot be understood as meaning that everything that could possibly be of significance for a reasonably attentive and cautious consumer is to be explained in detail in the credit agreement and that, on the contrary, it is necessary to assess whether the consumer has received the necessary information with regard to all facts and circumstances so as to be able to take an informed decision on whether to undertake the obligations involved.

The plaintiffs do not concur with this interpretation by the defendant regarding the case-law; they refer to the aforementioned judgment in Case C-125/18 and comparable judgments. In the case referred to, they point out, direct reference is made to the requirement that the terms of a variable mortgage must state, in detail, the method used to adjust the borrowing rate.

They state that this is a crucial point in the case because the conditions which are the subject of dispute, and which provide authorisation for the defendant to adjust the interest rate unilaterally, contain no explanation whatsoever as to the method used and how the reference interest rates mentioned in the conditions influence the interest rate at any given time. Thus, they argue, a position must be adopted on how to apply Articles 36 a-d of Act No 7/1936 on Contracts, Mandates and Invalid Legal Instruments, which constitute the transposition into Icelandic law of Directive 93/13/EEC, including what conditions regarding variable interest rates in consumer credit agreements must be met in order for the terms to be considered lawful and fair.

Consequences of interest terms being deemed unfair

The defendant has argued that even if the court comes to the conclusion that the terms on the adjustment of the interest rate are deemed invalid, this will not automatically entail that the provisions of the mortgage deed regarding the initial interest rate will be considered invalid. This assertion by the defendant appears to rest on two arguments: (i) that the initial interest rate was not unfair, unlawful or invalid, and (ii) that the terms of the original interest rate were "... independent, in terms of their substance and fulfilment, of the allegedly invalid terms on adjustment of the interest rate". These arguments are incompatible with the case-law of the European Court of Justice; see, e.g., its judgment in Case C-269/19 of 20 January 2021, where there is nothing in the Court's reasoning to indicate that it considered allowing the initial interest rate to stand, as this would have been incompatible with the aims of parties who agree on variable interest rates.

According to the judgment in Case C-229/19 of 27 January 2021, Directive 93/13/EEC is to be interpreted as meaning that the authorisation available to courts of law to amend, or to review, the substance of unlawful terms in a manner that will protect the interests of the seller or creditor is limited.

For this reason, it is argued that a position must be adopted on the consequences if the defendant's terms on variable interest are deemed invalid under Article 36 c [of Act No 7/1936] as that provision must be interpreted with reference to the rules of Directive 93/13/EEC, including consideration of the aims of the Directive as described in Article 7 thereof.

This case rests on the application of EEA rules regarding consumer credit agreements and unfair contractual terms. The European Court of Justice has generated a great deal of case-law with a bearing on Directive 93/13/EEC and the rules set out therein, including as regards variable interest terms in consumer credit agreements. It follows from the European Court of Justice's judgments cited above that these rules are of substantial significance in the plaintiffs' case, as they have based their pleas on arguments relating to the aforementioned directives. It is important, argue the plaintiffs, that the rules in question be interpreted in a uniform manner throughout the EEA. They point out that there are no clear precedents in this respect, either from Icelandic courts or the EFTA Court. Consequently, the plaintiffs regard it as the right course of action that the court seek the opinion of the EFTA Court.

The defendant's point of view:

In the defendant's view, it is not necessary for the resolution of the case to seek an advisory opinion, and it therefore opposes this being done. The defendant argues that no such doubt

exists in the case regarding the interpretation of substantive rules as to give occasion for the seeking of such an opinion. It argues that sufficient guidance can be found in the existing legal framework and case-law, including that in European law, regarding all the questions put by the plaintiffs in their request, to enable judgment to be delivered on the case.

Regarding Question (i)

In this question (notes the defendant), the plaintiffs seek to obtain an opinion as to whether, with reference to the provisions of Directive 2008/48/EC, on credit agreements for consumers, and specifically to those of Article 10(2)(f), the creditor is obliged to specify clearly, in the credit agreement, the method applied to calculate variable rates of interest. They also seek an opinion as to what fundamental considerations should be applied by a court when assessing whether the conditions and procedure applying to changes in the borrowing rate are satisfactorily specified in such provisions.

Directive 2008/48/EC, to which this question relates, was transposed into Icelandic law by the Consumer Credit Act, No 33/2013. On the other hand, there is no dispute in this case that Act No 118/2016, which transposed Directive 2014/17/EU, applies to the bond that is the subject of dispute here. Thus, argues the defendant, obtaining an advisory opinion regarding Question (i) must be regarded as irrelevant. In this context (in the defendant's view), even though the second sentence of Article 34(1) of Act No 118/2016 has a counterpart provision in point f of Article 7(4) of Act No 33/2013, this is without significance; in this context, reference is made to Supreme Court judgment in Case No 737/2013.

Further reference is made to the remarks on Question (ii).

Regarding Question (ii)

In Question (ii) (notes the defendant), the plaintiffs seek to obtain an opinion as to whether it is compatible with Article 24 of Directive 2014/17/EU if a variable rate credit agreement *states reference values in such a general manner (for example, "interest rates on the market") that it is not clear what reference rates of interest are meant or what effect they will have on adjustments of the rate.* They also ask whether a reference *to an unspecified rate of interest on the market, an unspecified rate of interest charged by the Central Bank of Iceland or unspecified financing terms available to the defendant* can be considered as meeting the requirement of the Directive stating that reference rates of interest are to be verifiable.

The defendant does not concur with the view that there is any need to obtain an opinion on this. It argues that it is up to the national courts to rule on disputes concerning the calculation

of variable interest as provided for in Article 34(1) of Act No 118/2016, whether the defendant's terms are considered as being based on the first or second sentence of Article 34(1).

Regarding the aforementioned provision, the preparatory works accompanying the bill which was passed as Act No 118/2016 stated, amongst other things: *This article is based on Article 24 of the Directive, which addresses variable credit interest. It is not expected that this provision will have great effect in Iceland, as it states that, in mortgage agreements, only 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), may be used. It should be stated that this provision does not prevent creditors from being able to state, in the property mortgage agreement, that adjustment of the interest rate is to be decided by the creditor with reference, e.g., to its financing costs or operating costs. If an interest-rate adjustment is based on such factors, the creditor is obliged to state this clearly and to explain under what circumstances the interest rate may be adjusted. Thus, the final sentence of the first paragraph states that the conditions and procedure for changing the interest rate shall be stated if decisions on interest-rate adjustment are 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. For this reason, it is proposed here that the same rules should apply as apply under current law regarding information that creditors are to give consumers about circumstances in which interest rates may be adjusted.*

The defendant points out that this case centres on the terms of a mortgage loan which the plaintiffs obtained from the defendant in 2019, in which mention was made of, amongst other things, variable rates of annual interest (see Articles 1 and 2 of the terms in the disputed mortgage agreement). There, it was stated, amongst other things, that the credit was to bear variable property mortgage interest and that the defendant could, during the mortgage period, raise or lower the interest rate *in accordance with Landsbankinn's interest-rate decisions at any given time. Interest-rate decisions shall take account of the Central Bank of Iceland's interest rate, interest rates on the market and other financing terms available to Landsbankinn.*

With reference to the second sentence of Article 34(1) of Act No 118/2016 (*cf.*, also, the foregoing discussion of the legislation in the preparatory works accompanying the bill), the defendant argues that it should be clear that it cannot be seen that such doubt applies regarding the substance of this provision as to necessitate obtaining an advisory opinion. In this connection, it says it should be stated, regarding Question (ii) specifically, that disputes as to whether the Directive was correctly transposed into Icelandic law are not under the purview of the District Court in this case.

In addition to the foregoing, the defendant states that it should be pointed out that Question (ii) is rather biased and implies, by the way it is worded, that an advisory opinion is being sought from the EFTA Court as to whether the terms of the mortgage on variable interest rates are as unclear as the plaintiffs maintain. The defendant argues that an assessment of whether or not this is the case evidently does not come under the purview of the EFTA Court.

Regarding Question (iii)

Taking all the circumstances of the case and the foregoing information into account, the defendant argues that there is nothing to indicate that the District Court is not competent to assess the substance of domestic legislation on the point regarding variable interest rates. Regarding the considerations to be observed when assessing whether terms are transparent and clear, the defendant argues that it is evident that it is up to the national court to assess such matters, taking into account the wording of the credit terms in question and all other circumstances (*cf.*, amongst other things, the European Court of Justice's judgment in Case C-26/13 and, for reference, the EFTA Court's judgment in Case E-27/13).

The defendant notes that the European Court of Justice has, in a considerable number of cases, discussed criteria that are regarded as following from Directive 93/13/EEC regarding the terms of consumer credit agreements, as is set out in the statement of claim and in the plaintiffs' request for an advisory opinion. Thus, the Court's criteria regarding terms of consumer credit agreements in the light of Directive 93/13/EEC are discussed in its judgment in Case C-26/13, and its judgment in Case C-125/18 contains a discussion that is comparable as regards this point. The latter judgment states that it is up to a national court to assess whether the terms of specific consumer credit agreements meet the court's criteria.

From these judgments, together with others of the same type, it is possible (in the defendant's view) to form a sufficient idea of what the position is regarding the stated question under Directive 93/13/EEC in European law, and thus under EEA law. Thus (in the defendant's view) sufficient guidance exists for an assessment of the terms in dispute (see, for reference, Icelandic Supreme Court Judgment in Case No 267/2014).

From this it follows (in the defendant's view) that it is up to the national court to assess whether the terms of the agreement were described to the consumer in a satisfactory manner. In making such an assessment, consideration must be given to the wording of the contract terms in question and all other circumstances; for comparative purposes, see, for example, the EFTA Court's judgment in Case E-27/13. From this judgment it can be deduced that a conclusion regarding the exact substance of contract terms regarding variable interest, and whether they

constitute sufficient explanation for consumers of the nature of variable interest rates, is in the hands of the national court.

It should be noted that the Annex to Directive 93/13/EEC, (the so-called *grey list*) has not been incorporated into Icelandic law and is therefore without significance for the resolution of the case. See Icelandic Supreme Court judgment in Case No 160/2015.

Regarding Question (iv)

In this question, the plaintiffs seek an opinion on what response should be made under domestic law if the court rules that the terms of the credit agreement on variable interest rates are invalid. They seek an opinion as to whether the initial, agreed, interest percentage can then retain its validity or, as appropriate, whether the credit will then bear interest in accordance with Article 18 (*cf.* Article 4) of the Interest and Indexation Act No 38/2001.

This question must be understood as inviting an opinion, firstly, on whether the contract term stating the initial interest rate would also be considered invalid, and not only the terms covering adjustment of the rate. In this connection, the plaintiffs refer, amongst other things, to the European Court of Justice's judgment in Case C-269/19, which they regard as setting a precedent. In this connection, however, it must be borne in mind that in assessing the consequences of an invalid provision, the judgment takes into consideration whether the consequences are particularly unfavourable for the consumer. Naturally, it is up to the national court to assess this, taking all the circumstances of the case into account. On this point, it is also of significance that it has not been argued in the case that the initial interest rate was unlawful or unfair, or that that term in the mortgage in question should be set aside. Under the circumstances, it is a matter for the national court to assess whether the term of the mortgage regarding the initial interest rate can retain its validity if the terms covering adjustment of the rate are deemed invalid in accordance with the plaintiffs' claims.

In the same way (in the defendant's view) it must be considered obvious that it is up to the national court to assess whether the conditions of Article 18 of the Interest and Indexation Act are met when the view is taken that the interest rate has not been agreed, as this statutory provision does not derive from Iceland's obligations under EEA law.

It must also be mentioned that the EFTA Court has, in its judgment in Case E-27/13, discussed the provisions of Article 6(1) of Directive 93/13/EEC. There (notes the defendant) it was stated specifically that this provision must be interpreted as meaning *that, where a national court considers that a given term is unfair within the meaning of that directive, the national court must ensure that such a clause is not binding on the consumer provided that the contract*

is capable of continuing in existence without the unfair term, in so far as such continuity of the contract is legally possible under the rules of domestic law. Naturally, the assessment of such a point should be the province of the national courts.

From the foregoing (in the defendant's view), it cannot be seen that it is necessary to seek an opinion regarding Question (iv) in order to resolve the present case before the court.

For the reasons stated above (in the defendant's view) the conditions for obtaining an advisory opinion from the EFTA Court cannot be regarded as being met.

Conclusion

The dispute in this case concerns provisions of a non-indexed mortgage deed drawn by the plaintiffs on the defendant on 4 July 2019 covering the determination of variable interest rates. The parties disagree as to whether the defendant's term in the mortgage deed regarding the calculation of variable interest is compatible with the provisions of the Consumer Property Mortgage Act No 118/2016, as they are to be applied and interpreted in conformity with Directive 2014/17/EU and those of the Consumer Credit Act No 33/2013, as they are to be applied and interpreted in conformity with Directive 2008/48/EC on credit agreements for consumers (etc.); the Icelandic act constituted the transposition of this directive into Icelandic law. Also relevant to the case is Directive 93/13/EEC on unfair terms in consumer contracts.

It has been stated, and the parties do not dispute, that the provisions of directives relevant to the case have frequently been the subject of judgments by the European Court of Justice. In the pleadings of the present case, it was mentioned that well over one hundred judgments have been delivered which involved interpretation of Directives 2008/48/EC and 93/13/EEC, no exact number being given. Nor do the parties dispute the fact that these judgments will be examined, as appropriate, when the substantive aspects of the issue in the present case are resolved. This fundamental perspective must be borne in mind when resolving the issues presented in the case; however, the court does not concur with the plaintiffs that disagreement between the parties over the interpretation of the judicial precedents that must be examined constitutes a special reason for seeking an advisory opinion from the EFTA Court.

The plaintiffs have identified four points on which they believe there is reason to seek an advisory opinion from the EFTA Court. The plaintiffs have expressed these points in the form of the four questions set out above. It should be stressed that the presentation of these questions is such as to make it impossible to base a request for an advisory opinion from the EFTA Court on them, since they involve pleas and/or reveal a biased position towards the matter in dispute.

Regarding Questions (i), (ii) and (iii)

In their pleadings and their documentary submissions, both parties have referred to judgments of the European Court of Justice which concern disputes on the interpretation of Article 10(2) of Directive 2008/48/EC. These include the recent resolution by the Court of actions against a German bank in Joined Cases C-33/20, C-155/20 and C-[187/20] of 9 September 2021 and of an action against a Spanish bank in Case C-125/18. Reference is made, in these cases, regarding the matters resolved in them, to a considerable number of other judgments, as is habitually done by the Court. Furthermore, attention must be given to the EFTA Court's judgment in Case E-25/13, of 28 August 2014, which concerned the contractual terms of a mortgage regarding indexation.

It must also be mentioned specifically that the second of the plaintiffs' questions contains premises which cannot be seen as having implications for the resolution of the case. In it, it is requested that the EFTA Court examine and resolve a specified issue in the light of the Annex to Directive 93/13/EEC. The Supreme Court of Iceland has, however, clearly established that the annex does not have the force of law in Iceland (see the Supreme Court judgment of 13 May 2015 in Case No 160/2015). Consequently, the matters set out in the aforementioned annex cannot be of independent significance for the substantive resolution of the case.

At this stage of the case, no premises exist for assessing the significance of individual resolutions by courts of law, national and foreign, for this case, e.g. as regards how the considerations under examination in those cases are to be applied; nevertheless, it seems evident that there is no shortage of guidance in the judgments, so it cannot be expected that the EFTA Court would resolve the matters in question in such a manner as to produce an additional source of guidance over and above what can be derived from judgments already delivered, as is required (*cf.*, for example, Supreme Court Judgment in Case No 267/2014 of 29 April 2014). For these reasons the court is obliged to reject the request to seek the opinion of the EFTA Court regarding the issues covered in Questions (i), (ii) and (iii) as they have been submitted.

Question (iv)

This question stands apart among the questions that the plaintiffs have sought to have put to the EFTA Court. As the plaintiffs have presented it, the question means that the plaintiffs wish to obtain the opinion of the EFTA Court regarding an Icelandic statutory provision, Article 18 of the Interest and Indexation Act (*cf.* Article 4 of the same act), which has no counterpart provision either in the EEA Agreement or, consequently, in Directives of the European Parliament and of the Council. This is an independent item of Icelandic legislation. Under these

circumstances, there appear to be no grounds for the EFTA Court to interpret the application of this Icelandic legal provision in conformity with the provisions of Directive 93/13/EEC, or for such a resolution to have any independent significance for the resolution of the present court case (*cf.*, for example, Supreme Court Judgment No 669/2012 of 30 November 2012). In the light of this, the court must also reject the request to seek an advisory opinion from the EFTA Court on the matters covered in Question (iv).

Thus, the court does not accept that there exist premises for seeking an advisory opinion from the EFTA Court in this case on the basis of the points and questions that the plaintiffs have presented. Consequently, their claim regarding this part of the case must be rejected.

On the other hand, under Article 1(1) (*cf.* Article 1(2)) of Act No 21/1994, the court is able, on its own initiative, to seek an advisory opinion on the interpretation of EEA rules. The heart of the dispute between the parties concerns, in particular, the interpretation and application of Article 34 of the Consumer Property Mortgage Act No 118/2016.

The plaintiffs invoke the rule expressed in the first sentence of Article 34(1) of the Act, which reads 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).

The sentence quoted above, the first sentence of Article 34(1) of the Act, constitutes the transposition into Icelandic law of Article 24(a) of Directive 2014/17/EU of the European Parliament and of the Council, which reads as follows:

[*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; [...].

On this basis, the plaintiffs conclude that the creditor is only permitted to use reference rates that are clear, accessible, objective, and verifiable. They argue that it is not sufficient for the creditor to have provisions in its terms, as it has in the present case, where reference is made to the Central Bank of Iceland's interest rate, interest rates on the market and the terms of financing available to the creditor.

The defendant, on the other hand, takes the view that its terms are in conformity with the second sentence of Article 34(1) of the Act, which reads as follows:

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 preparatory works to the bill which became the Consumer Property Mortgage Act stated that the second sentence of Article 34(1) was based on point f of Article 7(4) of the Consumer Credit Act No 33/2013, which specifies the information that must be provided before an agreement is made. Point f reads as follows:

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, [...].

The Consumer Credit Act constituted the transposition into Icelandic law of Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers; point f of Article 10 of that directive states:

[The credit agreement shall 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, [...].

When it comes to the substantive resolution of this case, it is clear that this will involve the interpretation of the provisions set out in the first and second sentences of Article 34(1) of Act No 118/2016; these derive from two European directives, as has been described above. One of the considerations with a bearing on the case is the interplay between these directives and how their provisions are to be interpreted in the light of the circumstances of the present case. With this in mind, the court cannot agree that the defendant's position, that it would be without significance to obtain an advisory opinion, is reasonable on this point.

In the opinion of the court, it has thus been sufficiently established that the interpretation of EEA rules may be of real significance in this case. Furthermore, the court considers that the facts of the case are sufficiently clear as to justify requesting, at this stage, from the EFTA Court, an advisory opinion under Act No 21/1994 on the Obtaining of Advisory Opinions from the EFTA Court on the Interpretation of the EEA Agreement.

Furthermore, it has been established that no case-law from the EFTA Court, the European Court of Justice, the Icelandic Court of Appeal or the Supreme Court of Iceland are available that would eliminate ambiguity regarding the interpretation of the EEA rules in question, and specifically of the interplay between them, in the light of the matter at issue in the present case.

The conclusion is therefore that there is sufficient occasion for the court to request, at its own initiative, an advisory opinion from the EFTA Court (*cf.* Article 1(1) of Act No 21/1994).

In accordance with the foregoing, a ruling was delivered at the session of the court on 23 June 2022 to the effect that the question stated in the District Court's Conclusion was to be put to the EFTA Court. The defendant did not accept this decision and brought an appeal against it before the Court of Appeal on 6 July 2022; the Court of Appeal delivered its ruling on the matter on 31 October 2022.

The ruling by the Court of Appeal upheld the conclusion reached by the District Court, finding that, in the light of the circumstances of the case, the pleas of the parties and the aims of the EEA Agreement regarding homogeneity and uniform interpretation of law, it had been sufficiently demonstrated that the provisions of the aforementioned directives and the interpretation of key concepts therein could be of real significance for the resolution of the case, and therefore that the question stated in the ruling should be submitted to the EFTA Court. The operative part of the ruling of the Court of Appeal is as follows:

Operative part of the ruling:

An advisory opinion is to be sought from the EFTA Court regarding 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?

In accordance with the above operative part of the ruling, it is requested that the EFTA Court provide an advisory opinion in the case.

Reykjavík, 4 November 2022

Björn L. Bergsson