



## REPORT FOR THE HEARING

in Case E-25/13

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

**Gunnar V. Engilbertsson**

and

**Íslandsbanki hf.**

concerning the interpretation of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

### **I Introduction**

1. The parties to the main proceedings pending before Reykjavík District Court are in dispute as regards the lawfulness of an indexation clause in a bond dated 2 May 2007 issued by Glitnir banki hf. for the purchase of real estate by Gunnar V. Engilbertsson (“Plaintiff”). On 14 October 2008, the bond was transferred from Glitnir banki hf. by way of an administrative decision of the Icelandic Financial Supervisory Authority to Íslandsbanki hf. (“Defendant”). The indexation at issue is based on the Consumer Price Index and the loan capital is increased in proportion to inflation.

2. In the proceedings before the Reykjavík District Court, the Plaintiff argued that the indexation provision is an unfair contract term contrary to Directive 93/13/EEC. On the basis of Article 6(1) of Directive 93/13/EEC, the corresponding national provision had to be interpreted as meaning that it required the unfair contract term to be set aside.

3. The Defendant has rejected the Plaintiff’s view. It argued that price indexation was permitted by law and that the loan complied with all relevant requirements. In any event,

it was not possible to set aside a provision of the bond relating to price indexation without interfering with its other provisions. The Defendant also submitted that the Directive had been correctly implemented into the national legal system.

4. The questions referred concern the interpretation of Directive 93/13/EEC, as incorporated in Annex XIX to the EEA Agreement at point 7a, (“the Directive”), with respect to loan contracts between consumers and suppliers for the financing of real estate purchases according to which the instalment repayments are linked to a predetermined index. They also concern the issue of whether Article 6(1) of the Directive has been correctly implemented into the Icelandic legal order.

*EEA law*

5. Article 3 EEA reads as follows:

*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*

*They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*

*Moreover, they shall facilitate cooperation within the framework of this Agreement*

6. Article 7 EEA reads as follows:

*Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*

*(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*

*(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

Directive 93/13/EEC

7. Directive 93/13/EEC on unfair terms in consumer contracts was incorporated into Annex XIX to the EEA Agreement at point 7a.<sup>1</sup>

8. Article 1 of the Directive reads:

*1. 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.*

*2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.*

9. Article 2 of the 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.*

10. Article 3 of the Directive reads:

*1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*

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

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

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<sup>1</sup> Inserted by Decision of the EEA Joint Committee No 7/1994 (OJ 1994 L 160, p. 1 and EEA Supplement No 17, 28.6.1994, p. 1), entered into force 1 July 1994.

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

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

11. Article 4 of the Directive reads as follows:

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

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

12. Article 5 of the Directive reads as follows:

*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).*

13. Article 6 of the Directive reads as follows:

*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.*

14. The Annex to the Directive reads as follows:

*Terms referred to in Article 3(3)*

*1. Terms which have the object or effect of:*

(a)...

*(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;*

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

(a)...

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

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

*- ...*

*(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described*

*National law*

*Act No 7/1936*

15. In Iceland, the Directive has been transposed by Act No 14/1995 amending Act No 7/1936 on Contracts, Agency and Void Legal Instruments by adding four new articles, Articles 36(a) to (d), to the latter Act and by amending Article 36.

16. The first paragraph of Article 36 states that a contract may be set aside, in full or in part, or amended, if it would be considered unfair or contrary to good business practice to invoke it, subject to Article 36(c). It is also stated that the same applies to other legal instruments.

17. Pursuant to the second paragraph of Article 36, consideration is to be given to the substance of the contract, the position of the parties, the circumstances when the contract was made and subsequent circumstances in any assessment made under paragraph 1 of that Article.

18. Pursuant to the first paragraph of Article 36(a), Articles 36(a) to (d) apply to contracts, including contract terms that have not been individually negotiated, provided that the contracts form part of the activities of one of the business activities of one of the

parties, the business operator, but do not form part of the activities of the other party, the consumer. Moreover, reference is made to Article 36(d).

19. It is required under Article 36(b) that written contracts offered by a business operator shall be phrased in plain and intelligible language. In the event of any doubts concerning the meaning of a contract referred to in paragraph 1 of Article 36, the contract shall be construed in the consumer's favour.

20. According to Article 36(c), Article 36 shall apply to contracts pursuant to the first paragraph of Article 36(a), but with the changes resulting from the second and third paragraphs of Article 36(c).

21. Pursuant to the second paragraph of Article 36(c), account should be had to the factors and circumstances referred to in paragraph 2 of Article 36, including the terms of other linked contracts. However, no attention is to be given to circumstances that arose subsequently, to the disadvantage of the consumer.

22. The third paragraph of Article 36(c) states that a contract is to be considered unfair if it is contrary to good business practices and substantially disturbs the balance between the rights and obligations of the contracting parties to the disadvantage of the consumer. If a term of this kind is set aside, either in full or in part, or amended, the contract shall, at the consumer's request, remain valid in other respects without change if it can be performed without the term.

#### Act No. 38/2001

23. Indexation of savings and credit was first generally permitted in Iceland by Act No 13/1979 on Economic Policy, and provisions on the matter have existed in Icelandic legislation ever since. Chapter VI of Act No 38/2001 on Interest and Indexation sets out the provisions in respect of indexation that are currently in force. Except to the extent permitted by Article 2 of the Act, the provisions of that chapter are mandatory in relation to all indexed savings and loans.

24. Pursuant to Article 13, the provisions of Chapter VI shall apply to obligations concerning savings and credits in Icelandic krónur where the debtor promises to pay money and it has been agreed or stipulated that the payments are to be price-indexed. It also states that the price indexation as referred to in the Chapter shall mean changes in line with a domestic price index and that authorisation for price indexation shall be as provided for in Article 14 of this Act unless otherwise provided for by law.

25. Pursuant to the first paragraph of Article 14, savings and loans may be price-indexed in accordance with Article 13 if the basis of the price indexation is the consumer price index ("CPI") as calculated by Statistics Iceland in accordance with legislation applicable to the index and published monthly in the Legal Gazette. An index that is

calculated and published in a specific month shall apply to the indexation of savings and loans from the first day of the second month thereafter. In paragraph 2, it is stated that a loan agreement may be based on a share price index, domestic or foreign, or a set of such indices which do not measure changes in general price levels.

26. In the first paragraph of Article 15, it is stated that the Central Bank may, subject to the approval of the Minister of Business Affairs, decide on a minimum maturity for indexed deposits and loans. The Bank may also, subject to the approval of the Minister, decide that the interest rates on indexed deposits and loans should be fixed during the period of the loan. Pursuant to the second paragraph, the Central Bank shall adopt further rules on the indexation of savings and loans.

#### Rules of the Central Bank No 492/2001

27. On the basis of Article 15 of Act No 38/2001, Rules No 492/2001 on Price Indexation of Savings and Loans were adopted by the Central Bank.

28. In Article 1, it is stated that domestic price indexation of savings and loans shall be based on the CPI as announced monthly by Statistics Iceland, cf. the provisions of Chapter VI of Act No 38/2001, unless otherwise stipulated by law.

29. Pursuant to the first paragraph of Article 4, provisions for indexing the principal of a loan against the CPI are only permitted if the loan is for a minimum term of five years. In the second paragraph, it is stated that the principal changes in proportion to changes in the CPI from the base index to the first due date, and then in proportion to changes in the index between due dates. The principal of a loan shall change on each due date before interest and instalments are calculated. The base index shall be the index that is in effect when the loan is furnished, unless otherwise determined by an agreement or the nature of the case.

30. The third paragraph of Article 4 states that all the due dates of a loan shall be on the same day of the month, so that the interval between them is counted in whole months. If the due date of a loan is on a different day of the month from that on which the loan is furnished, a daily interest rate with special indexation shall be calculated for the purpose of adjustment for deviations within the month of the loan (to a maximum of 29 days). On disbursement of a loan, the borrower pays daily interest if the due date is later in the month than the granting of the loan, while the lender shall pay if the due date is earlier. In the fourth paragraph it is stipulated that it is also permissible to conclude financial instruments, listed on a regulated market, cf. Act No 110/2007 on Stock Exchanges, provided that, on the day of the deposit of the loan and on the date of the payment of instalments and interest, the price indexation within a month shall be based on a daily linear change in the consumer price index, i.e. between its value on the first day of the month and its value on the first day of the month thereafter. Finally, the fifth paragraph

states that receipts shall state in detail the calculation of payments and accrued indexation.

31. Pursuant to Article 5, however, loan agreements may be indexed against a domestic or foreign equity index, or a basket of such indices which do not measure changes in the general level of prices. The provisions of Article 4 paragraph 1 apply to the term of lending, and the technicalities of the debt documents are subject to the provisions of Article 4, paragraphs 2, 3 and 5 as applicable.

#### Act No 12/1995

32. Act No 12/1995 on the CPI contains provisions concerning the methods used when the CPI is calculated. It provides that Statistics Iceland shall calculate and publish the index on a monthly basis. The index is to be compiled on a base determined by Statistics Iceland according to the results of the household budget survey. Insofar as possible, the index shall reflect average prices in Iceland. A special Advisory Committee on the CPI has the purpose of advising Statistics Iceland regarding the CPI and of monitoring its monthly calculations, cf. paragraph 2 of Article 1 of Act No 12/1995.

#### Act No 121/1994

33. At the time the bond in question was issued, Act No 121/1994 on Consumer Credit was in force. The Act transposed Directive 87/102/EEC into Icelandic law and was replaced by Act No 33/2013 on 1 November 2013, which implements Directive 2008/48/EC. The former Directive sets forth information disclosure requirements regarding consumer credits. Pursuant to its Article 2(3), the provisions of Article 4 and of Articles 6 to 12 shall not apply to credit agreements or agreements promising to grant credit, secured by mortgage on immovable property, insofar as these are not already excluded from the Directive under paragraph 1 (a) of this Article. However, the Icelandic legislator decided to apply the provisions of Directive 87/102/EEC to mortgage credit agreements through Act No 179/2000, amending Act No 121/1994.

34. Article 12 of the Act deals with credit agreements containing clauses allowing indexation or variations in the rate of interest and the amount or level of other charges contained in the annual percentage rate of charge, but unquantifiable at the time when it is calculated. In these cases, the annual percentage rate of charge shall be calculated on the assumption that the price level, interest rate and other charges will remain unchanged until the end of the credit agreement. Moreover, it is stated therein that it shall be assumed when calculating the annual percentage rate of charge that: (i) if the agreement does not specify a credit limit, the amount of credit granted shall not exceed ISK 150,000; (ii) if no fixed maturity is specified, and one cannot be deduced from the terms of the agreement, the maturity shall be deemed to be one year; (iii) where the agreement provides for more than one repayment date, the repayments shall be made at the earliest time provided for in the agreement.

### **III Facts and procedure**

35. By letter of 5 November 2013, registered at the EFTA Court on 12 November 2013, the Reykjavík District Court requested an Advisory Opinion in a case pending before it between Gunnar V. Engilbertsson and Íslandsbanki hf.

36. In 2005 and 2007, the Plaintiff took out three loans in the form of securities-backed bonds in order to buy property in Reykjavík. On 2 May 2007, the Plaintiff issued the last bond. Its header stated that it is "linked to the consumer price index with a provision on the review of the interest rate". It also defined the issuer, the overall loan period, the number of instalments and their timing, the date of the first instalment, and the date from which interest was to be calculated, as well as the bank account for repayment. In a special text box it states that the "index base" is 267.1 points.

37. According to Article 1 of the bond, "The principal of the debt shall be revised in proportion to changes in the consumer price index from the index base as recorded above until the first due date, and thereafter in proportion to changes in the index between subsequent due dates." It also made provision for the consequential revision of the principal of the debt, which "shall be revised on each due date before the interest and the instalment to be paid are calculated", as well as the subsequent instalments, which were to be "calculated in such a way that on each due date the indexation adjustment is added to the principal of the debt, the result then being divided by the number of due dates then remaining, including the due date at the time".

38. The bond was accompanied by a payment schedule signed by both parties on the same day as the bond was issued. It set out 180 due dates of the bond, with information about the individual instalments broken down into an instalment of the principal, of interest and costs. The payment schedule contained a clause noting that it was based on the "index currently valid" (as well as current interest rates and bank tariffs), and that this could "change in accordance with the provisions of the loan agreement." It was further stated that "[i]f the principal of the loan is subject to review and/or the loan period is not fixed, the schedule is based, purely as an example, on particular sums and a loan period of one year" and that the schedule formed part of the attached loan agreement. Moreover, the borrower confirmed that he/she had received and examined the schedule. Finally, the bond contained a provision authorising the calling-in of the entire debt in the event of default of payment of the instalments, as well as the possibility of an attachment to secure payment without any previous court orders, as provided for in the Enforcement Measures Act No 90/1989.

39. The relevant loan application – also dated 2 May 2007 – noted that it was an accompanying document to the bond, and that the security for the loan was the Plaintiff's property in Reykjavik.

40. From around mid-2009, the Plaintiff made no further payments. At the Defendant's request and based on the enforcement provisions set out in the bond, the Reykjavík District Commissioner made an attachment of the Plaintiff's share in his Reykjavík property that served as security for the loan. The Plaintiff raised objections to this and argued that the indexation provisions in the bond were unlawful and contrary to Article 36 and Articles 36(a) to 36(c) of Act No 7/1936. The Plaintiff's objections were dismissed and the Plaintiff referred the matter to Reykjavík District Court, demanding that the enforcement action be invalidated.

41. In these proceedings, the Plaintiff argued that the indexation provision had not been individually negotiated and that it was an unfair contract term contrary to Article 3(1) of the Directive. On the basis of Article 3 EEA and Article 6(1) of the Directive, the corresponding national provision had to be interpreted as meaning that it required the unfair contract term to be set aside. Moreover, Article 36 of Act No 7/1936 could not be considered a sufficient basis to set aside the term. These provisions state only that a contract clause may be invalidated, but not that this is obligatory.

42. In addition, the Plaintiff argued that the indexation mechanism had not been fully explained in the bond and that he therefore did not understand the financial risks and consequences of high inflation. In his view, the payment schedule could not give a realistic picture of how the principal of the debt and the instalment payments would develop during the loan period.

43. The Defendant rejected the Plaintiff's view. It argued that price indexation was permitted by law and that the loan complied with all relevant requirements. In any event, it was not possible to set aside a provision of the bond relating to price indexation without interfering with its other provisions. The Defendant also submitted that the Directive had been correctly implemented into the national legal system since, pursuant to Article 7 EEA, the Icelandic legislator has the choice of form and method as regards how to implement directives. The conclusion of this case would therefore depend on the interpretation of Act No 7/1936, since directives have no direct legal effect.

44. As regards the Annex of the Directive, the Defendant submits that it had not been implemented. However, there was no such obligation to implement the list in the Annex since it is only indicative and non-exhaustive.

45. The Defendant also argues that it was clearly stated in the bond that the principal of the debt was to change in line with changes in the CPI, in accordance with national law, from an index base which was also set out in a clear manner in the document.

46. On 4 July 2013, Reykjavík District Court granted the Plaintiff's request to obtain an Advisory Opinion from the EFTA Court on the first question presented, but not as regards the second. The Defendant had objected to that request and brought an appeal

against the decision before the Supreme Court of Iceland, which decided to refer the questions mentioned below to the EFTA Court.

#### **IV Questions referred**

47. With reference to the letter from the Supreme Court of Iceland of 8 October 2013 and its judgment of 8 October 2013 in Supreme Court Case No 489/2013, Reykjavík District Court poses the following questions:

- 1. Is it compatible with the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts if the legislation in a State which is a party to the EEA Agreement permits contracts between consumers and suppliers for loans to finance real estate purchases to contain provisions stating that the instalment repayments are to be linked to a predetermined index?**
- 2. If the answer to the first question is that the index-linking of repayments of loans taken to finance real-estate purchases is compatible with the provisions of Directive 93/13/EEC, then the second question is: Does the Directive limit the discretion of the EEA State in question to determine, whether through legislation or by means of administrative regulations, the factors that may cause changes in the predetermined index and the methods by which these changes are to be measured?**
- 3. If the answer to the second question is that Directive 93/13/EEC does not restrict the discretion of the Member State referred to in that question, then the third question is: is a contractual term regarded as having been individually negotiated within the meaning of Article 3(1) of the Directive when a) it is stated in the bond which the consumer signs when taking out the loan that his obligation is index-linked and the base index to be used when calculating price-changes is specified in the bond, b) the bond is accompanied by a payment schedule showing estimated and itemised payments to be made on the due dates of the loan, and it is stated in the schedule that these estimates may change in accordance with the indexation provision of the bond, and c) both the consumer and the lender sign the payment schedule at the same time as the consumer signs the bond?**
- 4. Is the method of calculation of price changes in contracts for loans to finance real estate purchases regarded as having been explicitly explained to the consumer within the meaning of paragraph 2(d) of the Annex to Directive 93/13/EEC when the circumstances are as described in the third question?**

- 5. Does a State that is party to the EEA Agreement have the option, when adopting Article 6(1) of Directive 93/13/EEC, of either prescribing in domestic legislation that unfair contract terms within the meaning of Article 6(1) of the Directive may be declared non-binding on the consumer or prescribing in domestic legislation that such terms shall be non-binding on the consumer at any time?**

## **V Written observations**

48. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Plaintiff, represented by Einar Tamimi, Attorney at Law, assisted by Guðrún Inga Torfadóttir, Attorney at Law;
- the Defendant, represented by Áslaug Árnadóttir, District Court Attorney, and Jóhannes Karl Sveinsson, Supreme Court Attorney, acting as legal counsel;
- the Icelandic Government, represented by Anna Katrín Vilhjálmsdóttir, First Secretary, Ministry for Foreign Affairs, acting as Agent, Eiríkur Áki Eggertsson, Legal Officer, Ministry of Finance and Economic Affairs, acting as Co-agent, Andri Árnason, Supreme Court Attorney as Lead Counsel, and Stefán Andrew Svensson, Supreme Court Attorney as Co-Counsel;
- the EFTA Surveillance Authority (hereinafter “ESA”), represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Auður Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (hereinafter “Commission”), represented by Michel Van Beek and Nicola Yerrell, Members of the Legal Service, acting as Agents.

## **VI Summary of the arguments submitted**

### *The Plaintiff*

49. At the outset, the Plaintiff submits that the questions referred by the Reykjavík District Court do not fully cover the question the District Court intended to refer before the judgment of the Supreme Court. As a consequence, the Plaintiff suggests giving an Advisory Opinion on the latter question as well as the questions that have been referred by the District Court.

### Applicability of the Directive

50. The Plaintiff submits that the Directive applies to the mortgage loan instrument in question. It neither follows from the Preamble to the Directive nor from the case law of the European Courts that the instrument at issue is excluded from the scope of the Directive.

51. In the Plaintiff's view, it follows from Reykjavík District Court's referral that it is undisputed that the terms of the mortgage loan had not been individually negotiated and therefore fall within the scope of Article 3(1) of the Directive. Moreover, the contract used was a standardised contract. Save for the information on the borrower, all terms, e.g. the amount of the loan, the interest rate, the base indexation of the principal and the information on repayments are standard and identical in all such contracts. In particular, the Plaintiff has had no possibility to influence or negotiate the indexation of the principal.

52. The Plaintiff submits further that the existence of a payment schedule does not alter the assessment under Articles 3(1) and (2) of the Directive, since it contains only an automatically generated calculation of instalments based on the contractual terms.

53. The Plaintiff alleges that the exclusion regulated in Article 1(2) of the Directive does not apply to the disputed indexation arrangement.<sup>2</sup> The mortgage loan instrument linking the borrower's obligations to a consumer price index does not reflect a mandatory statutory or regulatory provision in the sense of that Article. A legislative or regulatory provision does not exist under Icelandic law that requires an indexation of loans, such as the one at issue. The only relevant provision is Article 14(1) of Act No 38/2001, according to which savings and loans may be indexed if the basis of that indexation is the consumer price index calculated and published by Statistics Iceland.

54. The Plaintiff also alleges that, even if the exemption under Article 1(2) of the Directive were to apply *prima facie*, its application would be excluded since, pursuant to the findings in judgment in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*,<sup>3</sup> the consumer has to be informed about mandatory statutory or regulatory provisions, and the Defendant had not done so as regards the CPI Act No 12/1995.

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<sup>2</sup> As regards the scope of Article 1(2) of the Directive, reference is made to Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, judgment of 21 March 2013, not yet reported, paragraphs 26 to 28 and 32.

<sup>3</sup> Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, judgment of 26 April 2012, not yet reported, paragraph 29.

### Unfairness of the Indexation Term under Article 3(1) of the Directive

55. The Plaintiff claims that the manner in which the indexation term is presented renders it unfair pursuant to Article 3(1) of the Directive. Moreover, and by reference to Article 1(l) of the Annex to the Directive, the Plaintiff alleges that the indexation term is unfair since the contract at issue lacks a provision that allows the Plaintiff to cancel the contract if the final price is too high. In his view, it is evident from Article 2(d) of the Annex to the Directive that paragraph 1(l) of that Annex encompasses price indexation clauses, such as the one at issue.

56. The Plaintiff submits that the indexation is generally lawful, although the method by which prices vary, e.g. the underlying criteria for the calculation of the index, is far from explicitly described. What is stipulated in the bond is the principle of the loan being linked to the consumer price index. It also explains in some detail how the principal shall be revised to reflect changes in the consumer price index. However, this information does not enable the Plaintiff as a consumer to read from the terms of the contract, prior to or at the time he enters into it, the extent of the obligations he is undertaking. No guidance is given as to what to expect in terms of payment obligations during the contract period as a result of the indexation. For that to be the case, everything of importance would have had to be written into the contract in a clear and unambiguous fashion.

57. The Plaintiff also submits that the unfairness of the indexation clause at issue follows from the findings in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*<sup>4</sup> It states that, according to the facts at hand and the relevant national legislation, the indexation clause should be considered unfair pursuant to most if not all the examples indicated in that judgment:

- if the reasons for and method of price variations are not specified in a contract term resulting in such variations, such a term may be considered unfair;<sup>5</sup>
- if the consumer does not have the right to terminate the contract in case of price variations, the price variation term may be considered unfair;<sup>6</sup>

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<sup>4</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraphs 22 to 24 and 26 to 31.

<sup>5</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraphs 24 and 26.

<sup>6</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraphs 24 and 26.

- a contract term that does not meet the obligation contained in Article 5 of the Directive that it be drafted in clear, intelligible language may be considered unfair;<sup>7</sup>
- if a provision of national legislation, which sets out the rights and obligations that could supplement contested terms of the consumer contract, does not set out the reasons for and the method of the amendment of the price to be paid for services in plain, intelligible language, and, as the case may be, whether consumers have the right to terminate the contract, such terms may be considered unfair;<sup>8</sup>
- if a consumer is not able to examine all the contract terms applicable to him and, in addition, to examine the consequences of those terms, such terms may be considered unfair.<sup>9</sup>

58. The Plaintiff also submits that the indexation clause is precisely of the nature that has been found *per se* to be unfair in Joined Cases C-240/98 to 244/98<sup>10</sup>, i.e. without any need to further examine the national context. In the Plaintiff's view, the clause at issue is solely to the benefit of the seller and contains no benefit in return for the consumer.<sup>11</sup>

#### Non-bindingness of the Indexation Clause

59. The Plaintiff submits that, pursuant to Article 6(1) of the Directive and the case law concerning the function of that provision,<sup>12</sup> EEA States are obliged to introduce into national law provisions to the effect that unfair contract terms pursuant to Article 3(1) of the Directive shall not be binding on the consumer. In his view, this shall result automatically from the unfairness of the indexation term under Article 3(1) of the Directive. EEA States have no discretion as to the obligation to release a consumer from the binding effect of an unfair contract term.

60. The Plaintiff submits that, pursuant to Article 6(1) of the Directive, a contract that contains an unfair term shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

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<sup>7</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 27.

<sup>8</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 30.

<sup>9</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 27.

<sup>10</sup> Reference is made to Joined Cases C-240/98 to 244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98) [2000] ECR I-4941.

<sup>11</sup> Reference is made to Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-3403, paragraph 23.

<sup>12</sup> Reference is made to Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, judgment of 15 March 2012, not yet reported, paragraph 30; and *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 34.

61. The Plaintiff argues that it follows from the judgment in *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*<sup>13</sup> that a determination of the capability of a contract to continue in existence without the unfair term(s) shall be objectively assessed. The situation of the parties shall not have an impact on that decision. It shall only be decisive whether the contract can function without the unfair term.

62. The Plaintiff submits that it is clear that the contract can continue to exist without the indexation term. It will simply become a normal, non-indexed consumer mortgage loan agreement. The declaration of the indexation term not being binding and the continued existence of what remains of the contract will probably have a negative impact on the lender. However, this consequence must have been foreseen by the European legislator and the European courts when enacting and interpreting Article 6(1) of the Directive.

#### Answers to Questions 1 to 5

63. The Plaintiff suggests that the question to be submitted for an Advisory Opinion pursuant to the ruling of the District Court of 4 July 2013 be answered as follows:

*It is not in conformity with Council Directive 93/13/EEC on unfair terms in consumer contracts that the terms of a real-estate loan by the lender to the consumer, where stating: "The debt shall be repaid with equal payments of interest and instalments, annuity loan, plus indexation for every payment according to the consumer index"; where stating: "The debt is attached to the consumer index according to the aforementioned and changes in accordance with changes of the index from the index base of the debt instrument to the current index on the due date; the index base is defined; there is no further discussion or clarification of the consumer index as referred to, for example, the grounds on which it is based, how it is construed, how it changes, where or for what reasons, etc.; the grounds of the index are based on information about consumption on grounds of inspection of household expenses; all price changes of the commodities inspected, including changes derived from taxes and other public charges, affect the index; the prices of a large monthly sample of commodities and changes in prices determine changes of the index; the index of every month is based on the general prices during about one week around the middle of the month, except in instances where commodity prices change rapidly, in which instance collecting price data over a longer period of time is permissible; basing the index of every month on the average of a month or months is permissible as applicable if it turns out not to be possible to focus on present data about prices or price changes, or if*

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<sup>13</sup> Reference is made to *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, cited above, paragraph 32.

*this is not deemed as being applicable; the index base is changed annually, are binding for consumers.*

64. The Plaintiff suggests that the first question be answered as follows:

*It is compatible with the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts if the legislation in a State which is a party to the EEA Agreement permits contracts between consumers and suppliers for loans to finance real estate purchases to contain provisions stating that the instalment repayments are to be linked to a predetermined index, insofar as the reasons for or method of variation is explicitly and comprehensively described in the debt instrument, not only the link between the variations in the index and variations in the obligations, but also the factors that influence the level of the index, enabling the consumer to fully appreciate the extent of his obligation pursuant to the contract term, prior to or at the time of contracting.*

65. The Plaintiff suggests that the second question be answered as follows:

*Council Directive 93/13 does not limit the discretion of an EEA State to determine, whether through legislation or by means of administrative regulations, the factors that may cause changes in the predetermined index and the methods by which these changes are to be measured, insofar as these factors are capable of comprehension by an average consumer if explicitly described in a contract and of supporting a high degree of certainty regarding the contractual obligations of the consumer.*

66. The Plaintiff suggests that the third question be answered as follows:

*A contractual term is not regarded as having been individually negotiated within the meaning of Article 3(1) of Council Directive 93/13 when a) it is stated in the bond which the consumer signs when taking out the loan that his obligation is index-linked and the base index to be used when calculating price-changes is specified in the bond, b) the bond is accompanied by a payment schedule showing estimated and itemised payments to be made on the due dates of the loan, and it is stated in the schedule that these estimates may change in accordance with the indexation provision of the bond, and c) both the consumer and the lender sign the payment schedule at the same time as the consumer signs the bond, if the indexation term in the bond has been drafted by the lender in advance and the payment schedule does not impact on the actual or potential effect of the indexation on the borrower's obligations pursuant to the indexation clause in the bond.*

67. The Plaintiff suggests that the fourth question be answered as follows:

*The method of calculation of price changes in contracts for loans to finance real estate purchases are not regarded as having been explicitly explained to the consumer within the meaning of paragraph 2(d) of the Annex to Directive 93/13/EEC when the circumstances are as described in the third question.*

68. The Plaintiff suggests that the fifth question be answered as follows:

*A State that is party to the EEA Agreement does not have the option, when adopting Article 6(1) of Directive 93/13/EEC, of either prescribing in domestic legislation that unfair contract terms within the meaning of Article 6(1) (sic) of the Directive may be declared non-binding on the consumer or prescribing in domestic legislation that such terms shall be non-binding on the consumer at any time, but must restrict itself to the latter in accordance with the clear wording of Article 6(1).*

#### *The Defendant*

##### *Applicability of the Directive*

69. The Defendant argues that, when national legislation has set forth rules that directly or indirectly determine the terms of consumer contracts, consumers are not prone to suffer due to a weaker bargaining position and do not need the same protection since the playing field has been levelled. Hence, the Directive clearly states in Article 1(2) that contractual terms that reflect mandatory statutory or regulatory provisions of national law are not subject to the provisions of the Directive.

70. The Defendant submits that the 13th recital in the preamble to the Directive clearly states that the statutory or regulatory provisions of the Member States that directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms. Pursuant to that recital, Article 1(2) of the Directive applies to both mandatory and supplementary legal provisions, i.e. provisions that apply only to a contractual relationship in the absence of other commercial bargain.<sup>14</sup>

71. The Defendant submits that Article 7 EEA leaves the choice of form and method of implementation to the Contracting Parties – whether through primary law or administrative measures – without prejudice to the duty of national courts to interpret

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<sup>14</sup> Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraphs 27 and 28; and AG Trstenjak's Opinion of 13 September 2012 in that case, point 37; reference is also made to section 1-b Chapter III of the Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April on unfair terms in consumer contracts [COM/2000/0248 final].

national law in conformity with EEA law and in light of the purpose of the EEA rules in accordance with Article 3 EEA.

72. The Defendant refers to *Aziz* and argues that national legislation is the norm and that national norms that are applied in a contract between a professional and a consumer would normally not to be considered unfair.<sup>15</sup>

73. The Defendant claims that the indexation at issue is based upon rules that are to be considered mandatory rules. Indexation of mortgage loans is not obligatory, but a well-established and common means of coping with the inflation risk. If the parties agree that the loan shall be indexed, the indexation has to comply with Articles 13 and 14 of Act No 38/2001. Moreover, the calculation of the CPI, upon which the indexation has to be based, is to be carried out by Statistics Iceland in accordance with the rules set out in Act No 12/1995. Moreover, the contested indexation terms are in accordance with the relevant rules in Acts No 38/2001 and No 12/1995.

74. The Defendant also relies on the principle of legal certainty and argues that a business operator that enters into a contract containing terms that are in line with national legislation cannot be regarded as acting unlawfully.

75. Based on the aforementioned arguments, the Defendant claims that contractual terms that reflect provisions of national legislation fall outside the scope of the Directive, and claims that national legislation cannot be incompatible with the Directive.

The first question

Fairness of the contested indexation terms

76. The Defendant submits that the Annex to the Directive contains a list of the terms that may be regarded as unfair. However, this list is not exhaustive and it has not been regarded as binding.<sup>16</sup> It can be seen from subparagraph (1) of paragraph (1) of that Annex that indexation in itself is not to be considered unfair.

77. Moreover, the Defendant argues that that subparagraph does not apply to the indexation term at issue since it is not subject to any arbitral decision-making. The price index, as is clearly stipulated in the bond, is established by an independent public authority, Statistics Iceland, and can therefore not be considered as a unilateral change to the initial contract terms by the Defendant. It is the index mechanism that allows for changes in the course of the contractual relationship. Finally, the indexation term is regulated by law and not the Defendant or even Statistics Iceland.

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<sup>15</sup> Reference is made to Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, judgment of 14 March 2013, not yet reported, paragraph 68.

<sup>16</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 26.

78. The Defendant argues that it can also be seen from subparagraphs (c) and (d) of paragraph (2) of the Annex to the Directive that the use of price-indexation clauses are to be considered fair, provided that they are in accordance with the law and that the method by which prices vary is explicitly described. Moreover, similar arrangements are widely known and have been used in other economies. They are not unfair, but simply an allocation of a known risk, a commercial bargain.

79. The Defendant submits that the answer to the first question should be as follows:

*Contractual terms which reflect provisions of national legislation fall outside the scope of Directive 93/13/EEC. If the terms should be found to fall within the scope of Directive 93/13/EEC, the answer to the first question should be that it is compatible with the provisions of the Directive for legislation in a State which is a party to the EEA Agreement to permit contracts between consumers and suppliers for loans to finance real estate purchases to contain provisions stating that instalment repayments of the loan are to be linked to a predetermined index.*

The second question

80. The Defendant argues that it follows from Article 1(2) of the Directive that contractual terms that reflect mandatory statutory or regulatory provisions of national law are not subject to the provisions of the Directive. According to the 13th recital of the Directive, statutory or regulatory provisions of the Member State that directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms. Moreover, it follows from Article 1(1) of the Directive that the Directive is intended to regulate unfair terms in contracts only.<sup>17</sup> It does not influence the power of an EEA State to regulate the indexing of loans, and in particular when such indexation is an integral part of the domestic economy, i.e. the saving and preservation of the purchasing powers of savers.

81. The Defendant submits that the answer to the second question should be as follows:

*Directive 93/13/EEC does not limit the discretion of the EEA State in question to determine, whether through legislation or by means of administrative regulations, the factors that may cause changes in the predetermined index and the methods by which these changes are to be measured.*

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<sup>17</sup> Reference is also made to the Order of the Court in Case C-433/11 *SKP k.s. v Kveta Polhošová* [2012], not yet reported, paragraphs 33 and 34.

### The third question

82. The Defendant reiterates its opinion that the indexation term at issue falls outside the scope of the Directive.

83. The Defendant submits that the EFTA Court's jurisdiction is to give answers that concern the EEA Agreement, its Protocols and Annexes.<sup>18</sup> In its view, the Court would have to assess the facts of the case and to interpret national law in order to answer the third question, which is not within the role of the Court.<sup>19</sup>

84. As regards the interpretation of the concept of an "unfair term" under Article 3(1) of the Directive, the Defendant submits that it follows from case law that it is for the European Courts to set out the criteria which the national courts may or must apply when assessing whether the contractual term at issue is unfair in the circumstances of the case. The latter assessment is within the competence of the national court, however.<sup>20</sup>

85. The Defendant argues that the information given to the Plaintiff at the time the bond was issued was in accordance with both Article 6 and 12(1) of Act No 121/1994. The Defendant submits further that the term concerning price indexation was individually negotiated, as the Plaintiff had other options and could *inter alia* have negotiated for a non-indexed loan.

86. Based on the above, the Defendant submits that the Court answer the third question as follows:

*The question should not be answered as it falls outside the scope of the Directive and is a matter of national law. If the Court answers the question in substance, the Defendant submits that the answer should be that a contractual term should be regarded as having been individually negotiated within the meaning of Article 3(1) of the Directive when a) it is stated in the bond which the consumer signs when taking the loan that his obligation is index-linked and the base index to be used when calculating price-changes is specified in the bond, b) the bond is accompanied by a payment schedule showing estimated and itemised payments to be made on the due dates of the loan, and it is stated in the schedule that these estimates may change in accordance with the indexation provision of the bond,*

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<sup>18</sup> Reference is made to Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep 15, paragraph 78; Case E-16/10 *Philip Morris EFTA* [2011] EFTA Ct. Rep 330, paragraph 87.

<sup>19</sup> As regards the role of the national court, reference is made to Case E-2/95 *Eilert Eidesund v Stavanger Catering A/S* [1995-1996] EFTA Ct. Rep 1, paragraph 14.

<sup>20</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 22; and *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, cited above, paragraph 66.

*and c) both the consumer and the lender sign the payment schedule at the same time as the consumer signs the bond.*

The fourth question

87. The Defendant reiterates that the list of the terms that may be regarded as unfair in the Annex to the Directive is not exhaustive and that it has not been regarded as binding. Therefore, the Annex is not sufficient in itself to establish automatically the unfair nature of a contested term.<sup>21</sup> However, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of the term at issue.<sup>22</sup>

88. The Defendant also submits that, at the time the bond was issued, it was regulated under national law which information had to be given to consumers regarding the terms in consumer credit agreements, including indexation clauses in mortgage loans, and that the Defendant had complied with these rules, i.e. Articles 6 and 12 of Act No 121/1994.

89. Based on the above, the Defendant argues that, in order to answer the fourth question, the Court has to assess facts and interpret national law. However, that assessment is for the national court. It continues that the national court has to decide whether the term at issue is of an unfair nature in light of Articles 3(1) and (3) of the Directive.<sup>23</sup>

90. Based on the arguments mentioned in paragraphs 77 to 78 above, the Defendant argues further, that subparagraph 1 of paragraph (1) of the Annex to the Directive does not apply to the bond, and adds that, pursuant to paragraph 2(d) of the Annex, subparagraph (1) of paragraph (1) does not hinder having price-indexation terms, where lawful, provided that the method by which prices vary is explicitly described. The changes to the principal of the loan based on the price index mechanism provided in the bond and national law cannot be deemed to be unilateral changes by the Defendant to the initial contract terms. Articles 13 and 14 of Act No 38/2001 on interest and price indexation set out the only way in which the indexation of loans and savings is permitted under Icelandic law. Pursuant to Article 14 of that Act, loans may only be price-indexed if the basis of the price-indexation is the consumer price index as calculated by Statistics Iceland, an independent public authority, in accordance with legislation applicable to the index.

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<sup>21</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 25.

<sup>22</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 26.

<sup>23</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraphs 26 and 30.

91. The Defendant submits that the answer to the fourth question should be as follows:

*Paragraph 2 (d) of the Annex does not apply to the bond. If paragraph 2 (d) of the Annex is found to apply to the bond, the Defendant submits that the answer to question four should be that it is for the national court, ruling in the pending case, to assess whether the method of the calculation of price changes in the debated bond and accompanying loan documents should be regarded as having been explicitly explained to the Plaintiff within the meaning of paragraph 2(d) of the Annex to Directive 93/13/EEC.*

The fifth question

92. The Defendant argues that the relevant national law provisions are more flexible than Article 6(1) of the Directive and that, in most cases, they provide consumers with greater protection than Article 6(1) of the Directive. Article 6(1) has been implemented in the Icelandic legal order by Articles 36(1) and 36(c) of Act No 7/1936. A contract between a professional party and a consumer that has not been individually negotiated can be set aside in full or in part, or amended, if it would be considered unfair or contrary to good business practices to invoke it.

93. The Defendant argues that national authorities have a considerable margin as regards the implementation of directives into the national legal order. EEA States are required to provide in their national law that unfair contractual terms between a consumer and a professional party, which have not been individually negotiated, do not bind consumers.<sup>24</sup> By reference to case law, it adds that the implementation of a directive may, depending on its content, be effected in an EEA State by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of the directive, and that, where a provision of the directive is intended to create rights or the general legal context is sufficiently precise and clear, and the persons concerned can ascertain the full extent of their rights, and, where appropriate, rely on them before the national courts.<sup>25</sup>

94. By reference to case law, the Defendant submits further that, in the absence of EEA legislation, it is for the national legislator by virtue of the principle of procedural autonomy to establish procedural rules governing actions for safeguarding rights that

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<sup>24</sup> Reference is made to Case C-472/11 *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, judgment of 21 February 2013, not yet reported, paragraph 25.

<sup>25</sup> Reference is made to Case C-388/07 *The Queen on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569, paragraph 42; and Case 29/84 *Commission v Germany* [1985] ECR I-1661, paragraph 23; and Case 363/85 *Commission v Italy*, ECR 1987 I-1733, paragraph 7.

individuals derive from European law. However, these rules must comply with the principles of equivalence and effectiveness.<sup>26</sup>

95. The Defendant submits that the answer to the fifth question should be as follows:

*A State that is party to the EEA Agreement has the option, when implementing Article 6(1) of Directive 93/13/EEC, of either prescribing in domestic legislation that unfair contract terms within the meaning of Article 6(1) of the Directive may be declared non-binding on the consumer or prescribing in domestic legislation that such terms shall be non-binding on the consumer at any time.*

### *The Government of Iceland*

#### The first question

96. The Government of Iceland understands the first question as asking, in the abstract, whether national legislation that permits contracts between consumers and suppliers for loans to finance real estate purchases to contain provisions stating that instalment repayments are to be linked to a predetermined index is necessarily incompatible with the Directive.

97. Firstly, the Government of Iceland submits that the contractual terms at issue do not fall within the scope of the Directive since the Directive does not apply to contractual provisions reflecting applicable provisions of national legislation. As can be derived from recital 13 to the Directive, Article 1(2) of the Directive is based on the presumption that national statutes do not contain unfair terms.<sup>27</sup> The same recital clarifies that the wording “mandatory or regulatory provisions” extends not only to non-derogable laws which apply to contractual provisions, but also covers derogable default contractual provisions.

98. With reference to *RWE Vertrieb v Verbraucherzentrale NRW*, the Government of Iceland submits further that, where contractual terms which reflect provisions of national statutes or regulations which prescribe or permit the use of these terms in the category of contracts to which the contract in question belongs, those terms will, by virtue of Article 1(2) of the Directive, fall outside the scope of the Directive.<sup>28</sup>

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<sup>26</sup> Reference is made to *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, cited above, paragraphs 26 and 27.

<sup>27</sup> As regards the historical background, reference is made to AG Trstenjak’s Opinion of 13 September 2012 in Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, not yet reported, points 42 and 43.

<sup>28</sup> Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 27; and the Opinion in that case, point 50.

99. The Government of Iceland also argues that it is for the national court to assess whether the terms at issue reflect applicable statutory or regulatory provisions and thereby fall outside of the scope of the Directive.<sup>29</sup>

100. Secondly, the Icelandic Government argues, even if, notwithstanding the above, contractual terms that are permitted by legislation could fall within the scope of the Directive, such provisions would not be unfair in terms of the Directive.

101. The Icelandic Government submits that it is not stated in the Directive that a category of terms shall automatically be considered unfair *per se*, and nor is any category of contractual terms banned as such; instead, it is for the competent national authority to make an assessment of the terms at issue.<sup>30</sup> By reference to case law, the Icelandic Government argues that one criterion in the national court's assessment is to establish which set of national rules would apply in the absence of an agreement between the parties, and whether the consumer is put in a less favourable position than that provided for by the applicable national law. Therefore, national legislation that permits the use of certain clauses in contracts, in this context the indexation of loans, cannot be incompatible with the provisions of the Directive.

102. The Icelandic Government argues that, even if it were for the Court to assess whether the content of the applicable national legislation is “unfair” and “contrary to good faith”, the Government observes that the Icelandic legislation permitting the indexation of loans has been considered by the Iceland Parliament several times, and it has repeatedly determined that loan agreements, including consumer loans, may be linked to the consumer price index. The provisions of Act No 38/2001 apply mandatorily to price-indexed loans in Icelandic currency and can only be derogated from in the borrower's interest. That Act and its predecessors were passed with the aim of improving economic stability, and thereby the interests of society in general, including those of consumers, as well as reducing the interest burden on borrowers. Thus, the Icelandic Parliament has considered the appropriate balance to be struck between the interests of various parties to loan contracts for the financing of real estate purchases and the terms that may be included in such contracts. Moreover, the Icelandic Government contends that real interest rates on indexed loans are generally lower than those on non-indexed loans over time, and that has also been the case in Iceland.

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<sup>29</sup> Reference is made to Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, judgment of 30 May 2013, not yet reported, paragraph 33.

<sup>30</sup> Reference is made to Case C-478/99 *Commission v Sweden* [2000] ECR I-4170, paragraph 11; and Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter*, cited above, paragraphs 21 to 25.

103. Thirdly, notwithstanding the above, the Icelandic Government argues that, in any event, it is clear that price-indexation terms are not incompatible by their nature with the Directive.<sup>31</sup>

104. The Government of Iceland submits that the answer to the first question should be as follows:

*As provisions of national legislation fall outside the scope of Directive 93/13/EEC, it is compatible with the provisions of Directive 93/13/EEC for legislation in an EEA State to permit contracts between consumers and suppliers for loans to finance real estate purchases to contain provisions stating that instalment repayments are to be linked to a predetermined index.*

The second question

105. Firstly, the Government of Iceland submits that the Directive does not impose any limits on an EEA State determining by national legislation the factors that may cause changes in such a predetermined index as the CPI or the methods by which these changes are to be measured since the terms at issue do not fall within the scope of the Directive.

106. Moreover, the national law referred to in the question of Reykjavík District Court, i.e. the operation of the index, does not relate to contractual terms *per se* and would therefore not be covered or limited by the Directive in any event.

107. Secondly, and notwithstanding the above, the Icelandic Government submits that, since the national law of the EEA State will be a benchmark in the national court's assessment of whether contractual terms are to be considered fair, changes to the index as a result of factors and methodology prescribed by national law cannot in and of themselves give rise to a finding that contractual terms referencing that index are unfair. National law, such as the one in question, cannot be limited by the Directive in practice.

108. Accordingly, the Directive cannot, *de jure* or *de facto*, limit the EEA States' discretion to determine the factors that may cause changes in a predetermined index to which consumer loans are referenced or the methods by which these changes are to be measured. And, even if the Directive could limit that discretion, it fails to see how this could cause changes in the manner in which Statistics Iceland compiles the CPI, since the index is compiled independently by it and in accordance with European standards.

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<sup>31</sup> Reference is made to paragraphs 2(c) and 2(d) of the Annex to the Directive.

109. The Government of Iceland submits that the answer to the second question should be as follows:

*Directive 93/13/EEC does not limit the discretion of an EEA State to determine the factors that may cause changes in a predetermined index to which consumer loans are referenced or the methods by which these changes are to be measured.*

The third question

110. The Icelandic Government submits that a contractual term that reflects national law applicable to such contracts is outside the scope of the Directive. On the other hand, contractual terms that do not reflect the provisions of Articles 13 and 14 of Act No 38/2001, will, as a matter of national law, be void – unless they are to the advantage of the borrower. Accordingly, a contractual indexation term either reflects national law and falls outside the Directive's scope, or it does not reflect national law and is void as a matter of Icelandic law. Whether or not an indexation clause is individually negotiated within the meaning of the Directive cannot affect its validity under Icelandic law.

111. On this basis, the Government of Iceland argues that the question is hypothetical and therefore inadmissible, since, in light of the answers to the previous questions, the answer to this question cannot have any effect on the determination of the national court in the case before it.<sup>32</sup>

112. Without prejudice to that, and to the extent the Court declares the question admissible, the Icelandic Government submits that, pursuant to Article 3(2) of the Directive, it is for the national court to assess whether the indexation clause has been individually negotiated. Moreover, even if a contractual term has not been individually negotiated, the national court has to assess under Article 4(1) of the Directive whether that term is actually unfair, having regard to all the circumstances.

113. The Government of Iceland submits that the answer to the third question should be as follows:

*The question is inadmissible as it cannot have any effect on the determination of the national court in the case before it.*

The fourth question

114. The Icelandic Government refers to its observations referred to in paragraphs 110 to 111 above and submits that, as a matter of Icelandic law, the question is hypothetical.

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<sup>32</sup> Reference is made to Case E-6/96 *Tore Wilhelmsen AS v Oslo kommune* [1997] EFTA Ct. Rep. 64, paragraph 40.

115. Without prejudice to the aforesaid and to the extent that the Court decides that the question is admissible, the Icelandic Government submits that paragraph 2(d) of the Annex to the Directive, which is to be considered a limitation of paragraph 1(l) of the Annex to the Directive, is not relevant to the issue before the national court. Indexation of a loan principal does not represent a change in price of goods or services over the duration of the contract. It is intended rather to ensure that the principal of the loan remains consistent over the time for repayment of the credit and is not reduced by inflation during that period. The Icelandic Government argues that indexation of a loan principal is therefore analogous to, and fulfils the same function as, a component of the interest charged for the granting of credit in respect of a non-indexed loan and is far removed from the situation envisaged by paragraph 1(l) of the Annex to the Directive. Moreover, Icelandic law only permits loans to be indexed to the publicly maintained CPI. Therefore, lenders cannot unilaterally change the amount owed by borrowers.

116. If, the Government of Iceland continues, the Court, notwithstanding all the above, were to find the question admissible and paragraph 2(d) of the Annex to the Directive to apply to the indexation terms at issue, the Icelandic Government submits that the information provided could be regarded as an explicit description of the method by which prices may vary, in particular since information about the consumer price index itself is publicly available. The Icelandic Government submits in that respect that a reference had been made to the base index on the date the loan was taken out and a payment schedule with an illustrative example of estimated payments based on a given set of presumptions had been provided. However, in the Icelandic Government's view it is not possible to determine in the abstract whether or not a hypothetical document explicitly describes the method by which prices may vary. Accordingly, it is for the national court having regard to the actual document, all the circumstances, and the knowledge of the parties to determine this.

117. The Government of Iceland submits that the answer to the fourth question should be as follows:

*The question is inadmissible as it cannot have any effect on the determination of the national court in the case before it.*

The fifth question

118. The Icelandic Government submits by reference to case law that Article 6 of the Directive requires EEA States to take the necessary measures to ensure that unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on the consumer.<sup>33</sup> Moreover, provided that unfair terms are not binding on the consumer,

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<sup>33</sup> Reference is made to *Commission v Sweden*, cited above, paragraph 16.

EEA States have autonomy concerning the definition of the legal arrangements applicable to unfair terms.

119. In this respect, the Icelandic Government submits that EEA States have the choice of form and method of implementation under Article 7 EEA, which corresponds to the principle of national procedural autonomy, as limited by the principles of equivalence and effectiveness.<sup>34</sup> Accordingly, the Icelandic Government argues that it is sufficient for a State to provide the national courts with the power to annul unfair contractual terms as long as they are obliged to exercise that power with respect to terms they find unfair pursuant to the Directive.<sup>35</sup>

120. As regards the situation in Icelandic law, the Icelandic Government submits with reference to Articles 36(a) and 36(c) of Act No 7/1936 that Article 36 of that Act relates to both contractual terms that may be unfair pursuant to the Directive and terms that may be invalid or unfair purely as a matter of national law. Pursuant to Article 3 of Act No 2/1993, Icelandic courts are obliged to interpret national law in line with Iceland's obligations stemming from the EEA Agreement. Following these obligations, national courts, acting within the constitutional scope of that power, must annul contractual terms where they find that a contractual term is unfair within the meaning and scope of the provisions implementing the Directive.

121. The Icelandic Government argues that the end-result for the consumer is thereby effectively the same whether national law explicitly requires national courts to annul unfair contractual terms or simply gives them the power to do so.

122. The Government of Iceland submits that the answer to the fifth question should be as follows:

*EEA States have discretion as to how the provisions of Article 6(1) of Directive 93/13/EEC are implemented provided that the national courts are empowered to annul unfair contractual terms.*

*The EFTA Surveillance Authority*

Applicability of the Directive

123. ESA submits that, according to well-established case law, it is for the Court to provide the national court with all those elements for the interpretation of EEA law that

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<sup>34</sup> Reference is made to Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, paragraph 24.

<sup>35</sup> Reference is made to Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, judgment of 30 May 2013, not yet reported, paragraphs 11 and 51.

may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions.<sup>36</sup>

124. ESA contends that the scope of the Directive has not been addressed in the questions referred to the Court and nor does it seem to have played a role in the national proceedings. However, ESA asks the Court to address this issue and the meaning of Article 1(2) of the Directive, given the importance of the issue in the context of the present proceedings.

125. ESA submits that the aim of Directive is to address the behaviour of private operators as sellers of goods or supplier of services to consumers, with the objective of safeguarding the rights of the consumer, who is in a weak position vis-à-vis the seller or supplier. In turn, it is not the aim of the Directive to influence statutory or regulatory provisions that regulate contract terms under certain circumstances. Pursuant to recital 13 of the preamble to the Directive, terms of contract that are determined directly or indirectly by such provisions are presumed not to contain unfair terms.

126. As regards the indexation of mortgages such as the one at issue, ESA argues that the indexation and the calculation of the underlying CPI are largely covered by detailed provisions of national law, i.e. Articles 13 and 14 of Act No 38/2001 and the provisions of Act No 12/1995. These statutory rules are not to be considered mandatory in the sense that consumers are obliged to enter into indexed loan agreements. However, if private parties choose to do so, the terms of that indexation as stipulated in national law are mandatory. Thus, in ESA's view, the terms of bonds and payment schedules such as the ones at issue are at least indirectly determined on the basis of the aforementioned provisions.

127. ESA submits with reference to case law that contractual terms that reflect mandatory statutory or regulatory provisions set out in national law are *prima facie* excluded from the scope of the Directive.<sup>37</sup> It is not useful to distinguish between stipulations that, pursuant to national law, must be included in a contract and clauses whose inclusion is optional but where the content is mandatory. In neither case does the inequality of bargaining power influence the content of the stipulation to the detriment of the consumer. In the case of a clause that must be included, the interests of the weaker contracting party must be presumed to be taken into account by the national legislature.

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<sup>36</sup> Reference is made to Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-315/92 *Verband Sozialer Wettbewerb* ('Clinique') [1994] ECR I-312, paragraph 7; Case C-87/97 *Consorzio per la tutela de formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38; Case C-452/03 *RAL* [2005] ECR I-3947, paragraph 25; Joined cases C-95/07 and C-96/07 *Ecotrade Spa* [2003] ECR I-3457, paragraph 37; Joined Cases C-578/10 to C-580/10 *van Putten and Others*, judgment of 26 April 2012, not yet reported, paragraph 23; and Case C-273/12 *Harry Winston*, judgment of 11 July 2013, not yet reported, paragraph 24.

<sup>37</sup> Reference is made to *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, cited above, paragraphs 32 to 34.

In the case of a clause that is optional but whose content is determined by the national authorities, the national legislature must also be presumed to have balanced the interests of the parties. In any case, the bargaining strength of one party had no influence over the content of the stipulation.

128. ESA submits that it follows from case law<sup>38</sup> that contractual terms are excluded from the scope of that directive if they reflect provisions of national legislation governing a certain category of contracts, and argues that this applies to the terms at issue.

129. On the basis of the above, ESA contends that the terms of the bonds and payment schedules such as at issue in the main proceedings fall outside the scope of the Directive. Consequently, it is not necessary to provide the national courts with answers to the questions referred.

130. ESA suggests therefore that the answer to the questions should be as follows:

*The scope of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts as laid down in its Article 1(2) does not extend to contractual terms such as are at issue in the main proceedings insofar as they reflect national rules on the index-linking of instalment repayments of loans taken to finance real-estate purchases.*

The first question

131. At the outset, ESA notes that, in the alternative to the submissions made above and for the sake of good order, it submits observations on the questions referred by the national court.

132. As regards the criteria for the general assessment of unfairness pursuant to the Directive and the relationship between the European courts and national courts, ESA refers in particular to settled case law.<sup>39</sup>

133. With respect to the situation in the case at hand, ESA argues that the Directive does not set out a general prohibition on financial service providers having price-

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<sup>38</sup> Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 25. As regards further observations on the application of Article 1(2) of the Directive, reference is also made to the Opinion of AG Trstenjak in the same case, paragraphs 34 to 58.

<sup>39</sup> As regards the above-mentioned assessments, reference is made to *Sweden v Commission*, cited above, paragraphs 11 and 17; *Freiburger Kommunalbauten*, cited above, paragraphs 18, 19 and 21; Opinion of AG Geelhoed in Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* [2002] ECR I-4147, point 29; Joined Cases C-240/98 to C-244/98 *Océano Grupo* [2000] ECR I-4941, paragraphs 22 to 24; see also Case C-226/12 *Constructora Principado S*, judgment of 16 January 2014, not yet reported, paragraphs 20 to 23 and case law cited; Joined Cases C-537/12 and C-116/13, *Banco Popular Español, v Maria Teodolinda Rivas Quichimbo a.o.*, order of the court of 14 November 2013, not yet reported, paragraph 22 and case law cited.

indexation clauses in consumer mortgage contracts. On the contrary, paragraph 2(d) of the Annex to the Directive explicitly provides that price-indexation clauses do not, in and of themselves, amount to terms that may be regarded as unfair, where these clauses are lawful and the method by which prices vary is explicitly described. The emphasis is thus placed on the clarity and quality of the information about the price indexation which the seller or supplier provided the consumer with at the time when the contract was concluded.

134. ESA submits that the two conditions of paragraph 2(d) of the Annex to the Directive are fulfilled. Firstly, it is explicitly permitted pursuant to Chapter VI of Act No 38/2001 and Rules No 492/2001 for loans to be index-linked provided that the basis of the indexation is the official consumer price index. Secondly, it follows from the information given by the national court in its referral that an explicit description of the price-index mechanism was provided in the contract. The bond and the accompanying payment schedule contain provisions that specifically explain that the principal of the debt will be revised on each due date before the interest and the instalment to be paid are calculated, in proportion to changes in the CPI.

135. ESA therefore suggests that the answer to the first question referred should be as follows:

*Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not preclude national legislation, such as that at issue in the main proceedings, which authorises the parties to a loan agreement to agree on a price indexation method set out under national legislation provided that the terms thereof are explicitly described in plain and intelligible language in the contract.*

The second question

136. ESA argues that paragraph 2(d) of the Annex to the Directive only requires that the method of calculation for the price indexation is explicitly described in the contract, given that price-indexation clauses are lawful under national rules. There are no rules specifying the factors that may or may not be used when the amendments to a predetermined index are calculated.

137. ESA reiterates that the purpose of the Directive is to safeguard the rights of the consumer, who is often in a weak position vis-à-vis the seller or supplier. The Directive is not designed to fetter the powers of national authorities to regulate contract terms. The national authorities are therefore free to regulate which factors may cause changes in the predetermined index and the methods by which these changes are to be measured.

138. ESA adds that the fact that Article 1(2) of the Directive explicitly excludes mandatory statutory or regulatory provisions from its scope further strengthens the

conclusion that the Directive is not intended to address the powers of national authorities to regulate terms in consumer contracts.

139. ESA therefore suggests that the answer to the second question referred should be as follows:

*Directive 93/13/EEC does not create any ground for assessing the factors that may cause changes in the predetermined index and the methods by which these changes are to be measured.*

The third question

140. At the outset, ESA submits that it is for the national court to assess whether the contractual terms at issue have been individually negotiated within the meaning of Article 3(2) of the Directive.<sup>40</sup> However, the Court can provide guidance concerning when contractual terms may be considered to have been individually negotiated.

141. ESA submits that it remains unclear whether that question is relevant in the main proceedings. As noted in its 2001 Report on the Application of Directive 93/13/EEC,<sup>41</sup> Iceland has not limited the unfairness review of consumer contracts available under Article 36 of Act No 7/1936 to terms that have not been individually negotiated; that provision applies to any term in a consumer contract. This higher level of protection is explicitly permitted pursuant to Article 8 of the Directive.

142. In any event, ESA submits, there are no indications in the request of the national court as to whether or not the indexation clause should be included in the contract.

143. As regards letter (a) of the question, ESA submits that no contracting parties could have individually negotiated the base index or the calculation of it, since that is regulated by national law, and the contracting parties cannot have any influence on the base index agreed or on its future calculation. Accordingly, they cannot be considered to have been individually negotiated.

144. As regards letter (b) of the question, ESA submits that the fact that the bond had been accompanied by a payment schedule itemising estimated payments to be made on the agreed due dates does not change the outcome of the assessment at issue. ESA adds that it is expressly stated in the schedule that they are only estimates, which may change

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<sup>40</sup> Reference is made to *Constructora Principado S*, cited above, paragraph 19; as regards the burden of proof reference is made to the last sentence of Article 3(2) of the Directive.

<sup>41</sup> EFTA Surveillance Authority's Report on the Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts ("the EFTA Surveillance Authority's Report on the Application of Directive 93/13/EEC"), adopted on 6 December 2001. Available at: <http://www.eftasurv.int/media/public-documents/108301.PDF>.

in accordance with the indexation provision of the bond. Moreover, the information given is in accordance with the relevant national legislation, i.e. Act No 38/2001 and Rules No 492/2001.

145. As regards letter(c) of the question, ESA argues that the fact that both parties have signed the payment schedule does not alter the assessment. The substance of the payment schedule cannot be negotiated, as it is based on projections of future payments of the bond that depend on the CPI as it is calculated each month.

146. ESA therefore suggests that the answer to the third question should be as follows:

*It is for the relevant national court to establish whether a particular contract term has been negotiated individually, in the sense that the consumer was able to influence whether or not the term would be included, within the meaning of Article 3 of Directive 93/13/EEC.*

The fourth question

147. As a preliminary point, ESA notes that the Icelandic version of the relevant provision of the Annex to the Directive differs from the English version. The latter uses the term "explicitly described" instead of "explicitly explained" (in Icelandic: "útskýrð rækilega"). Other language versions are: FR: "explicitement décrit"; DE: "ausdrücklich beschrieben"; IT "siano esplicitamente descritte"; ES "se describa explícitamente"; DA "udføreligt beskrevet"; SV "beskrivs tydligt". The Authority submits that the term must be interpreted in line with the above-mentioned language versions of the Directive, in other words that the method by which prices vary must be explicitly described.<sup>42</sup>

148. ESA submits that, pursuant to the Directive, it is for the national court to assess whether the price-indexation clause has been explicitly described in the relevant documents within the meaning of paragraph 2(d) of the Annex to the Directive.<sup>43</sup> ESA adds that Article 5 of the Directive must be taken into account when making that assessment and that the fairness or unfairness of a commercial practice must be assessed against the "average consumer", who must be "reasonably well-informed and reasonably observant and circumspect", taking into account social, cultural and linguistic factors.<sup>44</sup>

149. ESA argues that the circumstances as described in the request suggest that the methods of calculating price changes in contracts for loans for the financing of real estate purchases have been explained to the consumer in a sufficiently clear manner. In

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<sup>42</sup> Reference is made to Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupþing hf* [2012] EFTA Ct. Rep. 592, paragraph 86.

<sup>43</sup> Reference is made to *Constructora Principado S*, cited above, paragraph 20.

<sup>44</sup> Reference is made to Case C-356/04 *Lidl v Colruyt* [2006] ECR I-8501, paragraph 78, and case law cited.

particular, it appears to reflect the method of calculation as explicitly described in Chapter VI of Act No 38/2001 and Rules No 492/2001.

150. ESA submits that it follows from the request that information given about the revision of the principal of the debt and about the calculation of the instalments in the bond and the accompanying payment schedule is sufficient in terms of the Directive.

151. ESA therefore suggests that the answer to the fourth question should be as follows:

*It is for the relevant national court to establish whether a particular price-indexation clause has been explicitly described within the meaning of paragraph 2(d) of the Annex to Directive 93/13/EEC in the relevant documentation.*

#### Fifth question

152. ESA submits that the question is only of a hypothetical nature in a case such as the present one, since it is obvious from the information provided in the request from the Reykjavík District Court that the Icelandic legislator has already made its choices as regards how to implement Article 6(1) of the Directive. In any event, detailed guidance on the scope of discretion that national legislators enjoy under the EEA Agreement when implementing directives can be found in *Jan Anfinn Wahl*.<sup>45</sup> The Court is competent, however, to reformulate the question<sup>46</sup> if it were to consider it appropriate to advise the national court on the obligation that follows from Article 6(1) of the Directive where a national court finds that a given term before it is unfair within the meaning of the Directive.

153. As regards the duty of national courts to interpret national law in conformity with EEA law, ESA recalls that Article 3 EEA requires the EEA States to take all measures necessary to guarantee the application and effectiveness of EEA law. Consequently, they must, as far as possible, apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law.<sup>47</sup> ESA notes further in that respect that it is settled case law by now that a national court seized with a case in

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<sup>45</sup> Reference is made to Case E-15/12 *Jan Anfinn Wahl v the Icelandic State*, judgment of 22 July 2013, not yet reported, paragraphs 49 to 56.

<sup>46</sup> Reference is made to Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey*, judgment of 19 September 2013, not yet reported, paragraph 31 and the case law cited.

<sup>47</sup> Reference is made to Case E-6/13 *Metacom AG v Rechtsanwälte Zipper & Collegen*, judgment of 27 November 2013, not yet reported, paragraph 69, and case law cited.

which the Directive applies has to carry out the assessment of the fairness of the contractual terms of its own motion.<sup>48</sup>

154. On that basis, ESA submits that Article 6(1) of the Directive requires that, where a national court considers that a given term before it is unfair within the meaning of that Directive, that court must (i) make a finding accordingly, and (ii) draw the necessary consequences; that is, ensure that such a clause is not binding on the consumer; and to make a decision as to whether "the contract is capable of continuing in existence without the unfair terms"; (only) in which case that contract "shall continue to bind the parties".

155. ESA finally submits that Article 4(1) of the Directive sets out that the relevant point in time to examine whether a given term is unfair within the meaning of the Directive is when the agreement at issue is concluded. In other words, a term that is fair at that time cannot, under the Directive, be considered to become unfair at a later stage of the contract's duration. Nor can an unfair term become fair due to lapse of time or changes that take place subsequent to the conclusion of the contract.

156. ESA therefore suggests that the answer to the fifth question should be as follows:

*Article 6(1) of Directive 93/13/EEC must be interpreted as meaning that where a national court considers that a given term before it is unfair within the meaning of that Directive, that court must ensure that such a clause is not binding on the consumer; and to take a decision as to whether the contract is or is not capable of continuing in existence without the unfair term.*

#### *The European Commission*

##### The first question

157. The Commission submits that Articles 3 and 4 of the Directive lay down general principles for the assessment of whether a particular contractual term is unfair, but do not as such preclude a price-indexation clause. This is further illustrated by the terms of Article 3(3) of the Directive read together with the Annex. Not only does this confirm that the list of terms set out in point 1 of the Annex is purely indicative, but paragraph 1(1) read together with paragraph 2(d) also goes on to provide express confirmation that a price-indexation clause may be permitted – subject only to the condition that, in order to be considered fair, such a clause should explicitly describe the method by which prices vary.

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<sup>48</sup> Reference is made to Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA* [2000] ECR I-4941, paragraphs 26 to 28.

158. The Commission submits that the answer to the first question should be as follows:

*Directive 93/13/EEC does not, in principle, prohibit provisions in contracts between consumers and suppliers for loans to finance real estate purchases which link the repayments of the loan to a predetermined index.*

The second question

159. In the Commission's view, the question should be answered in the negative since the Directive is silent in that regard. In particular, paragraph 2(d) of the Annex to the Directive lays down no specific conditions or criteria for the choice of factors to be taken into account, or the method of calculation.

160. The Commission submits that the answer to the second question should be as follows:

*Directive 93/13/EEC does not limit the discretion of the EEA States to determine the factors causing changes to such a predetermined index, nor the methods for their calculation.*

The third question

161. The Commission submits that it is a matter for the national court to assess whether the price indexation clause should be regarded as having been individually negotiated, taking all circumstances into account. In that assessment, the legal presumption stipulated in Article 3(2) is of particular importance.

162. The Commission adds that, at first sight, the information provided in the request from Reykjavík District Court would tend to suggest that the price-indexation clause was both a standard term used by the bank and part of a pre-drafted document. Further, the Commission continues, if the bank were to argue that such a term were nevertheless individually negotiated, it would need to prove this in accordance with the third subparagraph of Article 3(2) of the Directive.

163. The Commission submits that the answer to the third question should be as follows:

*It is for the relevant national court to establish whether a particular contract term has not been negotiated individually in accordance with Article 3(2) of Directive 93/13/EEC.*

The fourth question

164. The Commission argues that a preliminary issue that arises is whether the price-indexation clause could be said to reflect a mandatory statutory or regulatory provision within the meaning of Article 1(2) of the Directive, and, as such, be excluded from its application. The 13th recital of the preamble to the Directive explains this exclusion as being intended to cover contractual terms determined by provisions of national law, or default terms that are deemed to apply when the parties make no other specific arrangements. The rationale behind Article 1(2) of the Directive is that it may legitimately be supposed that the national legislature already struck an appropriate balance between all the rights and obligations of the parties to certain types of contract.<sup>49</sup>

165. The Commission submits that price indexation is governed by the terms of Act No 38/2001, which, pursuant to its Article 14, permits savings and loans to be price-indexed if the basis for that indexation is the consumer price index as calculated by Statistics Iceland. In this way, the Icelandic legislator has clearly weighed up the various interests of the parties to loan agreements and provided for the possibility of price-indexing, under certain strictly defined conditions.

166. The Commission argues that, in the case at hand, the inclusion of a price-indexation clause appears to remain purely a possibility: it is authorised by national law, but is not compulsory, and does not apply as a default rule in the absence of any specific contractual arrangement on this point. It follows that it cannot be a mandatory provision within the meaning of Article 1(2) of the Directive. Such a conclusion is further reinforced by the general consideration that derogations from EEA consumer protection law must be interpreted strictly.<sup>50</sup>

167. Also at the outset, the Commission submits that the exclusion mentioned in Article 4(2) of the Directive cannot apply to a term relating to a mechanism for amending the prices of the services provided to the consumer.<sup>51</sup>

168. As regards the substance of the price-indexation clause, the Commission submits that it is for the national court to assess whether a specific contract term is unfair or not, taking into account not only the factors listed in Articles 3 and 4 of the Directive, but also transparency requirements laid down in its Article 5. With reference to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, the Commission argues that this is of particular importance when the fairness of contracts permitting price changes is assessed.<sup>52</sup> Moreover, the Commission observes that the possibility for the consumer to

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<sup>49</sup> Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 28.

<sup>50</sup> Reference is made to Case C-481/99 *Georg Heiningер and Helga Heiningер v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-9945, paragraph 31.

<sup>51</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 23.

<sup>52</sup> Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraphs 49 to 55.

foresee, on the basis of clear, intelligible criteria, the changes that are likely to occur is of particular importance in this type of situation.<sup>53</sup>

169. Finally, the Commission argues that the answer to the question regarding whether the price-indexation clause contained an explicit and comprehensible description of the method by which prices vary, as also required by point 2(d) of the Annex to the Directive, is a crucial element of the case at hand. It allows the consumer to make an informed choice before signing the contract. Relevant factors will include those set out in points a) and b) of the third question referred by the national court, taken together with the precise drafting of the clause as a whole, as well as all other relevant circumstances, including the compliance of the clause with the national law provisions on price indexation.

170. The Commission adds that, where interest payments under a loan are indexed, it is clear that the payment schedule cannot, by its very nature, predict the exact instalments to be paid in future. However, an explicit and clear statement to the effect that those instalments might change in accordance with a defined index, as well as a specific reference to the price index method used, normally satisfies the transparency requirements discussed above.

171. The Commission submits that the answer to the fourth question should be as follows:

*It is for the relevant national court to establish whether a contract term relating to the indexation of repayment instalments of a loan to finance real estate purchases is to be regarded as having been explicitly and comprehensibly explained to the consumer. Such an assessment should take into account the precise wording of the relevant contract terms and all other relevant circumstances, including the circumstances set out in points a) and b) of the third question posed by the national court, as well as the applicable national legislation on price indexation*

The fifth question

172. The Commission submits that the fifth question queries the effects to be attributed to a finding that a contract term is unfair, and, more specifically, whether national law is obliged to make such a term non-binding on the consumer. In this regard, the Commission merely submits that Article 6(1) of the Directive plainly states that unfair terms in a contract "shall not" be binding on the consumer.<sup>54</sup>

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<sup>53</sup> Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 28.

<sup>54</sup> Reference is made to Case C-618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino*, judgment of 14 June 2012, not yet reported, paragraphs 62 and 63.

173. The Commission submits that the answer to the fifth question should be as follows:

*Article 6(1) of Directive 93/13/EEC should be interpreted as requiring unfair contract terms within the meaning of its Article 3(1) not to be binding on the consumer.*

Carl Baudenbacher  
Judge-Rapporteur