



JUDGMENT OF THE COURT

24 November 2014*

(Indexation of loans – Directive 87/102/EEC – Consumer credit agreements – Directive 93/13/EEC – Unfair terms – Mandatory terms)

In Case E-27/13,

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

Sævar Jón Gunnarsson

and

Landsbankinn hf.

concerning the interpretation of Council Directive 87/102/EEC of 22 December 1986 on consumer credit and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Sævar Jón Gunnarsson (“the Plaintiff”), represented by Bragi Dór Hafþórsson, District Court Attorney, acting as Counsel, and Björn Þorri Viktorsson, Supreme Court Attorney, acting as Co-Counsel;
- Landsbankinn hf. (“the Defendant”), represented by Hulda Árnadóttir, District Court Attorney, Lead Counsel, and Helgi Þór Þorsteinsson, District Court Attorney, Co-Counsel;

* Language of the request: Icelandic.

- the Icelandic Government, represented by Kristján Andri Stefánsson, Ambassador, 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, Lead Counsel, and Stefán Andrew Svensson, Supreme Court Attorney, Co-Counsel;
- the EFTA Surveillance Authority (“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 (“the Commission”), represented by Marta Owsiany-Hornung and Nicola Yerrell, Members of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Bragi Dór Hafþórsson; the Defendant, represented by Hulda Árnadóttir; the Government of Iceland, represented by Stefán Andrew Svensson; ESA, represented by Markus Schneider; and the Commission, represented by Nicola Yerrell, at the hearing on 11 June 2014,

gives the following

Judgment

I Legal background

EEA law

1 Article 3 EEA reads:

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.

2 Article 7 EEA reads:

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 87/102/EEC – The Consumer Credit Directive

- 3 Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48) (“the Consumer Credit Directive”) was included as point 4 of Annex XIX to the EEA Agreement. That point was deleted with effect from 12 May 2010 by EEA Joint Committee Decision No 16/2009 of 5 February 2009 (OJ 2009 L 73, p. 53, and EEA Supplement 2009 No 16, p. 24). By that same decision, Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Directive 87/102/EEC (OJ 2008 L 133, p. 66) was incorporated as point 7h of Annex XIX to the EEA Agreement.
- 4 The present case concerns a credit agreement entered into while the Consumer Credit Directive (Directive 87/102) was in force.
- 5 Recitals 5, 6, 9, 10 and 25 in the preamble to the Consumer Credit Directive read:

Whereas, given the increasing volume of credit granted in the Community to consumers, the establishment of a common market in consumer credit would benefit alike consumers, grantors of credit, manufacturers, wholesalers and retailers of goods and providers of services;

Whereas the programmes of the European Economic Community for a consumer protection and information policy ... provide, inter alia, that the consumer should be protected against unfair credit terms and that a harmonization of the general conditions governing consumer credit should be undertaken as a priority;

...

Whereas the consumer should receive adequate information on the conditions and cost of credit and on his obligations; whereas this information should include, inter alia, the annual percentage rate of charge for credit, or, failing that, the total amount that the consumer must pay for credit; whereas, pending a decision on a Community method or methods of calculating the annual percentage rate of charge, Member States should be able to retain existing methods or practices for

calculating this rate, or failing that, should establish provisions for indicating the total cost of the credit to the consumer;

Whereas the terms of credit may be disadvantageous to the consumer; whereas better protection of consumers can be achieved by adopting certain requirements which are to apply to all forms of credit;

...

Whereas, since this Directive provides for a certain degree of approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and for a certain level of consumer protection, Member States should not be prevented from retaining or adopting more stringent measures to protect the consumer, with due regard for their obligations under the Treaty;

6 Article 1(2) of the Consumer Credit Directive reads:

For the purpose of this Directive:

(a) 'consumer' means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;

(b) 'creditor' means a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons;

(c) 'credit agreement' means an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.

...

(d) 'total cost of the credit to the consumer' means all the costs, including interest and other charges, which the consumer has to pay for the credit;

(e) 'annual percentage rate of charge' means the total cost of the credit to the consumer, expressed as an annual percentage of the amount of the credit granted and calculated in accordance with Article 1a.

7 Article 1a(1)(a) of the Consumer Credit Directive reads:

The annual percentage rate of charge, which shall be that equivalent, on an annual basis, to the present value of all commitments (loans, repayments and charges), future or existing, agreed by the creditor and the borrower, shall be calculated in accordance with the mathematical formula set out in Annex II.

8 Article 1a(4) of the Consumer Credit Directive reads:

(a) The annual percentage rate of charge shall be calculated at the time the credit contract is concluded

(b) The calculation shall be made on the assumption that the credit contract is valid for the period agreed and that the creditor and the consumer fulfil their obligations under the terms and by the dates agreed.

9 Article 1a(6) of the Consumer Credit Directive reads:

In the case of credit contracts containing clauses allowing 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, the annual percentage rate of charge shall be calculated on the assumption that interest and other charges remain fixed and will apply until the end of the credit contract.

10 Article 4 of the Consumer Credit Directive reads:

1. Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement.

2. The written agreement shall include:

(a) a statement of the annual percentage rate of charge;

(b) a statement of the conditions under which the annual percentage rate of charge may be amended.

In cases where it is not possible to state the annual percentage rate of charge, the consumer shall be provided with adequate information in the written agreement. This information shall at least include the information provided for in the second indent of Article 6(1);

(c) a statement of the amount, number and frequency or dates of the payments which the consumer must make to repay the credit, as well as of the payments for interest and other charges; the total amount of these payments should also be indicated where possible;

(d) a statement of the cost items referred to in Article 1a(2) with the exception of expenditure related to the breach of contractual obligations which were not included in the calculation of the annual percentage rate of charge but which have to be paid by the consumer in given circumstances, together with a statement identifying such circumstances. Where the exact amount of those items is known, that sum is to be indicated; if that is not the case, either a method of calculation or as accurate an estimate as possible is to be provided where possible.

...

11 Article 15 of the Consumer Credit Directive reads:

This Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty.

Directive 93/13/EEC – The Unfair Terms Directive

12 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) (“the Unfair Terms Directive”) was included as point 7a of Annex XIX to the EEA Agreement.

13 Recitals 6, 13, 20 and 24 in the preamble to the Unfair Terms Directive read:

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts;

...

Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording ‘mandatory statutory or regulatory provisions’ in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

...

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;

...

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.

14 Article 1 of the Unfair Terms 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.

15 Article 2 of the Unfair Terms Directive reads:

For the purposes of this Directive:

(a) 'unfair terms' means the contractual terms defined in Article 3;

(b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

16 Article 3 of the Unfair Terms 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.

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.

17 Article 4 of the Unfair Terms Directive reads:

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

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

18 Article 5 of the Unfair Terms Directive reads:

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).

19 Article 6(1) of the Unfair Terms Directive reads:

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.

20 The Annex to the Unfair Terms Directive “Terms referred to in Article 3(3)” reads:

1. Terms which have the object or effect of:

...

(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)

...

(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.

- 21 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22) (“the Unfair Commercial Practices Directive”) was incorporated into Annexes IX and XIX of the EEA Agreement by EEA Joint Committee Decision No 93/2006 of 7 July 2006 (OJ 2006 L 289, p. 34, and EEA Supplement 2006 No 52, p. 27).

National law

Act No 121/1994

- 22 At the time the credit agreement in question was concluded, Act No 121/1994 on Consumer Credit (“the Consumer Credit Act”) was in force. This legislation transposed the Consumer Credit Directive into Icelandic law. In a similar manner to the Consumer Credit Directive, the Consumer Credit Act originally excluded from its scope agreements for the purchase of real estate. This exclusion was later removed. Since 2001 the Consumer Credit Act has applied to a broader group of consumer credit agreements than the Consumer Credit Directive itself.
- 23 Article 5 of the Consumer Credit Act requires credit agreements to be made in writing and to contain the information described in Articles 6 and 8. According to the first paragraph of Article 6, this includes information on the principal (the credit granted without any charges), the rate of interest, the total cost of the credit calculated in accordance with Article 7, the annual percentage rate of charge, which is the total cost of the credit expressed as an annual percentage of the principal and calculated according to the provisions of Articles 10 to 12, as well as the total amount to be repaid, the number of payments, amounts and payment dates, and the validity and conditions of termination. The second paragraph of Article 6 further states that if charges, repayments or other credit terms may be amended during the contract period, the consumer must be informed of the conditions applicable to such amendments.

- 24 Article 7 goes on to define the total cost of the credit, while Article 9 states that, although the Consumer Credit Act “provides for consumer information on interest rates or sums including interest rates, the parties concerned are not prevented from reaching an agreement on variable interest rates, either to some extent or altogether.”
- 25 Articles 10 to 12 lay down more detailed provisions concerning the calculation of the annual percentage rate of charge. Article 10 defines this charge as “the rate which balances the present value of the payment obligation of the creditor on the one hand and the consumer on the other according to their credit agreement.” Article 11 states that the annual percentage rate of charge “shall be calculated when the credit agreement is concluded.”
- 26 Article 12 of the Consumer Credit 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.”
- 27 According to the referring court, it follows from the preparatory materials to the Consumer Credit Act that Article 12 of that Act is intended to implement into Icelandic law the provisions of Article 1a(6) of the Consumer Credit Directive. It covers information to be given by the creditor in the case of credit contracts containing clauses allowing 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 the calculation is made.

Act No 7/1936

- 28 In Iceland, Act No 14/1995 implemented the Unfair Terms Directive by amending Article 36 and inserting Articles 36a to 36d into Act No 7/1936 on Contracts, Agency and Void Legal Instruments (“the Contracts Act”).
- 29 The first paragraph of Article 36 states that, subject to Article 36c, 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. It states also that the same applies to other legal instruments. It provides further that, in assessments made under the first paragraph, consideration shall be given to the substance of the contract, the position of the parties, the circumstances when the contract was made and subsequent circumstances, cf. the second paragraph.
- 30 Pursuant to the first paragraph of Article 36a, Articles 36a to 36d “apply to contracts, including contract terms, which have not been individually negotiated, provided that the contracts form part 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; cf., however, Article 36d.”

- 31 Article 36b requires that “[w]ritten contracts offered by a business operator to consumers shall be phrased in plain and intelligible language. In the event of any doubts concerning the meaning of a contract referred to in the first paragraph of Article 36a, the contract shall be construed in the consumer’s favour.”
- 32 According to the first paragraph of Article 36c, Article 36 shall “apply to contracts pursuant to the first paragraph of Article 36a, but with the changes resulting from the second and third paragraphs.” Pursuant to the second paragraph of Article 36c, “[i]n assessing whether a contract pursuant to the first paragraph is unfair, account should be taken of the factors and circumstances referred to in the second paragraph of Article 36, including the terms of other linked contracts. However, no account shall be taken of circumstances that arose subsequently, to the disadvantage of the consumer.” The third paragraph of Article 36c states that “[a] contract is unfair if it is contrary to good business practices and materially distorts the balance between the rights and obligations of the contracting parties, to the disadvantage of the consumer. If a term of this kind is set aside, either in full or in part, or amended, the contract shall, at the request of the consumer, remain valid in other respects without change if it can be performed without the term.”

Act No 38/2001

- 33 The Icelandic Act No 13/1979 on Economic Policy generally permits indexation of savings and credit. Provisions on the matter have existed in Icelandic legislation ever since. Chapter VI of Act No 38/2001 on Interest and Indexation (“the Indexation Act”) sets out the provisions on indexation currently in force. Except to the extent permitted by Article 2 of the Indexation Act, the provisions of that chapter are mandatory in relation to all indexed savings and loans.
- 34 Pursuant to the first paragraph of Article 13 of the Indexation Act, the provisions of Chapter VI “shall apply to obligations concerning savings and loans in Icelandic krónur (ISK) where the debtor promises to pay money and it has been agreed or stipulated that the payments should be price-indexed. Price indexation as referred to in this Chapter shall mean changes in line with a domestic price index. Authorisation for price indexation shall be as provided for in Article 14 of this Act unless otherwise provided for by law.”
- 35 Pursuant to the first paragraph of Article 14, “[s]avings 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 which 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.” The second paragraph of Article 14 states 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.”

- 36 The first paragraph of Article 15 states that “[t]he 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.” The second paragraph of that article states that “[t]he Central Bank shall adopt further rules on the indexation of savings and loans.”

Rules of the Central Bank No 492/2001

- 37 On the basis of Article 15 of the Indexation Act, the Central Bank adopted Rules No 492/2001 on Price Indexation of Savings and Loans (“the Rules”).
- 38 Article 1 of the Rules states 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.
- 39 Pursuant to the first paragraph of Article 4 of the Rules, 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. The second paragraph of that article provides that “[t]he 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.”
- 40 The third paragraph of Article 4 of the Rules 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 adjusting for deviations within the month of the loan (to a maximum of 29 days). Upon 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. The fourth paragraph of that article provides that in financial instruments, listed on a regulated market, it may be stipulated 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 CPI, that is between its value on the first day of the month and its value on the first day of the following month. Finally, the fifth paragraph of that article provides that receipts shall state in detail the calculation of payments and accrued indexation.

Act No 12/1995

- 41 Act No 12/1995 on the CPI contains provisions concerning the methods for calculating the CPI. 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. As far as possible, the index shall reflect average prices in Iceland. A special Advisory Committee on the CPI monitors Statistics Iceland's monthly calculations of the CPI.

II Facts and procedure

42 By order of 17 December 2013, registered at the Court on the same day, Reykjavík District Court requested an Advisory Opinion in a case pending before it between Sævar Jón Gunnarsson and Landsbankinn hf.

43 On 19 November 2008, Sævar Jón Gunnarsson took a loan in the amount of ISK 630 000 from Landsbankinn hf. A bond was issued for the debt. The bond contains standardised contractual terms prepared by Landsbankinn. The bond's header states that it is a "Bond with *in solidum* personal guarantee – loan to an individual." It further states that the bond is indexed, with a variable interest rate. The bond also defines the overall loan period, the number of instalments and the index base.

44 The first paragraph of the main text of the bond states that the loan is to be repaid in equal payments of instalments on the principal together with the interest thereon (an annuity loan arrangement), which means that each instalment and interest rate payment is the same throughout the loan period, unless the interest rate is changed. Then the bond states that:

[f]or indexation purposes, the loan is linked to the [CPI] and the debt changes in accordance with changes in the index from the index base until the payment date on any given occasion. Thus, the issuer [debtor] shall pay, in addition to each individual payment of instalments and interest, an indexation adjustment on each due date, based on the rise in the index from the base index figure.

45 On 20 November 2008, when the bond was issued, the Plaintiff also signed an "Annex to a bond – Repayment schedule". The schedule contains an itemisation of the repayments of the loan on each of the planned due dates (64 payments in total) together with a calculation of the outstanding balance, instalment repayment on the principal, interest payment and the costs pertaining to each payment. The schedule concludes with the following statement:

Note that this is an estimate. The estimate is based on 0% inflation, current interest rates and the bank's tariff of charges, which may change (cf. the provisions of the bond).

46 The nominal repayment burden of the loan turned out to be considerably higher than was indicated in the repayment schedule. According to the referring court, it may be assumed that the rise in the repayments was caused by the index-linked revision of the loan on each due date. The index-linked revision resulted in higher instalments than those set out in the repayment schedule.

- 47 It appears from the documents of the case that the actual rate of inflation reported at the time of conclusion of the loan agreement was higher than the 0% rate of inflation indicated in the bond. It is also clear from the case file that Iceland was experiencing an economic crisis at the time.
- 48 The Plaintiff brought proceedings against the Defendant before Reykjavík District Court. He argued that the indexation arrangement in the loan agreement was in violation of the Consumer Credit Act and the Consumer Credit Directive, and that it constituted an unfair consumer contract term. The Plaintiff contended that this was contrary to Articles 36 and 36a to 36d of the Contracts Act and the Unfair Terms Directive. On this basis, the term in question should be considered not binding. In particular, the Plaintiff argued that the payment schedule should have been based on an unchanged rate of inflation throughout the loan period and not a 0% rate of inflation, which had also caused the annual percentage rate of charge to appear too low.
- 49 The Defendant rejected this view. Reference was made to Article 12 of the Consumer Credit Act and the Consumer Credit Directive, which both allow provisions on variable rates of interest or other costs in a credit agreement to be calculated on the premise that no change will take place in the rate of interest and in costs during the term of the credit agreement. Accordingly, the Defendant argued that it was required, when calculating the estimated total cost of the credit, to assume that price levels would remain unchanged throughout the loan period, and similarly that it was correct to assume a 0% rate of inflation. Furthermore, the Defendant considered that price indexation was permitted by law and that the loan complied with all relevant legal requirements. In particular, the original document clearly stated that the loan was to be revised in line with changes to the CPI. The Defendant had no responsibility for the fixing of this index and the calculation method was clearly explained.
- 50 In the view of Reykjavík District Court, there is doubt about the proper interpretation and effect of the Consumer Credit Directive and the Unfair Terms Directive and whether, when calculating the total cost of credit to the consumer, it is permissible completely to ignore the rate of inflation as it is at the time when the loan is agreed and to assume instead an inflation rate of 0%.
- 51 In light of the above, Reykjavík District Court referred the following questions to the Court for an Advisory Opinion:
1. *Is it compatible with the provisions of Council Directive 87/102/EEC on consumer credit, as amended by Directive 90/88/EEC and Directive 98/7/EC, that when a credit agreement is made, which is linked to the consumer price index in accordance with an authorisation in enacted legislation, and the sum loaned therefore changes in accordance with inflation, the calculation of the total cost of the credit, and of the annual percentage rate of charge, which is shown to the consumer when the agreement is made, is based on 0% inflation, and not on the known rate of inflation on the date when the loan is taken?*

2. *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 an EEA State permits the inclusion of provisions in a consumer contract, stating that repayments of the loan are to be linked to a predetermined index?*
 3. *If the answer to the second question is that the index-linking of repayments of consumer loans is compatible with the provisions of Directive 93/13/EEC, then the third question is: Does the Directive limit the latitude of the EEA State in question to determine, through legislation or by means of administrative regulations, the factors that are to cause changes in the predetermined index and the methods by which these changes are to be measured?*
 4. *If the answer to the third question is that Directive 93/13/EEC does not restrict the latitude of the Member State referred to in that question, then the fourth 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 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 repayment schedule showing estimated and itemised repayments 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 grantor of credit sign the repayment schedule at the same time and in conjunction with the signature of the bond by the consumer?*
 5. *Is the method of calculation of price changes applying to a loan contract 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 fourth question?*
 6. *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 at all times be non-binding on the consumer?*
- 52 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

Preliminary remarks

53 Reykjavík District Court has referred six questions to the Court. The first question concerns the requirements of the Consumer Credit Directive with regard to the information to be provided to a consumer before entering into a price-indexed credit agreement. Questions 2 to 6 concern the interpretation of the Unfair Terms Directive in the context of contractual terms on indexation of credit repayment instalments. These last questions are in substance identical to the five questions examined by the Court in Case E-25/13 *Engilbertsson*, judgment of 28 August 2014, not yet reported. In answering these questions in the present case, the Court will therefore refer to its findings and conclusions in the previous judgment. The first question, on the other hand, was not addressed in *Engilbertsson*.

Applicability of the Consumer Credit Directive to credit agreements linked to the consumer price index

Observations submitted to the Court

54 Both in their written observations and at the oral hearing, the Defendant and the Icelandic Government questioned whether the contractual terms at issue fall within the scope of the Consumer Credit Directive. In their view, this Directive is a minimum harmonisation instrument, which provides for the approximation of laws and regulations relating to consumer credit. As such, the EEA States have a margin of appreciation for enacting legislation regarding those issues not addressed by the Consumer Credit Directive.

55 According to the Defendant and the Icelandic Government, the Consumer Credit Directive does not regulate price indexation of consumer credit agreements or contain any provisions governing indexation in general. In the absence of EEA legislation concerning the treatment of indexation in consumer credit agreements, it is for the national legal order of each EEA State to establish such rules.

56 ESA, on the other hand, submits that the Consumer Credit Directive is applicable both *ratione temporis* and *materiae*. The parties and the credit agreement itself fulfil the definitions specified in the Consumer Credit Directive, while price indexation constitutes a separate charge that has to be reflected, in principle, in the annual percentage rate of charge.

Findings of the Court

57 Pursuant to Article 1(1) of the Consumer Credit Directive, the Directive applies to consumer credit agreements. Credit agreements are defined in the first subparagraph of Article 1(2)(c) as agreements whereby “a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.” That broad understanding of the

notion is supported by recital 10 in the preamble to the Consumer Credit Directive, according to which “better protection of consumers can be achieved by adopting certain requirements which are to apply to all forms of credit.”

- 58 Article 2 of the Consumer Credit Directive provides that certain credit agreements and types of transaction are or may be excluded in part or in full from the Directive’s scope. Indexation of credit agreements is not specifically addressed. However, the Court notes that the credit agreement at issue in the main proceedings does not correspond to any of the types exempted from the scope of this Directive.
- 59 Moreover, the Consumer Credit Directive was adopted with the aim of ensuring both the creation of a common consumer credit market and the protection of consumers who avail themselves of such credit in that market (compare, to that effect, Case C-429/05 *Rampion and Godard* [2007] ECR I-8050, paragraph 59, and case law cited).
- 60 Consequently, the aim of the Consumer Credit Directive also militates against excluding a credit agreement linked to a CPI from its scope. It is the sole and legitimate purpose of an index clause in a credit agreement to correct the nominal amount of the consecutive loan instalments in line with CPI developments throughout the term of the loan.
- 61 It must therefore be held that the Consumer Credit Directive applies to the loan agreement at issue in the main proceedings.

Applicability of the Unfair Terms Directive

- 62 The Defendant, the Icelandic Government and ESA have questioned whether the contractual terms on indexation of repayment instalments at issue in the main proceedings fall within the scope of the Unfair Terms Directive to the extent they reflect mandatory statutory or regulatory provisions that are exempted from the scope of the Unfair Terms Directive pursuant to Article 1(2) of that Directive.
- 63 The Court examined the question of indexation of consumer mortgage loans in paragraphs 66 to 79 of *Engilbertsson*. The Court found that contractual terms that are optional but, if chosen by the parties, whose substance is not left to the parties to negotiate are considered mandatory within the meaning of the Unfair Terms Directive and thus exempted from its scope. This finding must apply equally to a consumer credit agreement, as in the present case. It is for the national court to ascertain whether the indexation terms relating to the repayment instalments of consumer credit agreements, such as those at issue in the present case, reflect mandatory regulatory or statutory provisions within the meaning of Article 1(2) of the Unfair Terms Directive.

The first question

Observations submitted to the Court

- 64 The Plaintiff considers that indexation is a cost of credit and, as such, must be disclosed *ex ante* through mandatory information. He notes that indexation affects regularly not only the outstanding repayments of the credit, but, most importantly, the principal of the loan.
- 65 The Plaintiff claims that not including the known change in the CPI at the time of concluding the loan agreement constitutes a misleading practice as this has a dramatic impact on the annual percentage rate of charge and the total cost of credit. Further, the repayment schedule accompanying the bond does not mention the effect of changes in the CPI on the total amount to be paid. This omission has to be interpreted as misleading since it leads to the assumption that changes in the CPI do not affect the total amount to be paid. On the contrary, the repayment schedule fixes a nominal amount to be repaid, based on an unchanged interest rate.
- 66 The Plaintiff further observes that the bond does not state how inflation may change or which factors may have an effect on inflation, nor is there an explanation on the relation between inflation and the CPI or the base index of the bond. In his view, this implies that the provisions of the bond on the total cost of credit are both opaque and misleading.
- 67 The Plaintiff also argues that Article 1a(6) of the Consumer Credit Directive, interpreted in conjunction with Article 4(2)(b), cannot be interpreted as allowing the annual percentage rate of charge and the total cost of credit to be calculated on the assumption that inflation will be 0% throughout the lifetime of the loan in question. The Defendant's method of calculation has the effect of making the loan appear to be a normal, non-indexed, variable interest rate loan, which is likely to have the effect that the consumer will take a transactional decision that he would not have taken otherwise.
- 68 The Defendant submits that the assumption of 0% inflation, or an unchanged price level, when calculating the annual percentage rate of charge was in fact mandatory under Article 12 of the Consumer Credit Act. In its view, it is clear that this provision was intended to implement into Icelandic law Article 1a(6) of the Consumer Credit Directive. The provisions of Article 12(1) referring to indexation and the assumption of the price level remaining unchanged are specific to Icelandic law, and thus go beyond the minimum harmonisation requirements set out in Article 1a(6). The references to indexation thus reflect the common Icelandic arrangement of loan obligations being indexed.
- 69 The Defendant observes further that while the English translation "price level" for the Icelandic term "verðlag" may appear somewhat vague, in Icelandic, the term has a clear meaning and refers to pricing as affected by inflation. Hence, according to the Defendant, the reference in Article 12(1) of the Consumer Credit

Act to the price level remaining unchanged is, in Icelandic, a clear reference to the object not being adjusted for inflation. As such, the Defendant submits that the requirement in the Consumer Credit Act for the annual percentage rate of charge to be calculated on the assumption of the price level remaining unchanged, unequivocally requires that the calculation does not factor in any adjustments for inflation, fixing the inflation level at 0%.

- 70 The Defendant observes that in cases where contractual terms on price indexation involve a consumer being required to pay on each due date, in addition to each instalment of principal and interest, an indexation adjustment based on the rise in the index from the base index figure, the indexation adjustment might be considered to fall within the scope of the consumer's total cost of credit. The effects of such indexation on the total cost of credit and the annual percentage rate of charge are, however, variable and impossible to quantify at the time of the calculation. In relation to those variable costs, Article 1a(6) of the Consumer Credit Directive applies, which provides for the assumption of an unchanged pricing level, that is with no changes due to inflation.
- 71 In the view of the Icelandic Government, the Consumer Credit Directive did not fully harmonise the cost factors to be taken into account when calculating the annual percentage rate of charge. In particular, the Consumer Credit Directive does not explicitly mention the indexation of loans in any form and thus does not explicitly require changes in the nominal amount or repayments as a result of indexation to be taken into account when calculating the total cost of credit and the annual percentage rate of charge. Nor does the Consumer Credit Directive explicitly provide that the annual percentage rate of charge and the total cost of the credit must be the nominal annual percentage rate of charge and the nominal total cost of the credit rather than the real annual percentage rate of charge and the real total cost of the credit. Accordingly, it cannot be concluded that the Consumer Credit Directive requires the calculation of a nominal annual percentage rate of charge in respect of indexed loans (based on current rates of inflation) rather than the calculation of the real annual percentage rate of charge.
- 72 Having regard to Articles 1a(6), 4(2) and 6(1) of the Consumer Credit Directive and to the Commission's Staff Working Document on Directive 2008/48/EC, the Icelandic Government submits that future costs that are unascertainable and cannot be estimated with a reasonable degree of certainty should be disregarded. Accordingly, even if, notwithstanding the above, changes to the nominal amounts payable as a result of indexation could fall within the definition of total cost of credit to the consumer, and the Consumer Credit Directive were to require a nominal annual percentage rate of charge, such changes should nonetheless not be included in the calculation of the total cost of credit and the annual percentage rate of charge.
- 73 Knowing the real annual percentage rate of charge will enable the consumer to make a rational, informed choice, whereas informing a consumer that he may have to pay a certain nominal sum at a date distant in the future, based on the current rate of inflation, is likely to be meaningless and may tend to make

decision making irrational. Also, if the nominal annual percentage rate of charge and total cost of credit to be provided to the consumer were to be based on the known rate of inflation at the time the annual percentage rate of charge is calculated, it would almost certainly not reflect the actual nominal annual percentage rate of charge or cost of credit payable, as the actual average rate of inflation over the duration of the loan is unlikely to be the same as the spot rate of inflation when the annual percentage rate of charge is calculated. This is particularly the case in a country like Iceland which has historically suffered high and volatile inflation.

- 74 In ESA's view, it is for the national court to decide whether the repayment schedule should have been based on the known rate of inflation at the date when the loan was taken, and not on the assumption of an inflation rate of 0%, as was done in this case.
- 75 ESA submits that it is of critical importance to inform the consumer of the total cost of credit calculated and expressed by means of the annual percentage rate of charge according to a single mathematical formula. Whether the annual percentage rate of charge was so calculated in the main proceedings is for the national court to establish, but ESA argues that an average consumer, who is reasonably well-informed and reasonably observant and circumspect, would expect an annual percentage rate of charge relating to a consumer credit that is indexed according to national inflation in Iceland to be calculated on a certain assumption about what that rate of inflation might be in the future.
- 76 Moreover, taking into account the economic situation in Iceland at the time when the contract at issue was concluded, ESA finds it difficult to envisage that an average consumer would expect that the forecast for the rate of inflation would amount to zero. In ESA's view, such information is misleading for the purpose of describing the total cost of a consumer credit. In this regard, ESA refers to the wording of Article 19(4) of Directive 2008/48/EC, the provision corresponding to Article 1a(6) of the Consumer Credit Directive, but which refers more clearly to the initial level of the relevant rate and charges than Article 1a(6) of the Consumer Credit Directive does.
- 77 ESA submits further that the Consumer Credit Directive requires creditors to provide consumers with adequate information in order to give them a fair idea of the cost of the credit, even if the total cost of that credit is subject to future changes that can only be predicted. In its view, although different methods of calculation may be permissible, the test must be that, where the total cost of the credit cannot be strictly calculated, any estimate of total cost must be based on realistic assumptions.
- 78 ESA therefore takes the view that it is, in principle, incompatible with the provisions of the Consumer Credit Directive to base a repayment schedule on a hypothetical rate of inflation of 0%, with the effect that the total cost of the credit appears significantly lower than the one calculated on realistic assumptions as regards future inflation. However, it is for the national court to assess whether the

Plaintiff in the main proceedings was provided with sufficient information about the annual percentage rate of charge for the loan at the time when the contract was signed as to allow him to form a fair idea of the total cost of the loan.

- 79 Were the national court to find that the method used by the Defendant to calculate the total cost of the credit is precluded by the Consumer Credit Directive, that court would have to address of its own motion possible remedies for such an infringement.
- 80 The Consumer Credit Directive does not specify any particular remedies for an infringement of the obligation to provide adequate information in a consumer credit contract. Article 14 of the Consumer Credit Directive requires EEA States to ensure that credit agreements do not derogate, to the detriment of the consumer, from the provisions of national law implementing the Directive and that the provisions adopted in implementation of the Directive are not circumvented as a result of the way in which agreements are formulated.
- 81 ESA submits that, once a breach of the consumer protection rules has been established, the national authorities must take the measures appropriate to ensure that the adverse effects of that breach do not subsist throughout the entire performance of the contract. It may appear that Article 36 of the Contracts Act, as well as the provisions of the Consumer Credit Act, may provide for an answer in that regard. However, it is for the national court to apply the remedies provided for under national legislation in the event that it concludes that the Plaintiff did not receive adequate information about the consumer loan.
- 82 In the Commission's view, it follows from the plain wording of Article 1a(6) of the Consumer Credit Directive that the calculation of the annual percentage rate of charge in this type of situation is to be made on the basis of the relevant charges fixed at the same level as apply when the calculation is made. Any other interpretation would permit a creditor to remove certain charges entirely from the calculation of the annual percentage rate of charge, providing a misleading impression of the final cost to the consumer. Such a result would undermine one of the primary objectives of the Consumer Credit Directive, namely to improve consumer protection by means of enhanced information and transparency. A crucial aspect of such protection consists in informing the consumer of the total cost of credit, which allows the consumer to compare different offers of credit on a similar basis and to assess the extent of his liability.
- 83 The Commission argues that it is precisely with a view to protecting the consumer against unfair credit terms and enabling him to have full knowledge of the future performance of a credit agreement that Article 4 of the Consumer Credit Directive obliges a creditor to provide the consumer with all information that could have a bearing on the implications of the agreement. Moreover, the Commission observes that the annual percentage rate of charge is a crucial tool in enabling the consumer to decide whether or not to sign up to a particular credit agreement.

- 84 According to the Commission, the calculation must give a reasonable indication of the total cost of the credit, which can only be achieved using existing relevant rates and values applicable at the time the credit agreement is concluded. The Commission also underlines that Article 1a(1)(a) of the Consumer Credit Directive expressly links the annual percentage rate of charge to the present value of all commitments.
- 85 The Commission finally adds that Article 19(4) of Directive 2008/48/EC, which reproduces the former Article 1a(6) of the Consumer Credit Directive, expressly provides that the annual percentage rate of charge is to be calculated on the assumption that the borrowing rate and other charges will remain fixed in relation to the initial level and will remain applicable until the end of the credit agreement.

Findings of the Court

- 86 By its first question, the national court asks in essence whether the terms “total cost of the credit” and “annual percentage rate of charge” contained in Article 1(2)(d) and (e) and Article 1a(1)(a) of the Consumer Credit Directive should be interpreted as meaning that, where a credit agreement is made that is linked to the CPI, it is permissible to omit the rate of inflation as it is at the time when the loan agreement is concluded, or, alternatively, whether such information must be provided to the consumer in accordance with Article 4 of the Directive.
- 87 The Consumer Credit Directive was adopted with the objectives of establishing a common market in consumer credit (recitals 3 to 5 in the preamble) and protecting consumers taking such credit in that market (recitals 6, 7 and 9 in the preamble). The Consumer Credit Directive is intended to ensure a minimum standard of protection in consumer credit matters.
- 88 To protect against unfair credit terms and to enable the consumer to have full knowledge of the terms of the loan agreement entered into, Article 4 of the Consumer Credit Directive provides that the borrower at the time of concluding such an agreement must have to hand all relevant information which could have a bearing on the implications of his undertaking (compare Case C-76/10 *Pohotovost* [2010] ECR I-11557, paragraph 68, and case law cited).
- 89 The Consumer Credit Directive provides in Article 4(1) and Article 4(2)(a) and (b) that the credit agreement must be made in writing and that the written agreement must include a statement of the annual percentage rate of charge and the conditions under which it may be amended.
- 90 Pursuant to Article 1(2)(e) of the Consumer Credit Directive, the term annual percentage rate of charge means “the total cost of the credit to the consumer, expressed as an annual percentage of the amount of the credit granted and calculated in accordance with Article 1a.” According to Article 1(2)(d), the total cost of credit to the consumer is defined as all the costs, including interest and other charges, which the consumer has to pay for the credit.

- 91 It follows that the term “total cost of the credit” comprises all the costs that the consumer is liable to pay under the credit agreement, including both interest charges and charges resulting from the price indexation of the principal. This information contributes to the transparency of the market, as it enables the consumer to compare offers of credit.
- 92 The Court notes that Article 1a(6) of the Consumer Credit Directive takes account of the fact that interest charges or other charges may be variable. It provides that where a charge is unquantifiable at the time when the annual percentage rate of charge is calculated, this annual percentage rate must be calculated on reasonable assumptions and that the charge in question remains fixed and will apply until the end of the credit contract.
- 93 An assumption that the rate of inflation will be 0% indicated in a loan agreement, at a time when the actual rate of inflation is considerably higher, does not correctly represent the charges resulting from the price indexation and thus the total cost of credit within the meaning of Article 1(2)(d). Consequently, such a statement does not correctly represent the annual percentage rate of charge defined in Article 1(2)(e) and Article 1a(1)(a) of the Consumer Credit Directive.
- 94 Provided that the level of protection established by the Consumer Credit Directive, as interpreted by the Court, is not compromised, it is for the national court to assess, having regard to all the circumstances of the case, the legal consequences of and the remedies for such incorrect information. In that assessment, the national court should take into account whether the consumer in question is an average consumer, who is reasonably well-informed, observant and circumspect (see Case E-1/05 *ESA v Norway* [2005] EFTA Ct. Rep. 234, paragraph 41).
- 95 The Court adds that a failure by a credit institution to provide the consumer with full information regarding the total cost of credit and the annual percentage rate of charge specified in Article 3 and Article 4(2)(a) of the Consumer Credit Directive may, depending on the circumstances, also qualify as an unfair business-to-consumer commercial practice under the Unfair Commercial Practices Directive. In the event that the national court finds the Unfair Terms Directive applicable to the indexation term at issue, a finding that a business-to-consumer commercial practice is unfair is one element among others on which the national court may base its assessment of the unfairness of that particular term (compare Case C-453/10 *Pereničová and Perenič*, judgment of 1 March 2012, reported electronically, paragraph 43).
- 96 Accordingly, the answer to the first question must be that, when a credit agreement is linked to a CPI and the cost of the credit thus changes in accordance with inflation, it is not compatible with the Consumer Credit Directive to calculate the total cost of the credit and the annual percentage rate of charge on the basis of 0% inflation if the known rate of inflation at the time of the credit agreement is not 0%. It is for the national court to assess, taking account of all the circumstances of the case, the legal consequences of and the remedies for

such incorrect information, provided that the level of protection established by the Consumer Credit Directive, as interpreted by the Court, is not compromised.

The second to sixth questions

- 97 To assist the national court in the event that it finds the Unfair Terms Directive applicable to the index-linked consumer credit, the Court will address the five remaining questions. These questions are in substance identical to the questions examined in *Engilbertsson*. The Court has no relevant information in the present case that could lead to a different assessment of the legal issues raised in *Engilbertsson*. With regard to the substance of the present questions, there is therefore no reason to make a distinction between a mortgage credit, as in *Engilbertsson*, and a consumer credit loan, as in the present case. The answers must therefore be substantially identical.
- 98 By its second question, the national court asks, in essence, whether the Unfair Terms Directive generally prohibits contractual terms on the indexation of loans in contracts with a consumer.
- 99 This question was assessed in paragraphs 87 to 98 of *Engilbertsson*. The Court found in paragraph 99 that the Unfair Terms Directive does not generally prohibit contractual terms on the indexation of loans in contracts between a supplier and a consumer. It is for the referring court to assess whether the term at issue is unfair. In this assessment the national court should take account of the fact that, under an indexed loan, the interest rate is normally lower than it would have been under a non-indexed loan, as was held by the Court in paragraph 92 of *Engilbertsson*.
- 100 By its third question, if the indexation of loans is not generally prohibited under the Unfair Terms Directive, the referring court asks, in essence, whether the Unfair Terms Directive limits the discretion of an EEA State to determine, through legislation or administrative regulations, the factors that may cause changes in a pre-determined index, such as the CPI, as well as the methods for measuring those changes.
- 101 This question was assessed in paragraphs 108 and 109 of *Engilbertsson*. The Court responded that the Unfair Terms Directive does not limit the discretion of an EEA State to determine in legislation or administrative regulation the factors that may cause changes in a pre-determined index, such as the Icelandic CPI, as well as the methods for measuring those changes, provided that they are explicitly described in the contract, as was held by the Court in paragraph 110 of *Engilbertsson*.
- 102 By its fourth question, the referring court asks, in essence, whether a contractual term must be regarded as having been individually negotiated within the meaning of Article 3(1) of the Unfair Terms 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.

- 103 This question was assessed in paragraphs 120 to 125 of *Engilbertsson*. The Court found that it is for the competent national court to establish whether a particular contract term has been negotiated individually within the meaning of Article 3 of the Unfair Terms Directive, as was held by the Court in paragraph 126 of *Engilbertsson*.
- 104 By its fifth question, the referring court seeks to establish, in essence, whether, under the circumstances described in the previous question, the method of calculation of price changes in loan contracts must be regarded as having been explicitly described to the consumer within the meaning of point 2(d) of the Annex to the Unfair Terms Directive.
- 105 This question was examined in paragraphs 138 to 145 of *Engilbertsson*. The Court found that it is for the national court to establish whether a contract term relating to the indexation of repayment instalments of a loan must be regarded as having been explicitly and comprehensibly described to the consumer. Such an assessment must take into account the precise wording of the relevant contract terms and all other relevant circumstances, as was held out by the Court in paragraph 146 of *Engilbertsson*.
- 106 The sixth question is construed as asking, in essence, which obligations follow from Article 6(1) of the Unfair Terms Directive where a national court finds that a given term is unfair.
- 107 This question was examined in paragraphs 158 to 164 of *Engilbertsson*. The Court found that Article 6(1) of the Unfair Terms Directive must be interpreted as meaning that, where a national court considers that a given term is unfair within the meaning of that directive, the national court must ensure that such a clause is not binding on the consumer provided that the contract is capable of continuing in existence without the unfair term, in so far as such continuity of the contract is legally possible under the rules of domestic law, as was held by the Court in paragraph 165 of *Engilbertsson*.

IV Costs

- 108 The costs incurred by the Icelandic Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Reykjavík District Court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Reykjavík District Court hereby gives the following Advisory Opinion:

1. When a credit agreement is linked to a consumer price index, it is not compatible with Directive 87/102/EEC to calculate the total cost of the credit and the annual percentage rate of charge on the basis of 0% inflation if the known rate of inflation at the time of the credit agreement is not 0%. It is for the national court to assess, taking account of all the circumstances of the case, the legal consequences of and the remedies for such incorrect information, provided that the level of protection established by Directive 87/102/EEC, as interpreted by the Court, is not compromised.

For the situation that the referring court does not consider the contractual terms on the indexation of repayment instalments of the consumer loan in question to be mandatory regulatory or statutory provisions within the meaning of Article 1(2) of Directive 93/13/EEC, the answers to the subsequent questions are as follows:

2. Directive 93/13/EEC does not generally prohibit contractual terms on the indexation of loans in contracts between a supplier and a consumer. It is for the referring court to assess whether the term at issue is unfair. The assessment must take account of the Court's interpretation of the concept of "unfair term".

3. Directive 93/13/EEC does not limit the discretion of an EEA State to determine, whether through legislation or by means of administrative regulation, the factors that may cause changes in a pre-determined index, such as the Icelandic consumer price index, as well as the methods for measuring those changes, provided that they are explicitly described in the contract.

4. It is for the competent national court to establish whether a particular contract term has been negotiated individually within the meaning of Article 3 of Directive 93/13/EEC.

5. It is for the competent national court to establish whether a contract term relating to the indexation of repayment instalments of a loan must be regarded as having been explicitly and comprehensibly described to the consumer. Such an assessment must 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 fourth question posed by the national court, as well as the national legislation on price indexation.

6. Article 6(1) of Directive 93/13/EEC is to be interpreted as meaning that, where a national court considers that a given term is unfair within the meaning of Directive 93/13/EEC, that court must ensure that such a clause is not binding on the consumer provided that the contract is capable of continuing in existence without the unfair term, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible.

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 24 November 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President