



REPORT FOR THE HEARING

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 the 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, as well as Council 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 about the lawfulness of an indexation clause in a bond. Sævar Jón Gunnarsson (“the Plaintiff”) received a loan from Landsbankinn hf. (“the Defendant”) in return for the issuing of a bond. The loan is linked to the Consumer Price Index and the loan capital is increased in proportion to changes in the index.

2. In the proceedings before the Reykjavík District Court, the parties are, *inter alia*, in dispute about whether the indexation arrangement in the bond is non-binding. In addition, it is disputed whether Article 12 of Act No 121/1994 complied with Directive 87/102/EEC.

* Revised in paragraph 5.

II Legal background

EEA law

3. 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

4. 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 87/102/EEC

5. Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit was included under point 4 to Annex XIX to the EEA Agreement before that point was deleted with effect from 12 May 2010.¹ For the sake of completeness, it is noted that Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC was incorporated into Annex XIX of the EEA Agreement at point 7h.²

¹ Point 4 was deleted with effect from 12 May 2010 by Article 1(2) of Decision No 16/2009, OJ L 73, p. 53.

² Point inserted by Decision No 16/2009 (OJ L 73, 19.3.2009, p. 53 and EEA Supplement No 16, 19.3.2009, p. 24), e.i.f. 1.11.2011.

6. Recital 9 to the Directive reads:

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.

7. Article 1(2) of the Directive reads:

For the purpose of this Directive:

[...]

(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.

8. Article 1a (1)(a) of the Directive reads:

The annual percentage rate of charge which shall be that rate, on an annual basis which equalises 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.

9. Article 1a (6) of the 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 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.

Directive 93/13/EEC

11. Directive 93/13/EEC on unfair terms in consumer contracts (“the Directive”) was incorporated into Annex XIX to the EEA Agreement at point 7a.³

12. Article 1(2) of the Directive reads:

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.

13. 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.

³ 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 on 1 July 1994.

14. 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.

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.

15. 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.

16. 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).

17. 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.

18. 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

19. 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.

20. 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.

21. Pursuant to the second paragraph of Article 36, in any assessment made under paragraph 1 of that Article, 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.

22. 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).

23. 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.

24. 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).

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

26. 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

27. 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 currently in force in respect of indexation. 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.

28. 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.

29. 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 that do not measure changes in general price levels.

30. 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

31. 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.

32. 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.

33. 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 by the nature of the case.

34. 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 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 date on which the loan is furnished, 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.

Act No 12/1995

35. 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 from a base determined by Statistics Iceland based on 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 is tasked with advising Statistics Iceland about the CPI and with monitoring its monthly calculations, cf. paragraph 2 of Article 1 of Act No 12/1995.

Act No 121/1994

36. At the time when the credit agreement at issue was concluded, Act No 121/1994 on Consumer Credit was in force. The Act transposed Directive 87/102/EEC into Icelandic law. On 1 November 2013, it was replaced by Act No 33/2013, which implements Directive 2008/48/EC.

37. Article 5 of the Act requires credit agreements to be made in writing and to contain the information described in Articles 6-8. This includes the principal, i.e. the credit granted without any charges (Article 6(1)), the rate of interest (Article 6(3)), the total cost of the credit calculated in accordance with Article 7 (Article 6(4)), 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 10-12 (Article 6(5)), as well as the total amount to be repaid (Article 6(6)), the number of payments, amounts and payment dates (Article 6(7)), and the validity and conditions of termination (Article 6(8)). The second paragraph of Article 6 further states that, where charges, repayments or other credit terms can be amended during the contract period, the consumer must be informed of the conditions surrounding such amendments.

38. Article 7 goes on to define the total cost of the credit, while Article 9 states that, although the 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”.

39. Articles 10-12 then lay down more detailed provisions concerning the calculation of the APR. APR is defined 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 10), and it is to be calculated at the time the agreement is concluded (Article 11).

40. 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.

III Facts and procedure

41. By letter of 17 December 2013 registered at the EFTA 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.

42. On 19 November 2008, the Plaintiff took out a loan of ISK 630,000 from the Defendant in return for the issue of a bond, which contained standardised contractual terms. Its header stated that it is a “Bond with *in solidum* personal guarantee – loan to an individual”, and that the bond was indexed, with a variable interest rate and equal repayment instalments. It also defined the overall loan period, the number of instalments and the index base.

43. According to the first paragraph of the main text of the bond, the loan was to be repaid in equal payments of the principal and of interest (i.e. the instalment and the interest were to be the same sum unless the interest rate changed). It went on to state that “for indexation purposes, the loan is linked to the consumer price index 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 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.”

44. The bond was accompanied by a repayment schedule signed by both parties on 20 November 2008. It set out 64 due dates of the bond, with information about the individual instalments, broken down into an instalment on the principal, interest and costs, as well as a calculation of the outstanding balance. Finally, 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).”

45. The repayment burden of the loan turned out to be considerably higher than was indicated in the repayment schedule, even though the variable interest rate fell after the first instalments were paid. It is assumed that the rise in the repayment figures was caused by the index-linked revision of the loan on each due date, which resulted in both the principal and the interest increasing to more than the figures set out in the repayment schedule.

46. The Plaintiff then brought proceedings against the Defendant before Reykjavík District Court. In the view of Reykjavík District Court, there is doubt about the interpretation of Article 12 of Act 121/1994 and about whether, when calculating the total cost of credit to the consumer, it is permissible to completely ignore the inflation rate as it is at the time when the loan is negotiated, but to assume instead an inflation rate of 0%. In light of all the above, the District Court found it appropriate to seek an Advisory Opinion from the Court.

IV Questions referred

47. Reykjavík District Court referred the following questions to the Court:

- 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?**

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 Bragi Dór Hafþórsson, District Court Attorney, acting as Counsel, and Björn Þorri Viktorsson, Supreme Court Attorney, acting as Co-Counsel;
- the Defendant, represented by Hulda Árnadóttir, District Court Attorney, as Lead Counsel, and Helgi Þór Þorsteinsson, District Court Attorney, as Co-Counsel;
- 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 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 “the Commission”), represented by Marta Owsiany-Hornung and Nicola Yerrell, Members of the Legal Service, acting as Agents.

VI Summary of the arguments submitted

The Plaintiff

49. The Plaintiff argues that it follows from the judgment in *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o* that a commercial practice that consists of indicating in a credit agreement an annual percentage rate of charge lower than the real rate must be regarded as misleading within the meaning of Article 6(1) of Directive 2005/29/EC insofar as it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.⁴

50. The Plaintiff is of the view that the European “fairness test” should, when the protection of consumers is at stake, apply to both private and public practices anchored in domestic legislation.

51. With respect to the specific situation in Iceland, the Plaintiff submits that indexation clauses are never individually negotiated between the parties, and that the method of calculation of the cost of credit is never explicitly described, while the indexation to inflation is usually referred to in just two standard sentences.

The first question

52. With reference to case law, the Plaintiff submits that it is of major importance to the consumer, prior to or at the time he enters into the contract, to be duly informed of all the factors that can have a bearing on the implications of his undertaking.⁵

⁴ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS*, judgment of 15 March 2012, published electronically, paragraph 47.

⁵ Case C-76/10 *Photovost*, Order of the Court, [2010] ECR I-11557, paragraph 68; Case C-226/12 *Construtoria Principado SA v José Ignacio Menéndez Álvarez*, judgment of 16 January 2014, published electronically, paragraph 26.

53. The Plaintiff submits that, at the time of the calculation of the APR, the change in the CPI that would affect the first payment of the loan was known to the Defendant. The effect the indexation of the capital and interest has on the calculation of the APR and the total cost of the credit is enormous. After only four months, a cost of credit of 6.1% has been added to the capital.

54. The Plaintiff further argues that the repayment schedule accompanying the bond does not mention the effect of changes in the CPI on the total amount to be paid. On the contrary, it states that “the total amount to be paid, based on an unchanged interest rate”, is said to be ISK 847,454. The Plaintiff therefore argues that this practice must be considered to be misleading and opaque.

55. The Plaintiff further argues that Article 1a(6) of Directive 87/102/EEC, interpreted in conjunction with Article 4(2)(b), cannot be interpreted as allowing the APR and the total cost of credit to be calculated on the assumption that inflation will be 0% throughout the lifetime of the loan. The Defendant’s method of calculation of the cost of the credit and the APR 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.

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

It is not compatible with the provisions of Council Directive 87/102/EEC, 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.

The second question

57. The Plaintiff submits that Directive 93/13/EEC does not, as such, preclude a price-indexation clause. This is illustrated by Article 3(3) read together with the Annex of that directive. Although the Annex is purely indicative, point 1(1), read together with point 2(d), confirms that a price indexation clause may be permitted on condition that the method by which prices may vary is explicitly described.

58. The Plaintiff submits that the CPI price-indexation clause cannot be regarded as reflecting a “mandatory statutory or regulatory provision” within the meaning of Article 1(2) of Directive 93/13/EEC and therefore be excluded from the Directive’s scope. In Iceland, the inclusion of a price indexation clause remains merely a possibility, but it is not compulsory. Article 14 of Act No 38/2001 allows for a variety of indexes to be used

in connection with a loan agreement. Thus, the Plaintiff submits that the CPI indexation cannot be considered a mandatory provision within the meaning of Article 1(2) of the Directive.

59. With reference to case law, the Plaintiff submits that the price indexation term in the bond and in the repayment schedule should have referred to any legislative or regulatory act determining the rights and obligations of the parties.⁶

60. The Plaintiff also submits that it follows from case law that, if a Member State extends the scope of a directive, such provisions must be interpreted uniformly.⁷

61. The Plaintiff finally notes that the Defendant has not fulfilled its obligations to calculate and disclose the cost of credit to the Plaintiff, which results in an unfair term under Directive 93/13/EEC.

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

Directive 93/13/EEC does not prohibit provisions in contracts between consumers and suppliers for loans that link repayments of the loan to a pre-determined index, if the method by which prices vary is explicitly described in the consumer credit contract.

The third question

63. The Plaintiff submits that the third question should be answered in the negative, simply because Directive 93/13/EEC cannot have a bearing on the methods or factors determining the CPI, although point 2(d) of the Annex states that, in order to be considered fair, a term of a contract providing for indexation should explicitly describe the method by which prices vary.

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

The provisions of Directive 93/13/EEC do not limit the discretion of EEA states to determine the factors causing changes to a pre-determined index such as Icelandic CPI or the methods by which it is measured.

⁶ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, judgment of 21 March 2013, published electronically, paragraph 50; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*, judgment of 26 April 2012, published electronically, paragraph 29.

⁷ Case C-28/95 *Leur-Bloem* [1997] ECR I-04161, paragraph 27; Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28; and Case C-602/10 *Volksbank Romania*, judgment of 12 July 2012, published electronically, paragraph 87.

The fourth question

65. As a preliminary point, the Plaintiff notes that this question is to be answered by the national court, taking into account all the circumstances. However, pursuant to the wording of Article 3(2) of the Directive, a term must not be regarded as 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.

66. The Plaintiff submits that Reykjavik District Court has indicated in its request that the bond contained standardised contractual terms and was drafted by the Defendant's employees. If the Defendant nevertheless argues that the term in question was individually negotiated, the burden of proof in this respect would be rest with him pursuant to the third subparagraph of Article 3(2) of Directive 93/13/EEC.

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

An answer to the question should be that it is for the national court to assess the matter, taking into account all the circumstances.

The fifth question

68. The Plaintiff submits that, when assessing whether the price indexation has been explicitly described, account must be taken not only of the factors listed in Articles 3 and 4 of Directive 93/13/EEC, but also of the transparency requirements laid down in Article 5 of the Directive.

69. The Plaintiff submits that it is of fundamental importance that it is possible for the consumer to foresee, on the basis of clear, intelligible criteria, the changes that are likely to occur 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. The Plaintiff adds that the information given to him was opaque and not transparent.

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

It is for the national court to establish whether a contract term relating to the indexation of repayment instalments and interest of a consumer credit loan contract is to be regarded as having been explicitly and comprehensibly explained to the consumer. Such assessment should take into account the precise wording of the relevant contract term and how the contract fulfils the obligation of transparency as set out in Directive 87/102/EEC.

The sixth question

71. The Plaintiff submits that it follows expressly from the wording of Article 6(1) of Directive 93/13/EEC that unfair terms in a consumer contract shall not be binding on the consumer. That conclusion can be drawn from the findings in *Banco Español de Credito*.⁸

72. It also follows from that judgment that Article 7(1) of Directive 93/13 requires Member States to provide for adequate and effective means of preventing the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. Moreover, it is found in that decision that, if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13.⁹

73. The Plaintiff therefore suggests that the sixth question be answered as follows:

Article 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term.

The Defendant

74. The Defendant notes that the questions referred to the Court relate to the treatment of Icelandic mandatory rules regarding indexation. As such, the Defendant submits, the indexation system and legislation relating thereto fall entirely outside the scope of the EEA Agreement on the basis of Article 125 EEA.

75. The Defendant argues that Annex XIX, and the EEA Acts falling thereunder, are not intended to address issues relating to economic policy or financial stability. As such, the Defendant submits, the EEA Acts cannot be considered to be related to or restrict a Member State's authority to regulate such issues on its own. With reference to the EFTA Court's case law, the Defendant submits that the EEA States enjoy a wide margin of discretion when making fundamental choices of economic policy.¹⁰

76. In light of the above, the Defendant suggests that the Court answer all of the referred questions in the following manner:

⁸ Reference is made to Case C-618/10 *Banco Español de Credito*, judgment of 14 June 2012, published electronically, paragraphs 62 to 63.

⁹ Reference is made to *Banco Español de Credito*, cited above, paragraphs 68 to 69.

¹⁰ Reference is made to Case E-16/11 *EFTA Surveillance Authority v Iceland* [2013] EFTA Ct. Rep. 5, paragraph 227.

The Icelandic system of price indexation, and legislation and rules relating thereto, was implemented in response to a financial crisis in Iceland resulting from a rapid rise in inflation. The system is a tool designed by the Icelandic legislature and the Central Bank of Iceland to ensure domestic economic and financial stability and seeks to preserve the current and future value of property, in the form of capital, when affected by inflation. As such, the indexation system, and legislation relating thereto, does not fall within the ambit of the EEA Agreement and cannot be addressed by the EFTA Court.

77. Should the Court conclude that the subject matter of the questions referred to it falls within the ambit of the EEA Agreement and EEA law in general, the Defendant wishes to submit observations on the referred questions.

The first question

78. The Defendant submits that Directive 87/102/EEC only provides for minimum harmonisation of the provisions of national law relating to consumer credit.

79. Since loan indexation is not governed by Directive 87/102/EEC, and in the absence of any other EEA legislation concerning the treatment of indexation in consumer credit agreements, it is for the Member States to establish rules in that field.¹¹

80. The Defendant suggests that the Court answer the first question as follows:

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, does not, according to its substance, apply to indexation of credit agreements. As such, the authorization and implementation of such indexation, including the manner in which such indexation is presented to a consumer creditor, is an issue to be decided by national law.

81. In the event that the Court does not conclude that the first question falls entirely outside the scope of Directive 87/102/EEC, the Defendant submits that the national legislature was not prohibited from enacting specific legislation providing for an assumption of 0% inflation when calculating the annual percentage rate of charge pursuant to Article 1a(6) of that Directive.

82. The Defendant, alternatively, proposes that the first question be answered as follows:

¹¹ Case C-470/12 *Pohotovost's. r. o. v Miroslav Vasuta*, judgment of 27 February 2014, published electronically, paragraph 46.

Council Directive 87/102/EEC on consumer credit, as amended by Directive 90/88/EEC and Directive 98/7/EC, does not prohibit the enactment of national legislation providing for the method in which indexation is treated for the purposes of calculating the total cost of the credit and of the annual percentage rate of charge, shown to the consumer when the agreement is made.

Second to sixth questions

Scope of Directive 93/13/EEC

83. Firstly, the Defendant submits that the Directive provides for harmonised secondary EEA legislation with regard to the terms used in consumer contracts.

84. 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 excluded from the provisions of the Directive. Pursuant to the 13th recital of the Directive, 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. The Defendant notes, in this regard, that the ECJ has considered this exclusion justified, since it may legitimately be supposed that the national legislature has struck a balance between all the rights and obligations of the parties to certain contracts.¹² The ECJ has further stated that contractual terms are excluded from the scope of that directive if they reflect provisions of national legislation governing a certain category of contracts, not only if the contract concluded by the parties is within that category, but also with respect to other contracts to which that legislation applies pursuant to national law.¹³

85. The Defendant submits that the indexation of credit agreements is not mandatory under Icelandic law. However, should the parties agree on an indexed loan, the execution of the indexation provision in the agreement is mandatorily provided for by law. Thus, the indexation provision clearly reflects mandatory and regulatory provisions of national law and, as such, falls outside the scope of the Directive.

86. Secondly, the Defendant notes that it is for the national court to decide whether the indexation provision in the parties' agreement can be considered to reflect mandatory or statutory regulatory provisions of national law.

87. In light of the above, the Defendant suggests that the Court answer questions 2 to 6 as follows:

¹² Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 28.

¹³ Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 27; reference is made to AG Trstenjak's Opinion in *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 50.

The scope of Directive 93/13/EC on unfair terms in consumer contracts does not extend to contractual terms which reflect mandatory [statutory] or regulatory provisions of national law such as those applying to the parties' dispute in the main proceedings.

88. In the alternative to the submissions made above, the Defendant submits observations on each specific question.

The second question

89. The Defendant submits that the Directive is generally intended to safeguard citizens in their role as consumers, when acquiring goods and services under contracts, against the abuse of power by the seller or supplier.

90. The Defendant argues that statutory provisions of national law that directly or indirectly determine the terms of consumer contracts are presumed not to result in unfair terms, as it may be legitimately supposed that the national legislature has already balanced the rights and obligations of the contracting parties.¹⁴ As such, any national legislation permitting certain provisions in consumer contracts will be deemed not to be unfair. Moreover, it is for the national court to decide whether the term at issue is of an unfair nature or not.¹⁵

91. Without prejudice to the above, the Defendant notes that Articles 3(1) and 4(1) of the Directive contain certain criteria for whether contractual terms can be considered unfair. Subparagraph 1 of paragraph (1) of the Annex to the Directive does not apply to the bond, and, pursuant to paragraph 2(d) of the Annex, subparagraph (1) of paragraph (1) of the Annex does not preclude price-indexation terms, where lawful, provided that the method by which prices vary is explicitly described.

92. The Defendant also notes that Directive 2008/48/EC specifically provides for the indexation of credit agreements affecting the borrowing rate.

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

Legislation in an EEA State permitting the inclusion of provisions in consumer contracts, stating that repayment of the loan are to be linked to a predetermined index is compatible with the provisions of Council Directive 93/13/EEC of 5 April 1983 on unfair terms in consumer contracts. Whether such provisions would be

¹⁴ Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 28.

¹⁵ Case C-478/99 *Commission v Sweden* [2002] ECR I-4147, paragraph 11; Case C-226/12 *Constructora Principado S.A.*, cited above, paragraph 20.

considered unfair in the meaning of Article 3(1) of the Directive is an assessment to be made solely by the national court.

The third question

94. The Defendant submits that Article 1(2) of the Directive specifically excludes contractual terms that reflect mandatory and regulatory provisions. The Defendant adds that the Directive, with its limited material scope, cannot be considered to have any effect on the latitude of Member States to enact national legislation relating to factors affecting the calculation and the measurement of indexation. The Directive does not limit the latitude of the national legislature of an EEA Member State to determine the factors that are to cause changes in the predetermined index and the methods by which these changes are to be measured.

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

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not limit the latitude of the EEA State in question to determine, through legislation or by means of administrative regulation, the factors that are to cause changes in the predetermined index and the methods by which these changes are measured.

The fourth question

96. The Defendant submits that the national court must determine whether a contractual term is deemed to be individually negotiated, based on the clear criteria set out in Article 3(2) of the Directive. The Defendant notes, in this respect, that the contractual terms at issue complied with the Icelandic law on indexation and that an obligation to negotiate contractual terms individually does not exist under Icelandic law. Article 36 of Act No 7/1936 does not limit the unfairness review to contractual terms that have been individually negotiated.

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

The issue of whether a particular contractual term can be considered individually negotiated, in the sense that whether it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term is an issue which is solely for the referring court to determine.

The fifth question

98. The Defendant submits that it is not necessary to implement the Annex to Directive 93/13/EEC into national law since it does not give the consumer an independent right over and above what is provided for in the Directive itself. However,

the Annex shall be taken into consideration when interpreting the provisions of the Directive. As such, the mere fact that a contractual term had not been explicitly explained to the consumer would not automatically result in such term being considered unfair.

99. The Defendant notes that it is for the referring court to determine whether the indexation clause had been explicitly explained to the consumer and whether the clause would be deemed unfair.¹⁶ The general criteria for that fairness test are set out in Articles 3(1) and 4(1) of the Directive.¹⁷

100. The Defendant submits that the jurisdiction of the EFTA Court only extends to the interpretation of the provisions of the applicable directives and to the criteria that the referring court may or must apply when examining a contractual term in light of those provisions.¹⁸

101. Without prejudice to the above, the Defendant submits that, in Iceland, price indexation has been common practice in loan agreements for a long period of time, and that the Plaintiff therefore has to be considered as a reasonably well-informed and reasonably observant and circumspect consumer.¹⁹

102. The Defendant notes that the price-indexation clause in the bond was set out in a clear and concise manner and that the repayment schedule clearly stipulated that the estimate was based on the assumption of 0% inflation, as provided for by law, which might change, as outlined in the terms of the bond.

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

The issue of whether a particular contractual term can be considered explicitly explained is an issue for the referring court to rule on.

The sixth question

104. The Defendant submits that Member States must be considered to have discretion as to how the provisions of Article 6(1) of Directive 93/13/EEC are implemented, insofar as national courts are vested with the authority to invalidate unfair contractual terms.

¹⁶ Reference is made to *Constructora Principado*, cited above, paragraph 20.

¹⁷ Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I-0475, para 33; Case C-478/99 *Commission of the European Communities v the Kingdom of Sweden* [2002] ECR I-04147, para 11 and 17; Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Cp. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-03403, para 18-19, 21.

¹⁸ Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 48.

¹⁹ Case C-356/04, *Lidl v Colruyt* [2006], ECR I-08501, paragraph 78.

105. The Defendant submits that Article 6 of the Directive requires Member States to take the necessary measures to ensure that unfair terms in a contract concluded with a consumer by a seller or supplier are not binding on the consumer. With reference to case law and to Article 7 EEA, the Defendant notes that the authorities of the Member States have a choice as regards the form and method of implementation.²⁰ In this regard, the Defendant submits that, while it is sufficient to grant a court power to annul unfair contractual terms, the national court must exercise that power in relation to contractual terms that it finds to be unfair pursuant to the Directive.²¹

106. The Defendant submits that Article 36 of Act No 7/1936 actually has a wider scope than contemplated by Directive 93/13/EEC, in that it even applies to contractual terms that have been individually negotiated. It is therefore clear, in the Defendant's view, that the national courts have the power to annul unfair contractual terms. The Defendant further submits that, in cases where contractual terms fall within the scope of Directive 93/13/EEC and the national court finds that such terms are unfair, the national court will be obliged to exercise its power to ensure that the consumer is not bound by the unfair provisions.

107. The Defendant submits that the answer to the sixth question should be as follows:

A Member State of the EEA Agreement has discretion in the implementation of national legislation regarding the annulment of unfair contract terms, insofar as the courts are granted power to annul such contract terms and find them non-binding on the consumer.

The Government of Iceland

The first question

108. The Government of Iceland understands the first question as asking whether calculating the APR and total cost of a loan indexed to the consumer price index based on 0% inflation is necessarily incompatible with Directive 87/102/EEC.

109. The Government of Iceland submits that indexation is a key feature of the Icelandic economy, and that it must therefore be assumed that consumers in the Icelandic market understand the key characteristics of an indexed loan, namely that the agreement is to repay the real value plus interest, but that the nominal amounts payable can increase or decrease with inflation, and that, in return, the rate of interest is lower than on a non-indexed loan.

²⁰ Case C-550/07 P *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v the Commission*, [2007] ECR 11-3523, paragraph 113.

²¹ Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, judgment of 30 May 2013, published electronically, paragraph 51.

110. The Government of Iceland submits that Directive 87/102/EEC did not explicitly mention the indexation of loans in any form. Thus, the Directive did not explicitly require that changes in the nominal amount or repayments as a result of indexation be taken into account when calculating the total cost of credit and the APR, and nor did it explicitly require the APR to be a nominal APR rather than the real APR. Accordingly, it cannot be concluded that Directive 87/102/EEC required the calculation of a nominal APR in respect of indexed loans (based on current inflation rates) rather than the calculation of the real APR.

111. With reference to Articles 4(2), 6(1), 1a(6) of Directive 87/102/EEC and the Commission's Staff Working Document on Directive 2008/48/EC, the Government of Iceland submits that future costs that are uncertain and cannot be estimated with a reasonable degree of certainty should be disregarded. Accordingly, even if, notwithstanding the above, Directive 87/102/EEC were to require the APR and the total cost of credit to be calculated on a nominal basis, the effects of inflation should not be included in the APR or the total cost of credit.

112. The Government of Iceland further submits that the purpose of the requirements in Directive 87/102/EEC, namely to inform the consumer of the total cost of credit, is to protect the consumer by enabling him/her to assess the extent of his/her liability.²² If the consumer is provided with the real APR rather than the nominal APR, the consumer is in a better position to make a rational, informed choice based on his/her known current income and the value of his/her assets.

113. Furthermore, the Government of Iceland submits that, if the nominal APR 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 APR is calculated, it would most certainly not reflect the actual nominal APR or cost of credit that would be payable, since the actual average rate of inflation over the duration of the loan would be unlikely to be the same as the spot rate of inflation when the APR was calculated. If the nominal APR was calculated at a time of deflation, the nominal APR and costs of credit could, instead, mislead the consumer by causing him or her to believe that the real rate of interest on the loan is lower than the actual real rate of interest. It could also make it more difficult for consumers to compare offers of credit.

114. Finally, the Government of Iceland requests the Court, in the event that it decides that it was incompatible with Directive 87/102/EEC for the APR and the total cost of credit for indexed loans to be calculated on a real basis rather than on the basis of the known rate of inflation on the day the loan was taken out, to limit the temporal effects of

²² Reference is made to Case C-264/102 *Cofnoga Merignac SA v Sylvain Sachithanathan*, ECR I-02157, paragraph 26.

its judgment in line with the principles developed by the ECJ.²³ Both the criteria for the limitation of the temporal effects of a decision, namely that those concerned must have acted in good faith and that, secondly, there must be a risk of serious difficulties, are satisfied in the case at hand.²⁴

115. In this regard, the Government of Iceland submits that it is clear from the above that, objectively, it is not legally certain that, in a situation where a consumer took out an indexed loan, Directive 87/102/EEC required the provision of the nominal APR based on the rate of inflation at the time the loan was taken out. The Government of Iceland further submits that ESA may have contributed to uncertainty by not taking issue with Iceland's implementation of Directive 87/102/EEC. Nor did it commence proceedings against Iceland in this regard.

116. With respect to the second condition and with reference to case law, the Government of Iceland submits that there would be a risk of significant and serious economic repercussions if it were incompatible with Directive 87/102/EEC for borrowers to be provided with a real APR and the total cost of credit.²⁵ In particular, the Government of Iceland raises concerns about retroactive reimbursement and recalculation, which would have serious economic effects on Iceland's financial markets and institutions.

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

It is 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 a credit agreement indexed, in accordance with national law, to the consumer price index bases the calculation of the total cost of the credit and the annual percentage rate of charge on 0% inflation and not on the current rate of inflation on the date the loan is taken.

The second question

118. The Government of Iceland understands the second question as asking, in the abstract, whether national legislation that permits contracts between consumers and

²³ Reference is made to Case 43/75 *Gabrielle Defrenne v Societe anonyme belge de navigation aeriennne Sabena* [1976] ECR 455.

²⁴ Reference is made to Case C-525/11 *Mednis SLA v Valsts ieņēmumu dienests*, published electronically, paragraphs 42-43; Case C-24/86 *Vincent Blaizot v University of Liege and others* [1988] ECR 379, paragraph 28.

²⁵ Reference is made to Case C-308/93 *Bestuur van de Sociale Verzekeringsbank v M. Cabanis-Issarte* [1996] ECR I-02097, paragraphs 47-48; Case C-163/90 *Administration des Douanes et Droits Indirects v Leopold Legros and others* [1992] ECR I-04625, paragraphs 32 and 34; Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co. HandelsgesmbH v Oberosterreichische Landesregierung* [2000] ECR I-01157, paragraph 59; *Vincent Blaizot v University of Liege a. o.*, cited above, paragraph 43.

suppliers to contain provisions stating that instalment repayments are to be linked to a predetermined index is necessarily incompatible with the Directive.

119. 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 that reflect applicable provisions of national legislation.²⁶ 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.²⁷ The same recital clarifies that the wording “mandatory or regulatory provisions” extends to derogable default contractual provisions.

120. 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.²⁸

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

122. The Icelandic Government submits that it is not stated in the Directive that a category of terms shall automatically be considered unfair *per se*. Nor is any category of contractual terms banned as such; instead, it is for the competent national authority to assess the terms at issue.²⁹ 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.

123. 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 several times by the Iceland Parliament, which has repeatedly determined that loan

²⁶ 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.

²⁷ 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.*, published electronically, points 42 to 43.

²⁸ Reference is made to Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, cited above, paragraph 33.

²⁹ 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.

agreements, including consumer loans, may be linked to the consumer price index. The provisions of the Interest and Indexation Act 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 promoting 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 have been struck between the interests of various parties to loan contracts and the terms that may be included in such contracts. Moreover, the Icelandic Government contends that, over time, real interest rates on indexed loans are generally lower than those on non-indexed loans, which has also been the case in Iceland.

124. The Icelandic Government also argues that, in any event, price-indexation terms are not, by their nature, incompatible with the Directive.³⁰

125. The Government of Iceland submits that the answer to the second 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 third question

126. The Government of Iceland submits that the Directive does not impose any limits on an EEA State determining, through national legislation, the factors that may cause changes in a predetermined index such 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.

127. Moreover, the national law referred to in the question from 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.

128. 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 methods 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.

³⁰ Reference is made to paragraphs 2(c) and 2(d) of the Annex to the Directive.

129. 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. Moreover, even if the Directive could limit that discretion, the Government of Iceland 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.

130. The Government of Iceland submits that the answer to the third 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 fourth question

131. 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. Whether or not an indexation clause is individually negotiated within the meaning of the Directive cannot affect its validity under Icelandic law.

132. 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.³¹

133. Without prejudice to the above, and to the extent that 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, it is for the national court to assess, pursuant to Article 4(1) of the Directive, whether that term is actually unfair, having regard to all the circumstances.

134. 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.

³¹ Reference is made to Case E-6/96 *Tore Wilhelmsen AS v Oslo kommune* [1997] EFTA Ct. Rep. 64, paragraph 40.

The fifth question

135. The Icelandic Government refers to its observations referred to in paragraphs 131 to 132 above and submits that, as a matter of Icelandic law, the question is hypothetical.

136. 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 the 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 period of repayment of the credit and that it is not reduced by inflation during that period. The indexation of a loan principal therefore fulfils the same function, albeit in a different manner, as a component of the interest charged for the granting of credit in respect of a non-indexed loan, and it 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.

137. If, the Government of Iceland continues, the Court, notwithstanding all the above, were to find the question admissible and that paragraph 2(d) of the Annex to the Directive applies 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 is publicly available. A reference was made to the base index on the date the loan was taken out, and a payment schedule was provided that contained an illustrative example of estimated payments based on a given set of presumptions. In the Icelandic Government's view, however, 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.

138. The Government of Iceland submits that the answer to the fifth 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 sixth question

139. The Icelandic Government submits that Article 6 of the Directive requires EEA States to take the necessary measures to ensure that unfair terms in a contract concluded

with a consumer by a seller or supplier are not binding on the consumer.³² Moreover, provided that unfair terms are not binding on the consumer, EEA States have autonomy to decide the legal arrangements applicable to unfair terms.

140. 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.³³ Accordingly, it is sufficient for a State to empower its national courts 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.³⁴

141. 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.

142. 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 empowers them to do so.

143. The Government of Iceland submits that the answer to the sixth 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.

³² Reference is made to *Commission v Sweden*, cited above, paragraph 16.

³³ Reference is made to Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, paragraph 24.

³⁴ Reference is made to Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, cited above, paragraphs 11 and 51.

The EFTA Surveillance Authority

The first question

Applicability of Directive 87/102/EEC

144. ESA notes that the information set out in the Request raises no particular doubts that Directive 87/102/EEC applies to the main proceedings *ratione temporis* and *ratione materiae*.

145. In ESA's view, the price indexation of the principal of a consumer credit constitutes a separate charge that, in principle, must be reflected in the APR, since the APR is designed to represent the total cost of the credit to the consumer.

146. ESA further notes that the fact that the present case does not concern a credit for a real estate transaction distinguishes it from the situation in pending case E-25/13 *Engilbertsson*.

147. ESA submits that the dual aim of Directive 87/102/EEC was to ensure both the creation of a common market in consumer credit and the protection of consumers who avail themselves of a credit. Thus, at the time the credit agreement is entered into, the consumer should receive adequate and comprehensive information in writing about the conditions and cost of any credit offered to him, as follows in more detail from Article 4 of Directive 87/102/EEC, as well as from case law.

148. ESA submits that it is for the national court, in the main proceedings, to establish and appraise whether the Defendant has lived up to its obligations.

Calculation of the APR

149. ESA notes that it remains for the national court to decide whether the method used by the Defendant to calculate the APR was incompatible with Directive 87/102/EEC.

150. ESA submits that it follows from case law that it is of critical importance to inform the consumer of the total cost of credit calculated and expressed by means of the APR according to a single mathematical formula.³⁵

151. ESA submits that an "average consumer", who is reasonably well-informed and reasonably observant and circumspect, would expect an APR for a consumer credit that is

³⁵ Reference is made to *Cofnoga Merignac*, cited above, paragraph 26.

indexed to national inflation in Iceland to be calculated on the basis of a certain assumption about what that inflation rate might be in the future.³⁶

152. However, taking into account the economic situation in Iceland at the time when the contract at issue was concluded, ESA submits that it has difficulty envisaging that an average consumer would expect that this forecast for the rate of inflation would amount to zero. In ESA's view, such a calculation 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 Directive 87/102/EEC, but which refers more clearly to the initial level of the relevant rate and charges than Article 1a(6) of Directive 87/102/EEC.

153. According to the Commission Staff Working Document on the application of Directive 2008/48/EC, the assumptions made when calculating the APR are intended to ensure that the APR is calculated in a consistent way to promote the comparability of different offers.³⁷

154. By reference to recital 2 of Directive 90/88/EEC,³⁸ ESA argues that only consistency across the EEA as regards the calculation of the APR enables consumers to compare different offers from different operators.

155. ESA submits that Directive 87/102/EEC requires creditors to provide consumers with adequate information in order to give them a fair idea of the costs of the credit, even if the total costs of that credit are subject to future changes that can only be predicted.

156. ESA further submits that different methods of calculation may be permissible, but that the test must be that, where the total cost of the credit cannot be strictly calculated, any estimate thereof must be based on realistic assumptions.

157. Finally, ESA notes that it is for the national court to assess whether the Plaintiff in the main proceedings has been provided with sufficient information about the APR for the loan at the time when the contract was signed to be able to form a fair idea of the total costs of the loan. It follows from the request that both the bond and the repayment schedule contain information about the conditions and the cost of credit, including explanations that the principal of the debt will be revised in proportion to changes in the CPI before the interest and the instalment on the debt are calculated, and also that the repayment schedule was an estimate based on 0% inflation, which may change.

³⁶ Reference is made to *Lidl v Colruyt*, cited above, paragraph 78.

³⁷ Commission Staff Working Document: Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to the costs and the Annual Percentage Rate of charge (SWD (2012) 128 final) .

³⁸ Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 061, 10/03/1990 pp. 14-18 .

Right to pursue remedies

158. ESA notes that, if the national court were to find that the method used by the Defendant to calculate the total cost of the credit is precluded by Directive 87/102/EEC, it would then have to address possible remedies for such an infringement on its own motion.³⁹

159. ESA submits that, in the absence of specific EEA rules governing remedies, it is for the domestic system of the EEA states to regulate the legal procedure for safeguarding the rights which individuals derive from EEA law. Such procedures must respect the principles of equivalence and effectiveness.⁴⁰

160. ESA argues that Article 14 of Directive 87/102/EEC requires EEA States to ensure that credit agreements do not derogate, to the detriment of the consumer, from the provision of national law that implements the provision of the Directive, and to also ensure that the provisions that are adopted in implementation of the Directive are not circumvented as a result of the way in which agreements are formulated.

161. 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.⁴¹

162. Finally, ESA submits, however, that it is for the national court to apply the relevant remedies provided for under national legislation in the event that it decides that the Plaintiff has not received adequate information about the consumer loan.

163. In light of the above, ESA suggests that the answer to the first question should be as follows:

It is in principle incompatible with the provisions of Council Directive 87/102/EEC on consumer credit to base a repayment schedule accompanying a credit agreement on a hypothetical inflation rate of 0%, with the effect that the total costs of the credit appear to be significantly lower than those calculated on realistic assumptions as regards future inflation.

It is however for the national court to assess, taking into account all the relevant facts of the case, whether information such as that provided by the creditor to the consumer at the time when the contract was signed in situations such as in the

³⁹ Reference is made to Case C-429/05 *Rampion* [2007] ECR I-08017, paragraphs 60 to 63.

⁴⁰ Reference is made to Case C-91/08 *Wall* [2010] ECR I-02815, paragraph 64.

⁴¹ Reference is made to *Rampion*, cited above, paragraph 63; Case C-503/04 *Commission v Germany* [2007] ECR I-6183, paragraphs 28 to 30.

main proceedings satisfies the conditions set out in Council Directive 87/102/EEC on consumer credit, in particular as regards the total cost of the credit as expressed by the annual percentage rate of charge ("APR").

Where the national court finds that such is not the case, it is for the national court to take, on its own motion, appropriate measures under the national legal order to remedy the infringement.

Second to sixth questions

Applicability of Directive 93/13/EEC

164. ESA contends that the scope of the Directive has not been addressed in the questions referred to the Court, despite the fact that the Defendant has referred to the fact that it is clear from the preamble to Directive 93/13/EEC that it does not apply to contract terms that follow from law or regulatory provisions.

165. ESA submits that the aim of Directive 93/13/EEC is to address the behaviour of private operators as sellers of goods or suppliers 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. It is not the aim of the Directive to influence statutory or regulatory provisions that regulate contract terms under certain circumstances. Pursuant to the 13th recital 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.

166. As regards the indexation of consumer loans 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.

167. 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.⁴² 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

⁴² Reference is made to *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, cited above, paragraphs 32 to 34.

the consumer. In the case of a clause that must be included, the interests of the weaker contracting party must be presumed to have been taken into account by the national legislature. 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 has had no influence on the content of the stipulation.

168. ESA submits that it follows from case law⁴³ 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 it argues that this applies to the terms at issue.

169. On the basis of the above, ESA contends that the terms of bonds and payment schedules, such as those 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 referred questions. ESA submits that this conclusion is not altered by the judgment of the ECJ in NFH,⁴⁴ where the situation that gave rise to those proceedings concerned the assessment of whether a contract term should be considered unfair within the meaning of Article 3 of Directive 93/13/EC, rather than the issue of the scope of that Directive.

170. ESA suggests, therefore, that the answer to the second to sixth 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 consumer loans.

The second question

171. In the alternative to the submissions made above and for the sake of good order, ESA submits observations on the second to sixth questions referred by the national court.

172. 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.⁴⁵

⁴³ 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.

⁴⁴ *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*, cited above, paragraph 29.

⁴⁵ 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-

173. 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-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 gave the consumer at the time when the contract was concluded.

174. ESA submits that the two conditions in paragraph 2(d) of the Annex to the Directive are fulfilled. Firstly, the conclusion of price-indexation clauses is explicitly permitted pursuant to Chapter VI of Act No 38/2001 and Rules No 492/2001. Secondly, it follows from the information given by the national court in its referral that it is specifically explained in the bond that the principal of the debt will be revised in proportion to changes in the CPI on each due date before the interest and the instalment to be paid are calculated.

175. ESA therefore suggests that the answer to the second question 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 third question

176. ESA argues that paragraph 2(d) of the Annex to the Directive only requires that the method of calculation for the price indexation be 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.

177. 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.

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*, cited above, 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, published electronically, paragraph 22 and case law cited.

178. 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.

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

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 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 fourth question

180. ESA submits that, in principle, 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.⁴⁶ However, the Court can provide guidance concerning when contractual terms may be considered to have been individually negotiated.

181. ESA submits that it is difficult to see the relevance of that question in the context of the present case. According to the Request for an advisory opinion, there is no dispute about the facts of the case and the bond at issue contained standardised contractual terms and was drafted by the Defendant's employees. Consequently, the parties agree that it has not been individually negotiated.

182. Moreover, as noted in its 2001 Report on the Application of Directive 93/13/EEC,⁴⁷ 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.

183. As regards letter (a) of the question, ESA submits that no contracting parties could have individually negotiated the base index or its calculation, 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.

⁴⁶ 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.

⁴⁷ 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>.

184. As regards letter (b) of the question, ESA submits that the fact that the bond was 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 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.

185. 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.

186. 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 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 fifth question

187. 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 term must be interpreted in line with the above-mentioned language versions of the Directive; in other words, the method by which prices vary must be explicitly described.⁴⁸

188. 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.⁴⁹ 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 in relation to the "average consumer", who must be "reasonably well-informed and reasonably observant and circumspect", taking into account social, cultural and linguistic

⁴⁸ Reference is made to Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupbing hf* [2012] EFTA Ct. Rep. 592, paragraph 86.

⁴⁹ Reference is made to *Constructora Principado S*, cited above, paragraph 20.

factors.⁵⁰ If there is any doubt concerning the meaning of a term, the interpretation which is most favourable to the consumer must prevail.

189. As regards the assessment of whether a contract term is unfair, ESA makes reference to case NFH, mentioning that the circumstances that gave rise to the proceedings in NHF differ from the situation in the case at hand. In NFH, it was held that the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the general business conditions with regard to the fees connected to the service to be provided is of fundamental importance. In this assessment, in light of the terms of the contract and also in light of the relevant national legislation, it must be taken into account whether the reasons or the method for the amendment of the contested provision have been set out in plain, intelligible language and whether the consumer has a right to terminate the contract.⁵¹

190. ESA submits that the circumstances as described in the request suggest that, technically speaking, the methods of calculation of price changes in consumer contracts have been described to the consumer in a sufficiently clear manner, in order for him to be able to foresee possible amendments to the contract. In 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.

191. ESA submits that it follows from the request that the information given about the linking of the loan to the CPI, the changing of the debt and the necessity of paying the indexation adjustment based on the increase in the index from the index base, and the accompanying payment schedule, is sufficient in terms of the Directive.

192. ESA therefore suggests that the answer to the fifth 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.

Sixth question

193. 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 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

⁵⁰ Reference is made to *Lidl v Colruy*, cited above, paragraph 78.

⁵¹ Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*, cited above, paragraphs 21 to 31.

implementing directives can be found in *Jan Anfinn Wahl*.⁵² The Court is competent, however, to reformulate the question⁵³ if it were to consider it appropriate to advise the national court on the obligation that follows from Article 6(1) of the Directive when a national court finds that a given term before it is unfair within the meaning of the Directive.

194. 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.⁵⁴ ESA also notes in that respect that it is now settled case law that a national court that is considering a case in which the Directive applies must carry out the assessment of the fairness of the contractual terms of its own motion.⁵⁵

195. 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 conclusions; that is, ensure that such a clause is not binding on the consumer; and 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".

196. 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 the lapse of time or changes that take place subsequent to the conclusion of the contract.

197. ESA therefore suggests that the answer to the sixth 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

⁵² Reference is made to Case E-15/12 *Jan Anfinn Wahl v the Icelandic State*, judgment of 22 July 2013, published electronically, paragraphs 49 to 56.

⁵³ Reference is made to Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey*, judgment of 19 September 2013, published electronically, paragraph 31 and the case law cited.

⁵⁴ Reference is made to Case E-6/13 *Metacom AG v Rechtsanwälte Zipper & Collegen*, judgment of 27 November 2013, published electronically, paragraph 69, and case law cited.

⁵⁵ 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.

consumer; and 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

198. The Commission understands this question to be linked to the repayment schedule attached to the Plaintiff's loan agreement and the statement that the estimated repayments were "based on 0% inflation".

199. In the Commission's view, it follows from the plain wording of Article 1a(6) of Directive 87/102/EEC that the calculation of APR in this type of situation is to be made on the basis of the relevant charges fixed at the same level as when the calculation is made. The calculation must be made using existing relevant rates and values applicable at the time the credit agreement is concluded and must give a reasonable indication of the total cost of the credit. The Commission also underlines that Article 1a(1)(a) of Directive 87/102 expressly links APR to the "present" value of all commitments.

200. The Commission further points out that any other interpretation would undermine one of the primary objectives of Directive 87/102, namely to improve consumer protection by means of enhanced information and transparency. A crucial aspect of the latter consists of 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.⁵⁶

201. With reference to *Pohotovost*, 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 Directive 87/102 obliges a creditor to provide the consumer with all information that could have a bearing on the implications of the agreement.⁵⁷ Moreover, the Commission observes that the APR is a critically important tool in enabling the consumer to decide whether or not to sign up to a particular credit agreement.⁵⁸

202. The Commission finally adds that Article 19(4) of Directive 2008/48, which reproduces the former Article 1a(6) of Directive 87/102, expressly provides that the APR is to be calculated on the assumption that the borrowing rate and other charges will

⁵⁶ Reference is made to *Cofinoga Merignac*, cited above, paragraph 26.

⁵⁷ Case C-76/10 *Pohotovost*, Order of the Court, cited above, paragraph 68.

⁵⁸ Case C-76/10 *Pohotovost*, Order of the Court, cited above, paragraph 70; *Cofinoga Merignac*, cited above, paragraph 26.

remain fixed in relation to the initial level and will remain applicable until the end of the credit agreement.

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

In circumstances where a credit agreement is linked to the consumer price index and the cost of the credit therefore changes in accordance with inflation, Articles 1a(6) and Article 4 of Directive 87/102/EEC must be interpreted as precluding the calculation of the total cost of the credit and of the annual percentage rate of charge from being based on a 0% rate of inflation instead of the known rate of inflation at the date the credit agreement was concluded.

The second question

204. 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.

205. The Commission submits that the answer to the second 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 third question

206. In the Commission's view, the question should be answered in the negative since Directive 93/13 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.

207. The Commission submits that the answer to the third 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 fourth question

208. The Commission submits that it is 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) of Directive 93/13 is of particular importance.

209. 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.

210. 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 particular contract term has not been negotiated individually in accordance with Article 3(2) of Directive 93/13/EEC.

The fifth question

211. 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 Directive 93/13, 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 has already struck an appropriate balance between all the rights and obligations of the parties to certain types of contract.⁵⁹

212. The Commission submits that price indexation is governed by the terms of Act No 38/2001, which, pursuant to its Article 14, permit 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

⁵⁹ Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraph 28.

of the parties to loan agreements and provided for the possibility of price indexing, under certain strictly defined conditions.

213. 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.⁶⁰

214. Also by way of preliminary comment 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.⁶¹

215. 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. This is of particular importance when the fairness of contracts permitting price changes is assessed.⁶² Moreover, the Commission observes that the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the changes that are likely to occur is of particular importance in this type of situation.⁶³

216. The Commission argues that the answer to the question of 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 in 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.

217. 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

⁶⁰ Reference is made to Case C-481/99 *Georg Heiningert and Helga Heiningert v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-9945, paragraph 31.

⁶¹ Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 23.

⁶² Reference is made to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, cited above, paragraphs 49 to 55.

⁶³ Reference is made to *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, cited above, paragraph 28.

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.

218. The Commission submits that the answer to the fifth 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 sixth question

219. The Commission submits that the sixth 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 Directive 93/13 plainly states that unfair terms in a contract "shall not" be binding on the consumer.⁶⁴

220. The Commission submits that the answer to the sixth 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

⁶⁴ Reference is made to *Banco Español de Crédito SA v Joaquín Calderón Camino*, cited above, paragraphs 62 to 63.