



Reykjavík, 13 January 2023

**TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT**

**WRITTEN OBSERVATIONS**

submitted pursuant to Article 90 of the Rules of Procedure of the EFTA Court by

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

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in

**CASE E-13/22**

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

v

***Landsbankinn hf***

in which the District Court of Reykjavík (Héraðsdómur Reykjavíkur) requests the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice concerning the interpretation and application of Directive 2014/17/EU, in particular, Article 24 of the Directive, and as appropriate, Article 10(2)(f) of Directive 2008/48/EC.

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## INTRODUCTION

1. By an application dated 4 November 2022, the District Court of Reykjavík (Héraðsdómur Reykjavíkur) requested the EFTA Court (hereinafter “the Court”) to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice. The District Court had concluded that interpretation of Directive 2014/17 was paramount for the resolution of the case *Birgir Þór Gylfason and Jórunn S. Gröndal v Landsbankinn hf.*, and therefore referred the following question to the Court:

*Is it compatible with Directive 2014/17/EU, in particular, Article 24 of the Directive, and as appropriate, Article 10(2)(f) of Directive 2008/48/EC (cf. recital 19 of the Preamble to Directive 2014/17/EU), that the terms of a consumer property mortgage, in which the interest rate is variable, state that adjustments of the interest rate are to take account of, amongst other things, the Central Bank of Iceland’s interest rate, interest rate on the market and other terms of finance available to the creditor?*

## LEGAL CONTEXT

### EEA Law

2. In the Preamble to the Agreement of the European Economic Area the contracting parties state their determination to “...*promote the interests of consumers and to strengthen their position in the marketplace, aiming at a high level of consumer protection.*”
3. Recital 67 of Directive 2014/17 states that:

*It is important to ensure that sufficient transparency exists to provide clarity for consumers on the nature of the commitments made in the interests of preserving financial stability and on where there is flexibility during the term of the credit agreement. Consumers should be provided with information concerning the borrowing rate during the contractual relationship*

*as well as at the pre-contractual stage. Member States should be able to maintain or introduce restrictions or prohibitions on unilateral changes to the borrowing rate by the creditor.*

4. Article 17 (6) of Directive 2014/17 states:

*Where the credit agreement allows for variations in the borrowing rate, Member States shall ensure that the consumer is informed of the possible impacts of variations on the amounts payable and on the APRC at least by means of the ESIS.*

5. Article 24 of Directive 2014/17 states:

*Where the credit agreement is a variable rate credit, Member States shall ensure that any indexes or reference rates used to calculate the borrowing rate are clear, accessible, objective, and verifiable by the parties to the credit agreement and the competent authorities.*

6. Annex II of Directive 2014/17, Part B, provides instructions to complete the European Standardized Information Sheet (ESIS). Section 3(6), “Main features of the loan,” states:

*This section shall explain whether the borrowing rate is fixed or variable and, where applicable, the periods during which it will remain fixed; the frequency of subsequent revisions and the existence of limits to the borrowing rate variability, such as caps or floors. The formula used to revise the borrowing rate and its different components (e.g. reference rate, interest rate spread) shall be explained. The creditor shall indicate, e.g. by means of a web address, where further information on the indices or rates used in the formula can be found, e.g. Euribor or central bank reference rate.*

7. Recital 19 of Directive 2014/17 states that:

*For reasons of legal certainty, the Union legal framework in the area of credit agreements relating to residential immovable property should be consistent with and complementary to other Union acts, particularly in the areas of consumer protection and prudential supervision. Certain essential definitions including the definition of ‘consumer’, and ‘durable medium’, as well as key concepts used in standard information to designate the financial characteristics of the credit, including ‘total amount payable by the consumer’ and ‘borrowing rate’ should be in line with those set out in Directive 2008/48/EC so that the same terminology refers to the same type of facts irrespective of whether the credit is a consumer credit or a credit relating*

*to residential immovable property. Member States should therefore ensure, in the transposition of this Directive, that there is consistency of application and interpretation in relation to those essential definitions and key concepts.*

8. Article 5 (1)(f) of Directive 48/2008/EC sets out the pre-contractual information the creditor is obliged to provide the consumer with regarding variable interest rates:

*the borrowing rate, the conditions governing the application of the borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions, and procedure for changing the borrowing rate; if different borrowing rates apply in different circumstances, the abovementioned information on all the applicable rates*

9. Article 10 (2)(f) of Directive 48/2008/EC, on information to be included in credit agreements, states:

*The credit agreement shall specify in a clear and concise manner:*

*...*

*(f) the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates*

10. Recitals 20 and 24 of Directive 93/13/EEC on unfair terms in consumer contracts state:

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

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

11. Article 3(1) of Directive 93/13/EEC states:

*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.*

12. Article 4 of Directive 93/13/EEC states:

*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.*

13. Article 5 of Directive 93/13/EEC states:

*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.*

14. The Annex to Directive 93/13/EEC, which contains an indicative list of the terms which may be regarded unfair, is worded as follows:

*Terms which have the object or effect of:*

...

*(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;*

*(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;*

...

*(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;*

*(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;*

## **National Law**

15. Article 34 of Act no. 118/2016 on Consumer Property Mortgage states:

*If a property mortgage agreement contains a provision stating that reference values, indexes or reference index rates are to be used for determining variable interest rates, the creditor may only use reference values, indexes or reference rates that are clear, accessible, objective and verifiable, both by parties to the agreement and by the Consumer Agency (Neytendastofa).*

*If a decision on the adjustment of the interest rate is not based on a reference value, indexes, or a reference interest rate, then the mortgage agreement shall state the conditions and procedure for adjustment of the interest rate.*

16. Annex I of Regulation no. 270/2017 on Consumer Property Mortgages contains a standardized information sheet for creditors to provide to consumers. Part B of Annex I sets out instructions to creditors on how to complete the information sheet, and states in segment 3(6) (Main features of the loan):

*This section shall explain whether the borrowing rate is fixed or variable and, where applicable, the periods during which it will remain fixed; the frequency of subsequent revisions and the existence of limits to the borrowing rate variability, such as caps or floors. The formula used to revise the borrowing rate and its different components (e.g. reference rate, interest rate spread) shall be explained. The creditor shall indicate, e.g. by means of a web address,*

*where further information on the indices or rates used in the formula can be found, e.g. Euribor-interests or central bank reference rate.*

17. Article 7 (4) of the Consumer Lending Act no. 33/2013 states:

*f. the borrowing rate, the conditions for its application and, if appropriate, any index or reference interest rate applicable to the initial borrowing rate, as well as the periods, conditions, and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information shall be provided on all of them.*

18. Article 12 (2) of the Consumer Lending Act no. 33/2013 states:

*A loan agreement shall set out in clear and concise manner:*

*...*

*f. the borrowing rate, conditions governing its application, and if appropriate, index or reference rate that can affect the initial borrowing rate, as well as the periods, conditions, and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates...*

19. Article 36 (b) of the Act no. 7/1936 on contracts, agency, and void legal instruments states:

*Written contracts offered by a business operator to consumers shall be phrased in plain and intelligible language.*

20. Article 36 (c) (2) of the Act no. 7/1936 on contracts, agency, and void legal instruments states:

*A contract is unfair if it is contrary to good business practices and materially distorts the balance between the rights and obligations of the contracting parties, to the disadvantage of the consumer. If a term of this kind is set aside, in full or in part, or amended, the contract shall, at the request of the consumer, remain valid in other respects without change if it can be performed without the term*



## FACTS

21. The plaintiffs of this case, Birgir Þór Gylfason and Jórunn Gröndal, are a young couple who live with their children in Kópavogur, Iceland. In 2019, they concluded mortgage loan agreements with Landsbankinn, a leading commercial bank in Iceland, for the purpose of financing the acquisition of their family home. This included the loan (hereinafter the “Loan”), amounting to ISK 6,500,000, disputed in this case. The mortgage loan agreement is dated July 4<sup>th</sup>, 2019 (hereinafter “the Agreement”). The term of the loan was 15 years and it was to be repaid in 180 monthly installments.
22. The terms of the Loan stipulate that the interest rate is variable. At the signing date of the Agreement, this interest rate was an annual rate of 6.6%. Clauses 1-3 in the Agreement describe how the variable interest rate functions:
1. *Variable mortgage interest shall be paid on this loan in accordance with the interest determined by Landsbankinn on non-indexed bridge loans at any given time. Interest shall be paid retrospectively, on the same dates as the repayment instalments, unless another arrangement is agreed upon.*
  2. *Landsbankinn may, at any time during the loan period, raise or lower the aforesaid interest rate in accordance with Landsbankinn’s interest-rate decisions at any given time. Interest-rate decisions shall take account, amongst other things, of the interest rates of the Central Bank of Iceland, interest rates on the market, and other financing terms available to Landsbankinn. Changes to the interest rate shall be announced on paper or via another durable medium, e.g. in an on-line bank, and shall take effect 30 days after the date of the announcement. The above-mentioned 30-day period may be changed in accordance with the relevant provisions of law. An adjustment involving lowering of interest rate may be scheduled to take effect on the date of the announcement, but this is not obligatory.*
  3. *If the drawer (mortgagor) is not willing to accept adjustments as provided for in item 2, he or she may repay the outstanding balance on the terms that were in effect prior to the*

*adjustment, provided that the entire outstanding balance is repaid within 30 days of the date of the announcement from Landsbankinn.*

23. In February 2021, the plaintiffs refinanced the Loan and paid all outstanding amounts. While the Loan was outstanding, Landsbankinn had adjusted the rate several times.

24. In February 2021, when the plaintiffs refinanced the Loan, the Central Bank of Iceland had lowered its key interest rate from 4% to 0.75%. During the same period, Landsbankinn had lowered the interest rate applicable to the Loan, from 6.6% to 4.30%. Effectively, this entails that Landsbankinn had increased its margin (or spread) on the base rate from 2.6% when the Agreement was made, to 3.55% in 2021. This development is illustrated in the following graph which has been presented in the case before the District Court in Reykjavík:

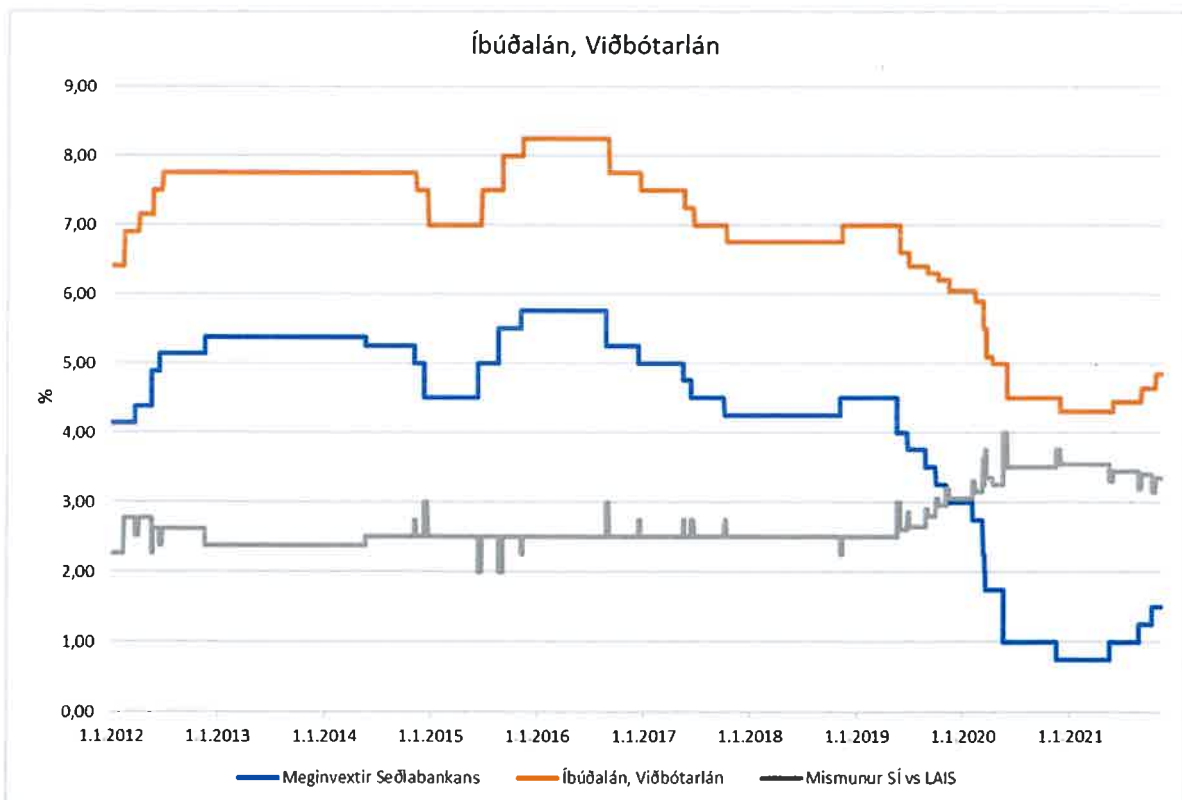


Image 1. Interest rate trends from 1 January 2012 to 1 January 2021. Central Bank of Iceland, key interest rate (blue), Landsbankinn, supplementary loan (orange), and the difference between the two (grey).

25. The blue line in Image 1 shows the development of the key interest rate of the Central Bank of Iceland, from 2012 to 2021. The orange line shows the development of the interest rate determined by Landsbankinn for supplementary loans of the same type as the Loan, during the same period. Furthermore, the graph illustrates that the interest rate determined by Landsbankinn follows the Central Bank's key rate consistently from 2012 till mid-2019, and the spread on the base rate was therefore constant until mid-2019. Finally, the graph demonstrates how Landsbankinn increased its margin, or spread, while the Loan was outstanding, from mid-2019 to 2021.
26. In the spring of 2021, the Consumers' Association of Iceland ("NS") started a public campaign to highlight how leading Icelandic commercial banks adjust variable rates in consumer loans. NS pointed out that standardized terms in loan agreements, offered to consumers, lack necessary transparency and that these terms provide banks with an opportunity to manipulate rates to their benefit at the cost of ordinary consumers.
27. The plaintiffs, after they had reviewed arguments and evidence presented by NS, believed they had been treated unfairly by Landsbankinn. Moreover, they did not believe the bank had presented any convincing arguments to justify how the bank had increased the interest rate margin on their loans. In December 2021 they filed a loan suit against Landsbankinn in the District Court of Reykjavík.
28. The plaintiffs argue that the term setting out how the bank is unilaterally allowed to change the rate is illegal and void, and therefore the bank had instructed them to pay higher interest on the Loan than the bank was allowed to charge.
29. The plaintiffs base their case on legal requirements stemming from EEA law, the Council Directive 93/13/EEC on unfair terms in consumer contracts (hereinafter "Directive 93/13"), Directive 2014/17/EU on credit agreements for consumers relating to residential property (hereinafter "Directive 2014/17"), and Directive 2008/48/EC on credit agreements for consumers (hereinafter "Directive 2008/48").

## LEGAL ANALYSIS

### *General – the essence of the dispute*

30. The plaintiffs argue that the terms of the Agreement, that allow Landsbankinn to unilaterally determine the interest rate, do not define in a clear, accessible, objective, and verifiable manner how the bank calculates the rate.
31. Firstly, the plaintiffs argue that Landsbankinn's terms do not provide a full description of the factors that affect the interest rate. The terms state that factors, not articulated or mentioned in the Agreement, can affect adjustments to the rate (see the phrase "*amongst other things*", paragraph 22).
32. Secondly, the reference factors that the Agreement sets out are vague and general. Thus, it is not clear which interest rate of the Central Bank the terms refer to. The Central Bank announces many types of interest rates each week (for example the key interest rate, rates for term deposits, penalty interests, and REIBOR). The term "*interest rates on the market*" is even more vague and does not provide specific guidance as to what reference rates or reference values may affect or prompt adjustments. The text "*other financing terms available to Landsbankinn*" seems not to refer to any specific rate but allegedly appears to apply to all sources of finance available to the bank at any given moment.
33. Thirdly, no method or formula to calculate the rate is set out or explained. This leaves wide discretion for the bank to unilaterally change the rate, to the detriment of the plaintiffs.
34. In its written objections to the District Court of Reykjavík, Landsbankinn argued that the bank does not in a standardized consumer mortgage loan need to "*specify comprehensively all factors or references that will or can impact the determination of interest rates*", or "*precisely define the proportional weight of each factor or reference.*" Furthermore, Landsbankinn has

argued that it is not unlawful “to utilize factors or references that are not made public, and a lender alone can verify.”<sup>1</sup>

35. The gist of the dispute is therefore whether Landsbankinn has fulfilled its legal obligation to set out the terms of the variable interest rate in the Agreement in a transparent manner. More specifically, whether a bank needs to (i) specify in a loan contract (or connected documentation) comprehensively relevant factors that can affect decisions to adjust the interest rate, (ii) define with precision each factor or reference that can impact the rate, and (iii) explain the functionality of the method or formula used to calculate or determine any adjustment to the rate.

*Requirements stemming from Art. 24 of Directive 2014/17*

36. The plaintiffs argue that the three factors mentioned in the Agreement, that may affect adjustments to interest rate of the Loan, are all “reference rates” within the meaning of Article 24 of Directive 2014/17. All factors mentioned in the terms of the Agreement refer to certain but unclear types of market rates: an interest rate set by the Central Bank, interest rates determined on the market and interest rates of financing available to Landsbankinn.

37. In accordance with Article 24 of Directive 2014/17, a creditor is required to use only reference rates that are clear, accessible, objective, and verifiable by the parties to the credit agreement. The plaintiffs believe the terms of the Agreement obviously do not fulfill any of these requirements.

38. The reference rates of the Agreement are not accurately specified, and therefore, it is unclear which rates are used to calculate or determine adjustments of the interest rate of the Loan. Consequently, information regarding the reference rates is not accessible to the consumer. As the quoted market rates in the Agreement lack specificity, the terms leave wide discretion to Landsbankinn, to pick and choose applicable benchmark rates for each adjustment to the

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<sup>1</sup> Following is the passage in Landsbankinn’s written arguments in Icelandic “*þurfi ekki að telja tæmandi þau atriði eða viðmið (breytur) sem muni hafa eða muni geta haft þýðingu við ákvörðun vaxta, eða skilgreina þurfi fyrirfram nákvæmlega hlutfallslegt vægi hvers atriðis eða hvernar viðmiðunar. Né heldur leiðir af 2. máls. að óheimilt sé að líta til atriða eða viðmiða sem ekki eru opinber og lánveitandi getur einn sannreynt*”

interest rate of the Loan. This ambiguity makes it impossible for the consumer to verify that Landsbankinn has adjusted the rate in accordance with the Agreement.

39. The defendant, Landsbankinn, argues in its written memorandum to the District Court of Reykjavík, that the abovementioned requirements set out in Article 24 of Directive 2014/17 do not apply to the method used by Landsbankinn to determine adjustments to the interest rate. Landsbankinn argues that the provision only applies when a creditor uses “*indexes or reference rates*” to “*calculate the borrowing rate.*” Accordingly, Landsbankinn maintains that the terms of the Agreement that govern the variability of the interest rate, are not connected to, or based on any reference rate. This interpretation of Article 24, that Landsbankinn bases its defense on, entails that it would be optional for creditors whether to provide clear and verifiable benchmarks for variable rates and adjustments thereof.
40. A rational consumer will expect that the variable interest rate will follow the movements of recognized market benchmarks. The consumer knows that there is a risk of increased rates, but also a promise of upside if market rates decrease. But in the absence of transparent benchmarks, the general consumer is in a difficult position to assess the integrity of adjustments made by a professional lender. The well-known story of the infamous LIBOR scandal illustrates the risk facing consumers of being manipulated when lending rates are adjusted in an unclear and ambiguous process.
41. EEA rules on how financial institutions determine variable rates have at least twofold urgent purpose: to enable comparison between different choices available for consumers and to prevent manipulation.
42. Transparent, clear, and intelligible information and terms governing variable rates enable consumers to compare and reflect on the characteristics of different credit products. Clear information enables the consumer to make rational choices and is important for the functioning of an effective market. Directive 2014/17 states this objective in various provisions (see for example recital 40, 44, and 66, and Article 14).

43. Moreover, recital 67 of Directive 2014/17 discusses the importance of sufficient transparency to provide clarity for consumers and states that the directive aims to enable regulation to maintain or introduce restrictions or prohibitions on unilateral changes to the borrowing rate by the creditor.
44. The interpretation of Article 24 of Directive 2014/17 should not compromise the attainment of these objectives of the directive. To achieve “*high level of consumer protection*”, one of the aims of the EEA Agreement, terms relating to variable interest rates need to clarify how the interest is adjusted, what factors come into play, and how the lender utilizes these factors to calculate or determine adjustments and their magnitude.
45. If on the other hand, Article 24 of Directive 2014/17 is interpreted to give creditors the ability to “opt out” by defining very broad and open-ended guidelines for adjustments instead of reference to a concrete objective benchmark, the creditor is provided with great leeway to maneuver and manipulate the interest rate to the detriment of a consumer.
46. The instructions set out in Annex II of Directive 2014/17 also provide meaningful guidance for the interpretation of Article 24 of the directive. Creditors are instructed to set out “...*the formula used to revise the borrowing rate and its different components (e.g. reference rate, interest rate spread) shall be explained. The creditor shall indicate, e.g. by means of a web address, where further information on the indices or rates used in the formula can be found.*” This obviously requires creditors to define clear and concrete references or factors that affect the determination of the interest rate adjustment and, on that basis, specify or explain the functionality of the method or the formula used to determine the adjustments to the rate.
47. In the standard information sheet, Landsbankinn provided no information to the plaintiffs regarding the parameters and method used to adjust the interest rates. The information sheet only reiterates the terms of the Agreement. So, no formula or method is presented by the bank, neither in the credit agreement nor any information sheet provided by Landsbankinn, that can explain how the borrowing rate is revised.

*Requirements stemming from Article 10(2)(f) of Directive 2008/48*

48. Article 10 (2) of Directive 2008/48 stipulates that certain information and terms need to be specified in a credit agreement “*in a clear and concise manner.*” Item (f) in particular, states that a credit agreement needs to specify “*conditions and procedures for changing the borrowing rate,*” as well as any index or reference rate applicable to the initial rate.
49. The use of the concept *conditions* in the text of the directive refers to things, circumstances, or events that are prerequisite to any adjustments of the rate. To ensure full transparency, these conditions need to be stipulated in the text of a credit agreement in a clear and concise manner.
50. Case C-66/19 (*Kreissparkasse Saarlouis*) of the Court of Justice of the European Union (CJEU) provides guidance on the interpretation of the term “*conditions*” in Article 10(2) of Directive 2008/48/EC where the CJEU states that “*knowledge and good understanding, on the part of the consumer, of the information that must be mandatorily included in the credit agreement, in accordance with Article 10(2) of Directive 2008/48, are necessary for the proper performance of the agreement and in particular the exercise of the rights of the consumer ...*” (see paragraph 45 of the judgment). Moreover, the case clarifies that the credit contract needs to inform the consumer of the substance of the contractual obligations, referred to in Article 10(2). This entails, for instance, that Article 10(2) must be interpreted as precluding a credit agreement from making general reference to conditions (such as “amongst other things”) that are not clearly articulated in the text of the agreement.<sup>2</sup>
51. The concept *procedure* refers to a particular method for performing a task. In the German language version of Directive 2008/48, the phrase “*Die Art und Weise*”<sup>3</sup> is used in article 10(2)(f) to describe the same, underlining even more strongly that a description or formulation of the steps that need to be taken to determine how the rate is adjusted, needs to be articulated in the text of the credit agreement.
52. In joined cases C-33/20 (*UK v Volkswagen Bank GmbH*), C-155/20 (*RT, SV, BC v Volkswagen Bank GmbH, Skoda Bank*) and C-187/20 (*JL, DT v BMW Bank GmbH, Volkswagen Bank*

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<sup>2</sup> See also case C-42/15 (Home Credit Slovakia).

<sup>3</sup> „...bedingungen und die Art und Weise der Anpassung des Sollzinssatzes..“



*GmbH*), the CJEU also set out meaningful guidelines for the interpretation of the requirements stemming from Article 10 of Directive 2008/14. The CJEU was, inter alia, requested to interpret the meaning of the provisions of Article 10(2)(1) that stipulate that a credit agreement shall specify the arrangements for adjustments to the interest rate payable in the case of late payments.

53. In its ruling in C-33/20, C-155/20 and C-187/20 (in paragraphs 94 and 95), CJEU sets out a firm criterion to evaluate whether a credit agreement specifies in a clear and concise manner the arrangements for adjustment of the applicable penalty interest rate. The CJEU explains:

*Article 10(2)(1) of Directive 2008/48 is to be interpreted as meaning that a credit agreement must state, in the form of a specific percentage, the rate of late-payment interest applicable at the time of conclusion of that agreement and must explain the specific arrangements for adjusting the rate of late-payment interest. Where the parties to the credit agreement concerned have agreed that the rate of late-payment interest is to change in step with a change in the base rate set by the central bank of a Member State and published in an easy-to-access official journal, a reference in that agreement to that base rate is sufficient, **provided that the method of calculating the rate of late-payment interest relative to the base rate is set out in the credit agreement. In that regard, two conditions must be met. In the first place, that method of calculation must be set out in a way which is readily understood by an average consumer who does not have specialist knowledge in the financial field and must enable him or her to calculate the rate of late-payment interest based on the information provided in the credit agreement. In the second place, the frequency with which the base rate may be varied, which is determined by national provisions, must also be set out in the credit agreement concerned.** [My emphasis]*

54. The plaintiffs argue in support for their case that the same or a similar standard applies with respect to Article 10(2)(f) and consequently, a credit agreement must specify in a clear and concise manner the method of calculation used to adjust the interest rate of a variable interest rate in a way that is readily understood by average consumers and enables them to verify that the interest rate has indeed been adjusted in line with their agreement with the creditor.

55. The English version does not use the same words in Article 10(2)(f) and Article 10(2)(l) to describe the obligation to specify in a credit agreement how interest rates are adjusted. Whereas the term *procedures* is applied in item (f), the word *arrangements* is used in item (l). The same applies to the Icelandic version, where the term “málsmeðferð” is used in item (f) and the term “fyrirkomulag” is used in item (l). However, there is neither a logical nor a linguistic reason to confer completely different meanings to these words. In this context the words have similar meaning and purpose. In fact, some versions of the Directive use the same words in both instances, for example the Spanish version that states in item (f) that a credit agreement must specify “*procedimientos de variación del tipo deudor*”, and item (l) refers to “*los procedimientos para su ajuste*”. In the German version items (f) and (l) both include the phrase “*Die Art und Weise*” to describe what needs to be explained regarding the potential adjustment of interest rates in a credit agreement.
56. In accordance with Recital 19 of Directive 2014/17 that key concepts should be in line with those set out in Directive 2008/48/EC, these guidelines were applied in the transposition of Directive 2008/14 into Icelandic Law, to ensure consistency of application and interpretation. This included requirements relating to adjustments to a variable interest rate, set out in Article 34 of Act no. 118/2016 on Consumer Property Mortgage, which states the following: “*If a decision on the adjustment of the interest rate is not based on a reference value, indexes, or a reference interest rate, then the mortgage agreement shall state the conditions and procedure for adjustment of the interest rate.*”
57. The terminology “*conditions and procedure for adjustment of the interest rate*” is clearly derived from article 10(2)(f) of Directive 2008/48, and sets the very basic, minimal, requirement as to how a variable borrowing rate is presented in a credit agreement. In a credit agreement the conditions that need to be fulfilled to allow for adjustments to the interest rate shall be specified, and moreover, the procedure applied to determine adjustments has to be described in a “*clear and concise*” manner.
58. Neither Directive 2014/17 nor Directive 2008/48 mandate the use of reference values or indices, so the rationale for an adjustment may be linked to other kind of factors. For example,

a term in a credit agreement may prescribe a change in the interest rate if certain events occur or when a defined period has lapsed. But in every instance, the credit agreement needs to clarify, in a clear and concise manner, the conditions and procedure applicable for the adjustment of the rate.

59. If the creditor utilizes reference rates or indices as benchmarks, further requirements come into play. Then the credit agreement not only has to define the conditions and procedure but needs also to define reference values that are accessible, objective and verifiable. This requirement aims to secure both clarity on commitments undertaken by the consumer and substantive integrity of the benchmark used by the creditor.

*Parallel application with Directive 93/13*

60. The CJEU has applied transparency requirements stemming from sectorial legislation, such as Directive 2014/17, and Directive 93/13 in a complimentary fashion. The CJEU ruling in C-92/11 (*RWE Vertrieb*) is a case in point. Point 2 of the operative part of the judgment states:

*Articles 3 and 5 of Directive 93/13 in conjunction with Article 3(3) of Directive 2003/55/EC... concerning common rules for the internal market in natural gas... must be interpreted as meaning that, in order to assess whether a standard contractual term by which a supply undertaking reserves the right to vary the charge for the supply of gas complies with the requirements of good faith, balance and transparency laid down by those directives, it is of fundamental importance:*

— *whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges.*

61. In joined cases C-33/20 (*UK v Volkswagen Bank GmbH*), C-155/20 (*RT, SV, BC v Volkswagen Bank GmbH, Skoda Bank*) and C-187/20 (*JL, DT v BMW Bank GmbH, Volkswagen Bank*

*GmbH*, the CJEU bases its arguments partly on a precedence that concerns interpretation of Directive 93/13 (see paragraph 94 of the judgment). The CJEU refers to case C-125/18, *Gómez del Moral Guash*, by analogy, and underlines thereby the parallel application of the Consumer Credit Directive and Directive 93/13.

62. The CJEU's judgment in case C-125/18, *Gómez del Moral Guash v Bankia SA*, sets out guidelines regarding the interpretation of Directive 93/13, in particular Articles 4(2) and 5, with a view to complying with the transparency requirement of a contractual term setting a variable rate under a mortgage loan agreement.<sup>4</sup> These guidelines are in essence identical to the requirements set out by the CJEU in *UK v Volkswagen Bank GmbH*, which deals with transparency requirements stemming from Article 10(2)(1) of Directive 2008/48. In each case, the CJEU emphasizes that the term must be readily understood by an average consumer; the term must define a clear benchmark or criteria; and the specific functioning of the method used to determine or calculate the rate must be explained. The CJEU highlights the importance of the predictability of the contract terms and clarifies that the terms must enable consumers to assess and foresee the economic consequences of their obligations.
63. The guidelines set out in the CJEU's judgment in the *Gómez del Moral Guash* case are the product of a long line of cases dealing with transparency requirements stemming from Directive 93/13 in respect of contract terms that enable a seller or a supplier to change the contract price or payments which consumers must make under a contract. The CJEU has summarized the standard to be expected from sellers and suppliers in a number of cases concerning various subject matters. The CJEU has applied these standards, for instance, to the functioning of the currency conversion mechanisms applying to mortgage loans indexed to

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<sup>4</sup> Point 2 of the operative part: "*Directive 93/13, in particular Article 4(2) and Article 5 thereof, must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term setting a variable interest rate under a mortgage loan agreement, that term not only must be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations. Information that is particularly relevant for the purposes of the assessment to be carried out by the national court in that regard include (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and (ii) the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated.*"

foreign currency (see case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai*, paragraphs 73-73 and C-186/16 *Ruxandra Paula Andriciuc and Others*, paragraphs 49-51). Also, in relation to energy supply agreements, (see C-92/11 *RWE Vertrieb AG*). There are, moreover, a number of cases which deal with terms that enable a creditor to adjust the interest rate of a credit agreement, see for example cases C-143/13 (*Matei*), C-348/14 (*Bucara*), and C-269 (*Banca B. SA*).

64. The EFTA Court has also, for instance in case E-25/13 (*Gunnar V. Engilbertsson v Íslandsbanki hf.*), stressed the importance of the quality and the clarity of information presented to a consumer in a credit agreement in relation to terms that allow the creditor to unilaterally change the amount of payments to be made by the consumer (see for example paragraphs 97-99). The Court referred to the transparency requirements stemming from Articles 3(3) and 5 of Directive 93/13, and their impact on the assessment on whether a term is “unfair”.
65. In case E-25/13, the EFTA Court in this context also referred to the judgment of CJEU in the joined cases C-359/11 and C-400/11 (*Schulz and Egbringhoff*). In its judgment of *Schulz and Egbringhoff*, the CJEU emphasizes that to ensure a high level of consumer protection, a supplier or seller must provide to the consumer information regarding the reasons and preconditions of any adjustment to the price to be paid by the consumer, in a way that enables the consumer to verify and challenge adjustments to the price (see paragraphs 45-47).
66. The interpretation of the transparency obligations stemming from Article 10(2)(f) of Directive 2008/48 needs to take appropriate account of this case law of the CJEU and the Court. Consequently, the “*conditions and procedures for changing that rate*” must be interpreted to mean that a creditor is obliged to draft a standard term, that enables him to unilaterally adjust the interest rate, in a way that is readily understood by an average consumer and clearly defines all the parameters any adjustment can be based on, explains the specific functionality of the method used to adjust the rate, and provides predictability for the consumer in respect of his/her obligations.

## CONCLUSION

67. Accordingly, the plaintiffs respectfully request that the Court should answer the question referred as follows:

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

Article 10(2)(f) must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term setting a variable interest rate under a mortgage loan agreement, a credit agreement must:

- state, in a clear and concise manner, all relevant conditions or factors that may affect the interest rate, and
- enable an average consumer, who does not have specialist knowledge in the financial field, to understand the specific functioning of the method used for determining the rate and thus evaluate, based on clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations.

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

On behalf of Birgir Þór Gylfason and Jórunn S. Gröndal,

A handwritten signature in blue ink, reading "Ingvi Hrafn Óskarsson". The signature is fluid and cursive, with the first name "Ingvi" being the most prominent.

Ingvi Hrafn Óskarsson,

Lögmaður/Attorney at Law