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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the **European Commission**, represented by Inese Rubene and Petr Ondrůšek, Members of its Legal Service, acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels and consenting to service by e-EFTA Court, in

Case E-4/23

The Consumers' Agency (Neytendastofa) v,

v

Íslandsbanki hf

in which the Icelandic Court of Appeal (Landsréttur) requested 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.

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I. INTRODUCTION

1. The European Commission (hereinafter: “**the Commission**”) addresses in these observations the seven questions referred to the EFTA Court by the Icelandic Court of Appeal (Landsréttur) (hereafter: “**the referring court**”).

II. THE FACTUAL AND LEGAL FRAMEWORK

2. The Commission bases its observations on the description of facts as set out in the ruling of the referring court seeking the advisory opinion of the EFTA Court (hereinafter: the “**reference order**”)¹.
3. The legal framework for the present case consists of Directive 2008/48 on consumer credit agreements² (hereinafter: “**Directive 2008/48**” or the “**Directive**”). Where appropriate, the Commission reproduces the text of the relevant provisions of the Directive in Part IV devoted to the discussion of the questions.

III. THE QUESTIONS REFERRED TO THE EFTA COURT

4. The referring court seeks an advisory opinion from the EFTA Court on the following questions:

1. Must Articles 5 and 10 of Directive 2008/48/EC, and particularly Article 5(1)(f) and Article 10(2)(f) thereof, be interpreted as meaning that the creditor is to specify, in an exhaustive listing in a standard form and in the credit agreement, the conditions on which its decisions to raise or lower the borrowing rate on credit that bears variable interest may be based?

2. First, is the requirement of Article 5 of Directive 2008/48/EC, that the consumer is to be provided with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement, met if, among the conditions for changing the borrowing rate that are specified on the standard form (cf. Article 5(1)(f)), there is a general reference to

¹ The Commission’s submission is based on the English translation of the reference order provided by the EFTA Court. References to certain pages or parts of the reference order in the text of this submission are references to the English translation of the order.

² 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 (OJ L 133, 22.5.2008, p. 66).

an unforeseen increase in the creditor's costs? Secondly, is the requirement of Article 10 of Directive 2008/48/EC, that a credit agreement is to specify in a clear and concise manner the conditions and procedures for changing the borrowing rate (cf. Article 10(2)(f)), met if, among those conditions, there is a general reference to an unforeseen increase in the creditor's costs?

3. Is the requirement of Article 5 of Directive 2008/48/EC, that the consumer is to be provided with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement, met if the wording of a provision in the standard form (cf. Article 5(1)(f)) includes general and open-ended references such as "etc.", as is the case in the standard form involved in this case?

4. Does it follow from Article 5(1)(g) of Directive 2008/48/EC that the APR is to be illustrated in the standard form with a representative example in which all the assumptions used to calculate the percentage are stated even though all components of the credit which the consumer intends to take are known?

5. Does it follow from Article 5(1)(i) and Article 10(2)(k) of Directive 2008/48/EC that "other charges deriving from the credit agreement" are always to be specified, irrespective of whether or not the credit is of such a type that both payment transactions and drawdowns of the credit are recorded?

6. If the answer to Question 5 is such that it follows from Article 5(1)(i) and Article 10(2)(k) of Directive 2008/48/EC that, generally, information is to be provided in the standard form on charges deriving from the credit agreement, is this requirement met by referring to the creditor's schedule of charges, which may undergo change? Is it necessary to specify clearly in the standard form itself what the charges are and what they will be in the future?

7. Does it follow from Article 5(1)(l) of Directive 2008/48/EC that the charges to be paid in the case of late payment are to be specified in the standard form or whether it is sufficient that the creditor make a general reference to its schedule of charges, which may undergo changes?

IV. THE ANALYSIS

IV.1. Preliminary remarks on Articles 5 and 10 of Directive 2008/48

5. Given that all questions referred to the EFTA Court concern the interpretation of Article 5 or Article 10 of Directive 2008/48, or both, it appears useful to make

several preliminary remarks concerning those provisions. These remarks provide the context for the subsequent analysis and responses proposed by the Commission for each individual question.

6. Article 5 of Directive 2008/48 focuses on empowering the consumer by ensuring that the creditor provides the consumer with all the necessary information before the contract is concluded ('pre-contractual information'). More specifically, as stated in Recital 19 of the Directive, the objective of the provision of the pre-contractual information is to "*enable consumers to make their decisions in full knowledge of the facts*" and, to this end, the consumers "*should receive adequate information, which the consumer may take away and consider, prior to the conclusion of the credit agreement, on the conditions and cost of the credit and on their obligations*".
7. As specified in the first subparagraph of Article 5(1), the objective of the provision of pre-contractual information is to allow consumers "*to compare different offers in order to take an informed decision on whether to conclude a credit agreement*". To this end, the Directive establishes a standard format for the provision of that information (Standard European Consumer Credit Information – hereafter 'SECCI', laid down in Annex II to the Directive). Importantly, given that the Directive is a full harmonisation directive (as clarified also in Article 22 of the Directive and Recital 9 thereof, the SECCI format is fully harmonised and, as such, it must be used by the creditors. In other words, the creditor is obliged to provide the mandatory pre-contractual information by using the SECCI form. Accordingly, it can be considered that it is precisely the information provided in the SECCI that allows the consumers "*to make their decisions in full knowledge of the facts*", as explained in Recital 19 of the Directive.
8. Article 10 of Directive 2008/48 aims at enabling the consumer "*to know his rights and obligations under the credit agreement*" (see also Recital 31 of the Directive). Article 10 of Directive 2008/48 specifically establishes that the credit agreement should contain all the necessary information requirements laid down in paragraph 2 of that Article in a clear and concise manner. It is important to note that the Court of Justice has confirmed that the information obligations laid down in that paragraph "*must imperatively be included in a credit agreement*" (judgment of 5 September 2019, *Pohotovost'*, C-331/18, EU:C:2019:665, paragraph 50; judgment of 20 March 2020, *Mikrokasa S.A.*, C-779/18. ECLI:EU:C:2020:236, paragraph 45).

9. As in the case of Article 5 of the Directive, the mandatory nature of Article 10 flows from the fact that the Directive is a full harmonisation instrument. In this regard, both Article 5 and Article 10 of Directive contribute to attaining the objective pursued therein, which, as the Court of Justice has confirmed, “*consists, as can be seen from recitals 7 and 9 in the preamble to that directive, in providing, as regards consumer credit, full and mandatory harmonisation in a number of key areas, which is regarded as necessary in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit.” (judgment of 27 March 2014, *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paragraph 42).*

IV.2. The first question

10. The first question reads as follows: *Must Articles 5 and 10 of Directive 2008/48/EC, and particularly Article 5(1)(f) and Article 10(2)(f) thereof, be interpreted as meaning that the creditor is to specify, in an exhaustive listing in a standard form and in the credit agreement, the conditions on which its decisions to raise or lower the borrowing rate on credit that bears variable interest may be based?*
11. Articles 5(1)(f) and Article 10(2)(f) of Directive 2008/48 concern the provision of information related to the borrowing rate. Both provisions are drafted in an essentially identical manner. The reason for which the two provisions mandate the provision of (identical) information both at the pre-contractual stage and when the credit agreement is concluded is explained in Recital 32 to the Directive. Pursuant to that Recital, “[I]n order to ensure full transparency, the consumer should be provided with information concerning the borrowing rate, both at a pre-contractual stage and when the credit agreement is concluded”.
12. It is further useful to recall that while Recital 32 explains the reason for the inclusion of information on the borrowing rate, Recital 19 provides guidance on how the borrowing rate should be calculated. Pursuant to that Recital, “[A]s regards the borrowing rate, the frequency of instalments and the capitalisation of interest, creditors should use their conventional method of calculation for the consumer credit concerned”.
13. The Commission considers that taking into account the fundamental importance of the information on the borrowing rate and in order to ensure that full

transparency and the objectives of Article 5 and Article 10 of Directive 2008/48 are achieved, all the conditions need to be specified in the standard form and the credit agreement, respectively. Otherwise, and in particular in case of a variable borrowing rate, as in the case at issue, it would be difficult for the consumer to compare offers (which would frustrate the objective of Article 5 of the Directive, as explained in the preceding section) and to genuinely appraise consumer's rights and obligations under the credit agreement (which, in turn, would frustrate the objective of Article 10 of the Directive).

14. The Commission therefore concludes the response to the first question should be as follows:

“Article 5(1)(f) and Article 10(2)(f) Directive 2008/48 must be interpreted as meaning that the creditor is to specify, in an exhaustive listing in a standard form and in the credit agreement, respectively, the conditions on which its decisions to raise or lower the borrowing rate on credit that bears variable interest may be based.”

IV.3. The second question

15. The second question reads as follows: *First, is the requirement of Article 5 of Directive 2008/48/EC, that the consumer is to be provided with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement, met if, among the conditions for changing the borrowing rate that are specified on the standard form (cf. Article 5(1)(f)), there is a general reference to an unforeseen increase in the creditor's costs? Secondly, is the requirement of Article 10 of Directive 2008/48/EC, that a credit agreement is to specify in a clear and concise manner the conditions and procedures for changing the borrowing rate (cf. Article 10(2)(f)), met if, among those conditions, there is a general reference to an unforeseen increase in the creditor's costs?*

16. At the outset, the Commission notes that the contractual term in dispute, reproduced at point 38 of the English version of the reference order, reads as follows:

“The borrowing rate for individuals are variable, and adjustments thereto, are based, amongst other things, on changes in the bank's financing costs (credit terms), its operating costs, public levies and/or other unforeseen costs, the prime rate of the Central Bank of Iceland, changes in the consumer price index, etc.

Decisions on adjustments of the borrowing rate are taken by a professional committee within the bank, acting on behalf of the governing board. The committee takes account, in particular, of trends in the cost factors listed above and assesses whether changes in them constitute grounds for adjustment of the borrowing rate. The weighting of the factors listed above in decisions on adjustments of the borrowing rate is variable, being determined by, amongst other things, government decisions and circumstances on the market at any given time. When adjustments are made to the borrowing rate, all these factors are assessed, collectively and/or individually. Changes in any of these factors may result in an adjustment of the borrowing rate, either raising it or lowering it.” [emphasis added by the Commission]

17. It is apparent from the above excerpt that second question concerns the reference to “*other unforeseen costs*”. In the view of the Commission, the placement of that reference in the sentence, does not allow to conclude with certainty how the term “other” could be understood. Specifically, it is not entirely clear whether the term “other” could be understood as qualifying/limiting the scope of “unforeseen costs” to those that would be imposed by the government (and thus would be similar to “public levies”) or whether the term “other” is supposed to mean that the “unforeseen costs” may be of any kind whatsoever. At the same time, since the wording of the second question makes it clear that the referring court understands the reference to “other unforeseen costs” to be “a general reference to an unforeseen increase in the creditor’s costs” (emphasis added), the Commission bases its observations on this broad understanding of that term.
18. As regards Article 5 of Directive referred to in the first part of the second question, the Commission recalls (as explained in the context of the first question above) that the provision of information concerning the borrowing rate at the pre-contractual stage is of fundamental importance. A reference to a variable borrowing rate that is too generic, namely that the conditions for its application are not sufficiently clear, does not provide the transparency that is necessary to allow the consumer to compare different offers in order to take an informed decision on whether to conclude a credit agreement. This may be especially the case if one of the factors which may influence the calculation of the borrowing rate is totally open-ended, with the only exception that the costs it covers must be “unforeseen” (in addition, the term “unforeseen” is a concept which in itself might lead to different interpretations).

19. Moreover, the Commission notes that according to the disputed contractual term, reproduced above, the “other unforeseen costs” are among the factors whose weighting in the determination of the adjusted borrowing rate is not clear but would depend on future factual aspects which, in themselves, are not conclusively stated in the disputed contractual terms (see the words “*among other things*”). This fact exacerbates the ambiguity of the term “other unforeseen costs” and further considerably reduces the foreseeability of the adjustment of the borrowing rate.
20. Similar considerations apply to the second part of the second question, which concerns Article 10 of Directive. As already mentioned, the provision of information concerning the borrowing rate at the contractual stage, namely in the credit agreement, is of fundamental importance and should be provided in a clear and concise manner. Article 10(2)(f) of the Directive further states that “*the conditions governing the application of the borrowing rate*” need to be mentioned. It seems rather obvious that the objective of Article 10 would not be achieved if the reference to the conditions affecting the borrowing rate were such that it removed or reduced the understanding of how the rate will change. The explanations that the Commission made with respect to the ambiguity of the disputed contractual term at the pre-contractual stage apply *a fortiori* at the contractual stage: there is no question that at that stage the consumer needs to be placed in a position whereby he can genuinely appraise all his rights and obligations (or “*the actual extent of commitment*”, as the Court of Justice expressed it in the judgement of 19 December 2019, C-290/19 *RN v Home Credit Slovakia*, EU:C:2019:113, para 31). A general reference to an unforeseen increase in the creditor’s costs makes it difficult, if not impossible, for the consumer to make such an appraisal.
21. Therefore, the Commission proposes that the response to the second question should be as follows:

“Article 5(1)(f) of Directive 2008/48/EC precludes that among the conditions for changing the borrowing rate that are specified on the standard form there is a reference to an unforeseen increase in the creditor’s costs, where due to that reference the conditions for the change of the borrowing rate are not sufficiently clear to allow the consumer to compare different offers. It is for the national court to assess whether this is the case, taking into account, in particular, whether the conditions for the change of the borrowing rate are

foreseeable. Article 10(2)(f) of Directive 2008/48/EC precludes that among the conditions for changing the borrowing rate that are specified in the credit agreement there is a reference to an unforeseen increase in the creditor's costs, where due to that reference the conditions for the change of the borrowing rate are not sufficiently clear to inform the consumer of the actual extent of its commitment. It is for the national court to assess whether this is the case, taking into account, in particular, whether the conditions for the change of the borrowing rate are foreseeable.”

IV.4. The third question

22. The third question reads as follows: *Is the requirement of Article 5 of Directive 2008/48/EC, that the consumer is to be provided with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement, met if the wording of a provision in the standard form (cf. Article 5(1)(f)) includes general and open-ended references such as “etc.”, as is the case in the standard form involved in this case?*
23. First, the Commission refers to the analysis made in the context of the preceding question as that analysis provides a useful background for the consideration of the third question.
24. Second, in view of the Commission, the inclusion or not of open-ended terms, such as ‘etc’, is not in itself decisive in answering the question of whether Article 5(1)(f) of Directive 2008/48 has been complied with. Rather, it is important to determine whether the level of granularity and specificity of the information provided to the consumer is such that the objective of Article 5 of the Directive is reached, namely that the consumer is provided the relevant information allowing to compare the different offers. In other words, well-articulated and exhaustive conditions may contain a provision that uses a less precise term, such as “etc”, as long as the objective of Article 5 of the Directive is reached.
25. Nonetheless, it is of course correct to say that general and open-ended terms, such as “etc” do not reduce or remove vagueness (rather the contrary), and thus, depending on the context, the use of such terms may run counter to the objective of Article 5 of the Directive.
26. In the present case, it appears that the disputed contractual term (reproduced at above), provided at the pre-contractual stage, contains too many generic references (‘etc’, ‘among other things’) and a large number of conditions

(including the open-ended weighing, as discussed in the context of the second question) that altogether make it hard, if not impossible, for the consumer to compare different offers.

27. Based on the above, the Commission proposes to respond to the third question as follows:

“Article 5(1)(f) of Directive 2008/48/EC precludes the use of general and open-ended references such as “etc.” or “amongst others things” as conditions governing the application of the borrowing rate listed in the standard form where due to these references the conditions for the application of the borrowing rate are not sufficiently clear so as to allow the consumer to compare different offers. It is for the national court to assess whether this is the case, taking into account, in particular, whether the conditions for the change of the borrowing rate are foreseeable.”

IV.5. The fourth question

28. The fourth question reads as follows: *Does it follow from Article 5(1)(g) of Directive 2008/48/EC that the APR is to be illustrated in the standard form with a representative example in which all the assumptions used to calculate the percentage are stated even though all components of the credit which the consumer intends to take are known?*
29. The Commission notes that the factual basis for the question does not seem to be entirely clear. In particular, it is not entirely clear what information on the APR (and the representative example) the creditor actually provided in the standard form. It appears from paragraph 16 of the reference order that the creditor considered that *“it was necessary to produce representative examples only when it was not possible to calculate the APR”* and that *“the calculation of the APR constituted, at all times, adequate provision of information, as the rate was accompanied by an explanation of what was included in it and the premises for its calculations”*. Yet, according to the statement on page 27 of the reference order (second paragraph), the creditor also seems to have argued that it *“is not therefore possible to set out a representative example of the APR otherwise than by presenting a percentage, and thus the percentage figure itself is the representative example”*. Perhaps the most revealing description of the factual situation is that on page 27 of the reference order (third paragraph), which reflects the creditor’s (defendant’s) version of the description of the facts as follows: *“The percentage*

figure that is set out in Section 3 of the defendant's standard information form is based on the numerical assumptions set out in Section 2 of the form. Thus, the rate is covered in the first part of the Section 3 of the form, and all fees that the borrower is required to pay are discussed in the fifth part of Section 3; there is no requirement to provide information on indexation adjustment as the credit is not index-linked. Thus, all the information needed by the borrower is stated in the form and then combined in the representative example which is the percentage figure; this is presented in the second column in Section 3. It cannot be seen that the consumer is done any additional favour by having all this information repeated in the column where the percentage figure is shown." Based on these statements, the Commission understands that the information provided in the second box (entitled "Annual Percentage Rate of Charge (APR)" in Part 3 of the SECCI form (entitled "Costs of the credit") consisted only of the APR rate, expressed as a percentage.

30. At the outset, the Commission notes that the representative example has a very important role especially at the pre-contractual stage, in particular at the very early stage where not all elements of the credit are known (e.g., advertising). This is reflected also in Recital 19 of Directive 2008/48, which provides, inter alia, that "*[T]o ensure the fullest possible transparency and comparability of offers, such information should, in particular, include the annual percentage rate of charge applicable to the credit, determined in the same way throughout the Community. [A]s the annual percentage rate of charge can at this stage be indicated only through an example, such example should be representative.*"
31. The position of the creditor, who did not in the present case provide a representative example in the standard form, seems to be based on the argument that it had provided assumptions on which the APR rate was calculated in other parts of the form and that those assumptions were already based on the specific elements of the credit provided by the consumer (which allowed the creditor to calculate the specific APR that the consumer would get, instead of a representative APR).
32. The creditor's approach appears to be in direct contradiction with the Directive. This is because, as regards the use of representative examples, the text of Article 5(1)(g) of Directive 2008/48 is rather clear. It states that the pre-contractual information shall specify "*the annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative*

example mentioning all the assumptions used in order to calculate that rate; where the consumer has informed the creditor of one or more components of his preferred credit, such as the duration of the credit agreement and the total amount of credit, the creditor shall take those components into account".

Therefore, the knowledge of the specific elements of the credit does not remove the obligation to provide a representative example, it just means that the creditor is obliged to take those specific elements into account when providing the example (effectively, the actual example of the credit at issue) and mentioning all the assumptions used to calculate the rate (the knowledge of which may be equally important for the ability of the consumer to compare different offers).

33. Further, the fact that those specific elements used to calculate the APR may actually also have been stated in other parts of the SECCI form does not remove the obligation to repeat them in the box concerning the APR (the second box, entitled 'Annual Percentage Rate of Charge (APR)' in Part 3 of the SECCI form, entitled 'Costs of the credit'), where this is necessary to explain the calculation of the representative example. This follows rather clearly also from the second column of the box concerning the APR, where it is stated that the creditor is to provide "*% A representative example mentioning all the assumptions used for calculating the rate to be set out here*". This statement in the SECCI form makes it clear that the legislator considered that the representative example had to be provided at all times, as it is a particularly useful way for the consumer of understanding the costs (even if they are stated elsewhere) and comparing the various offers. Thus, even if the assumptions used for the calculation of the representative example were listed elsewhere in the SECCI form, they should still be repeated in the content of the representative example in that form.
34. It is true that the more elements of the credit are known, the less the example will be hypothetical (this is because of the creditor's obligation to take the specific elements of the credit into account). That does not mean, however, that the provision of the example and the underlying calculation would be without purpose: to the contrary, the provision of such a more targeted example/calculation allows the consumer to compare various offers even better, as the comparison can take place on the basis of information that is specific to consumer's particular situation.
35. The creditor apparently argued before the referring court (see page 27 of the reference order, fourth paragraph) that Commission guidelines on the application

of the consumer credit directive³ state that when a contract is concluded, no representative example is needed because all assumptions are known. The Commission confirms that this document – which however is in the form of a staff working document only and, as specified therein, does not represent an official position of the Commission – contains the following statement: “*Finally, at the contractual stage, no representative example exists because the APR refers to the specific credit agreement concluded by the consumer, and the unknown elements of the credit, if any, will be determined by the relevant assumptions*”⁴. This statement is however in no contradiction with the preceding analysis, which makes it clear that at the pre-contractual stage the provision of the representative example is very useful and important, as also underlined by the legislator.

36. Based on the above, the Commission proposes to respond to the fourth question as follows:

“Article 5(1)(g) of Directive 2008/48/EC requires that the APR is to be illustrated in the standard form with a representative example in which all the assumptions used to calculate the percentage are stated even though all components of the credit which the consumer intends to take are known; in such a case, however, the creditor shall take the known components into account when providing the example.”

IV.6. The fifth question

37. The fifth question reads as follows: *Does it follow from Article 5(1)(i) and Article 10(2)(k) of Directive 2008/48/EC that “other charges deriving from the credit agreement” are always to be specified, irrespective of whether or not the credit is of such a type that both payment transactions and drawdowns of the credit are recorded?*
38. The relevant parts of Article 5(1)(i) and Article 10(2)(k) of Directive 2008/48 read as follows: “where applicable, the charges for maintaining one or several accounts recording both payment transactions and drawdowns, unless the opening of an account is optional, together with the charges for using a means of

³ Commission Staff Working Document Guidelines on the application of Directive 2008/48/EC (Consumer Credit Directive) in relation to costs and the Annual Percentage Rate of charge, SWD (2012)128 final, available at: https://commission.europa.eu/system/files/2018-11/guidelines_final.pdf

⁴ Page 10 of the document, quoted above. The emphasis is in original.

payment for both payment transactions and drawdowns, any other charges deriving from the credit agreement and the conditions under which those charges may be changed".

39. Given that the provisions use the term "where applicable", the information obligations that they impose apply only in those instances when the conditions laid down in the provisions are met. In this regard, it is further specified in the instructions included in the SECCI (in the introductory part at the end of point 1), that "*wherever 'if applicable' is indicated, the creditor must fill in the box if the information is relevant to the credit product or delete the respective information or the entire row if the information is not relevant for the type of credit considered.*" In addition, Point 3 of SECCI setting out the Costs of credit contains, under the heading "Related costs", a boxreading "If applicable Any other costs deriving from the credit agreement" and "If applicable Conditions under which the abovementioned costs related to the credit agreement can be changed".
40. The Commission recalls again that the SECCI is a fully harmonised format (which may not be amended or deviated from). As explained above, the rationale for the harmonisation of the SECCI form is that a uniform format across the Union is used to allow the consumer easily compare offers. Any omission of the mandatory pre-contractual information in the SECCI would be contrary to Article 5 of the Directive.
41. Hence, whenever any of the charges referred to in Article 5(1)(i) are applicable, the requisite information about those charges as well as the conditions under which those charges can be changed have to be included in the SECCI (irrespective of whether or not the credit is of such a type that both payment transactions and drawdowns of the credit are recorded). The need to state such costs (and the conditions of their change) relates to the fact of that such costs are imposed, and not to the type of credit agreement at issue. In so far as such costs derive from credit agreements within the meaning of Article 3(c) of Directive 2008/48, they need to be stated.
42. *A fortiori*, taking account of the fact that, as stated above, at the contractual stage the consumer is to know the exact extent of its obligations, and given the identical wording of Articles 5(1)(i) and 10(2)(k) of the Directive, the Commission concludes that the same conclusion applies *mutatis mutandis* also in the context of the credit agreement.

43. Based on the above, the Commission proposes to respond to the fifth question as follows:

Article 5(1)(i) and Article 10(2)(k) of Directive 2008/48/EC require that “other charges deriving from the credit agreement” are always to be specified, in the standard form and in the credit agreement, respectively, regardless of whether or not the credit is of such a type that both payment transactions and drawdowns of the credit are recorded.

IV.7. The sixth question

44. The sixth question reads as follows: *If the answer to Question 5 is such that it follows from Article 5(1)(i) and Article 10(2)(k) of Directive 2008/48/EC that, generally, information is to be provided in the standard form on charges deriving from the credit agreement, is this requirement met by referring to the creditor’s schedule of charges, which may undergo change? Is it necessary to specify clearly in the standard form itself what the charges are and what they will be in the future?*
45. The Commission notes that while the sixth question concerns the extent of information that is to be included in the standard form, the question also refers to Article 10 of Directive which does not include an obligation to provide a standard form. For the sake of clarity, the Commission will address the question in the context of both Articles 5 and 10 of the Directive.
46. In its response to the fifth question the Commission explained that, in accordance with Article 5 of the Directive and the relevant part of the SECCI form (laid down in Annex II to the Directive), the information concerning ‘other charges deriving from the credit agreement’ should always be included in the form when such ‘other charges’ are applicable. In that context, the Commission highlighted that the SECCI is a fully harmonised instrument/format that could not be deviated from. Accordingly, the Commission concludes that the reply to the question of whether the requirement laid down by Article 5(1)(i) is met by referring to the creditor’s schedule of charges which may undergo a change, should be replied in the negative, in the sense that all the necessary information should be placed in the respective box under Point 3 of the SECCI.
47. The above conclusion, nevertheless, does not mean that the information included in the relevant box needs to contain all – possibly very detailed – information laid down in the creditor’s schedule of charges: the information to be provided in the

SECCI form should succinctly yet sufficiently inform the consumer what the charges are and, in case they might be changed in the future, what are the conditions for such a change, in order to allow the consumer to understand from the standard form itself what the “other costs” would be and, on that basis, to enable him/her to compare the different offers.

48. As regards the requirement to include the information on other costs in the credit agreement itself, the Commission notes that unlike Article 5 of the Directive, Article 10 does not establish a prescribed format in which information is to be provided to the consumer. Pursuant to Article 10(2) of the Directive, the information is to be provided in a clear and concise manner. That does not mean that the information has to be included in a single document. As the Court of Justice confirmed in this context, “[A]lthough, ... all the information referred to in Article 10(2) of Directive 2008/48 need not necessarily be included in a single document, attention must, nonetheless, be drawn to the fact that, having regard to Article 10(1) of the directive, all the information listed in Article 10(2) must be set out on paper or on another durable medium and be incorporated into the credit agreement.” (point 33 of the judgement in C-42/15 Home Credit Slovakia, quoted above) The Court of Justice continued to add that: “[I]n so far as the information referred to in Article 10(2) of Directive 2008/48 must be included in a clear and concise manner, a credit agreement must ... contain a clear and precise cross-reference to other paper, or other durable, media containing the information that was actually given to the consumer prior to the conclusion of the agreement so as to give him the opportunity to be genuinely apprised of all his rights and obligations.” (point 34 of the judgement in C-42/15 Home Credit Slovakia, quoted above)
49. Hence, while all the information referred to in Article 10(2) of the Directive must be set out on paper or on another durable medium, a credit agreement need not necessarily be drawn up in a single document. Thus, Article 10(2) does not preclude a separate schedule of charges (which may undergo changes) being annexed to or cross-referenced in the credit agreement. However, to comply with the obligation that the information in Article 10(2)(k) must be specified “in a clear and concise manner”, as stated in the chapeau of Article 10(2), the fact that other charges apply and that they may undergone changes must, in itself, be stated in the credit agreement itself (and might not be “hidden” only in the annexed or

cross-referenced document)⁵. Only then the cross-reference to the paper or other durable medium, which is not included in the same document as the credit agreement, can be understood as being sufficiently clear and precise. Last, but not least, it goes without saying that the information in the annexed or cross-referenced schedule must be specific and clear enough to allow the consumer to understand what the charges are and what they will be in the future, so that that the objective of Article 10 of the Directive is not frustrated.

50. Based on the above, the Commission proposes to respond to the sixth question as follows:

Article 5(1)(i) of Directive 2008/48/EC requires that the standard form contains all information on charges deriving from the credit agreement and the conditions under which those costs can be changed that is necessary to allow the consumer to compare different offers. Article 10(2)(k) of Directive 2008/48/EC requires that where the information on charges deriving from the credit agreement and the conditions under which those costs can be changed is not provided in the credit agreement itself, the agreement specifies that such charges apply and may be changed and contains a clear and precise cross-reference to other paper, or other durable, media containing further information on those aspects.

IV.8. The seventh question

51. The seventh question reads as follows: *Does it follow from Article 5(1)(l) of Directive 2008/48/EC that the charges to be paid in the case of late payment are to be specified in the standard form or whether it is sufficient that the creditor make a general reference to its schedule of charges, which may undergo changes?*
52. At the outset, the Commission refers to the preceding analysis concerning “other charges” and the possibility to specify them in a schedule of charges (which may undergo changes) in the context of Article 5(1)(i) of Directive 2008/48. That analysis, undertaken as part of the Commission’s reply to the sixth question, applies *mutatis mutandis* to the seventh question.

⁵ To this effect, see also the Opinion of AG Sharpston delivered on 9 June 2016 in C-42/15 Home Credit Slovakia, EU:C:2016:431, para 52.

53. Moreover, it should be underlined that a sufficient transparency of costs that could arise in case of late payments is essential to ensure consumer protection. In this regard, the relevant box in the SECCI form even includes an explicit explanation designed to draw the consumer's attention to this issue, reading as follows: "*Missing payments could have severe consequences for you (e.g., forced sale) and make obtaining credit more difficult.*"
54. Given that the Commission concluded in the context of the previous question that information on "other charges" and the conditions of their change should be included in the standard form itself, *a fortiori* the same conclusion applies to the category of costs that could arise in case of late payments and that could have severe consequences for the consumer, as explicitly underlined by the legislator in the Directive itself. The absence of information on those costs would frustrate the objective of Article 5 of the Directive.
55. Based on the above, the Commission proposes to respond to the seventh question as follows:

Article 5(1)(l) of Directive 2008/48/EC requires that the standard form contains all information on charges to be paid in the case of late payment and the conditions under which those costs can be changed that is necessary to allow the consumer to compare different offers.

V. CONCLUSION: THE PROPOSED RESPONSES

56. In the light of the preceding discussion, the Commission proposes to respond to the questions from the referring court as follows:
- 1) *Article 5(1)(f) and Article 10(2)(f) Directive 2008/48 must be interpreted as meaning that the creditor is to specify, in an exhaustive listing in a standard form and in the credit agreement, respectively, the conditions on which its decisions to raise or lower the borrowing rate on credit that bears variable interest may be based.*
 - 2) *Article 5(1)(f) of Directive 2008/48/EC precludes that among the conditions for changing the borrowing rate that are specified on the standard form there is a reference to an unforeseen increase in the creditor's costs, where due to that reference the conditions for the change of the borrowing rate are not sufficiently clear to allow the consumer to compare different offers. It is for the national court to assess whether this is the case, taking into account, in particular, whether the conditions for the change of the borrowing rate are*

foreseeable. Article 10(2)(f) of Directive 2008/48/EC precludes that among the conditions for changing the borrowing rate that are specified in the credit agreement there is a reference to an unforeseen increase in the creditor's costs, where due to that reference the conditions for the change of the borrowing rate are not sufficiently clear to inform the consumer of the actual extent of its commitment. It is for the national court to assess whether this is the case, taking into account, in particular, whether the conditions for the change of the borrowing rate are foreseeable.

- 3) *Article 5(1)(f) of Directive 2008/48/EC precludes the use of general and open-ended references such as "etc." or "amongst others things" as conditions governing the application of the borrowing rate listed in the standard form where due to these references the conditions for the application of the borrowing rate are not sufficiently clear so as to allow the consumer to compare different offers. It is for the national court to assess whether this is the case, taking into account, in particular, whether the conditions for the change of the borrowing rate are foreseeable.*
- 4) *Article 5(1)(g) of Directive 2008/48/EC requires that the APR is to be illustrated in the standard form with a representative example in which all the assumptions used to calculate the percentage are stated even though all components of the credit which the consumer intends to take are known; in such a case, however, the creditor shall take the known components into account when providing the example.*
- 5) *Article 5(1)(i) and Article 10(2)(k) of Directive 2008/48/EC require that "other charges deriving from the credit agreement" are always to be specified, in the standard form and in the credit agreement, respectively, regardless of whether or not the credit is of such a type that both payment transactions and drawdowns of the credit are recorded.*
- 6) *Article 5(1)(i) of Directive 2008/48/EC requires that the standard form contains all information on charges deriving from the credit agreement and the conditions under which those costs can be changed that is necessary to allow the consumer to compare different offers. Article 10(2)(k) of Directive 2008/48/EC requires that where the information on charges deriving from the credit agreement and the conditions under which those costs can be changed is not provided in the credit agreement itself, the agreement specifies that such charges apply and may be changed and contains a clear and precise*

cross-reference to other paper, or other durable, media containing further information on those aspects.

- 7) *Article 5(1)(l) of Directive 2008/48/EC requires that the standard form contains all information on charges to be paid in the case of late payment and the conditions under which those costs can be changed that is necessary to allow the consumer to compare different offers.*

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