



EUROPEAN COMMISSION

Brussels, 24 April 2023  
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## **TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT**

### **WRITTEN OBSERVATIONS**

submitted pursuant to Article 20 of the Statute of the EFTA Court by the

### **EUROPEAN COMMISSION**

represented by H el ene Tserepa-Lacombe, Legal Adviser, Julie Samnadda, Napole on Ruiz Garc a and Corneliu Hoedlmayr, members of its Legal Service, with a postal address for service in Brussels at the Legal Service, Greffe Contentieux, BERL 1/169, 200 Rue de la Loi B-1049 Brussels.

#### **in Case E-1/23**

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Reykjavik District Court, in the case of

**Elva D ogg Sverrisd ttir and  lafur Vigg  Sigur sson**

**Plaintiff**

against

** islandsbanki hf.**

**Defendant**

requesting an advisory opinion regarding the interpretation of the act referred points 31g and 31j of Chapter IX and in point 7h of Chapter XIX. (OJ L 60, 28.2.2014, p. 34) of the EEA Agreement namely Directive 2014/17/ on credit agreements for consumers relating to residential immovable property <sup>1</sup> (the Mortgage Credit Directive) and Directive 2008/48/EC on credit agreements for consumers <sup>2</sup> (the Consumer Credit Directive).

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<sup>1</sup> OJ L 60, 28.2.2014, p. 34–85

<sup>2</sup> OJ L 133, 22.5.2008, p. 66–92

## 1. FACTS AND PROCEDURE

1. This dispute before the Reykjavik District Court concerns the contractual terms in a mortgage agreement or deed (Mortgage Agreement) which provides for repayment based on variable interest and concluded between the Plaintiffs and their lender, the Defendant on 21 January 2021. With effect from that date, under the terms of the Mortgage Agreement, the Plaintiffs received a loan of ISK 57 610 000 from the Defendant for a term of 480 months, with the first repayment date set for 1 March 2021. The Plaintiffs now claim that the Mortgage Agreement should be declared invalid.
2. The underlying dispute concerns the particular contractual terms of the Mortgage Agreement which deal with the determination of variable interest rates. The claim of invalidity rests on whether on the basis of those contractual terms, the Defendant was entitled to raise the borrowing rate applying to the amount owed by the Plaintiffs under the bond in three interest-rate adjustments during 2021.
3. The Mortgage Agreement is a non-indexed property mortgage loan, to be repaid in equal instalments, with variable interest.
4. The Mortgage Agreement also states that the debt was to be repaid with equal payments of interest. However, as the interest rate was variable, the lender i.e the Defendant reserved the right to recalculate the loan at every adjustment of the interest rate and/or amend the terms based on changed circumstances, and repayment instalments were to take account of the interest rate as it was on the date on which the recalculation was based. Interest-rate adjustments could result in an increase or a decrease of each instalment, and would consequently have an impact on the total amount repaid. Article 2 of the contractual terms then stated that variable non-indexed mortgage interest was to apply, as determined at any given time and published on the index chart of Íslandsbanki hf. Adjustments to the interest rate were to take account of, amongst other things, changes in the bank's financing costs, its operating costs, public levies and/or other unforeseen costs, the Central Bank of Iceland's prime rate, and changes in the consumer price index.
5. The Plaintiffs argue that the terms of the Mortgage Agreement regarding adjustments of the interest rate applying to the loan were at variance with the

provisions of the Consumer Property Mortgage Act No 118/2016, and with Article 36 of Act No 7/1936 on Contracts, Mandates and Invalid Legal Instruments.

6. The Plaintiffs raise certain arguments which pertain respectively to the Mortgage Credit Directive, the Consumer Credit Directive also Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29–34 Directive 93/13/EEC on unfair terms in consumer contracts (the Unfair Contract Terms Directive) as follows:
  - the interpretation of the substantive content of Article 34 of Act No 118/2016, which should be by reference to Article 24 of the Mortgage Credit Directive; and
  - the relationship between the Mortgage Credit Directive and the Consumer Credit Directive as the requirements regarding the contents of terms in consumer credit agreements covering variable interest are stated in point f of Article 12(2) of Act No 33/2013 and in the second sentence of Article 34(1) of the Consumer Credit Act No 118/2016. These provisions (the Plaintiffs note) are derived from the Consumer Credit Directive (Article 10(2)(f)); and
  - Articles 4 and 5 of the Unfair Contract Terms Directive which the Plaintiffs consider in the light of the case law of the Court of Justice must be interpreted as meaning that the creditor must explain accurately the method used to calculate the interest rate.
7. The Defendant considers that the Mortgage Agreement complies with Article 34 of Consumer Property Mortgage Act No 118/2016 and rejects the assertion that the Mortgage Agreement is not compatible with the Contracts Act No 7/1936, thus opening the way to a declaration of invalidity. The Defendant notes that Act No 118/2016 does not specify that a contractual provision that does not meet the requirements of the act is to be regarded as invalid. The Defendant claims that the conditions in the bond between the parties are in full conformity with Article 34 of the aforementioned act and therefore cannot be set aside on the basis of contract law principles.

8. The District Court agrees with the Plaintiffs that an interpretation of the Mortgage Credit Directive and its relationship with the Consumer Credit Directive is necessary for the resolution of the case and the impact that this has on the interpretation of the Consumer Property Mortgage Act No 118/2016. The other matters raised in argument in particular the Unfair Contract Terms Directive have not been referred.
9. By order of 13 December 2022, the District Court has sought an advisory opinion from the EFTA Court on the following question:

*Is it compatible with Directive 2014/17/EU (see, in particular, Article 24 thereof) and, as appropriate, with Article 10(2)(f) of Directive 2008/48/EC (cf. recital 19 of Directive 2014/17/EU), that the terms of a consumer property mortgage with variable interest state that adjustments of the borrowing rate will take account of factors including operating costs and other unforeseen costs?*

## **2. PRELIMINARY REMARKS**

10. In the light of the relevant facts set out in the Request for an Advisory Opinion, the Commission notes that the date at which the Mortgage Agreement was concluded i.e. January 2021 (the relevant date) was prior to the entry into force of Joint Committee Decision No. 125/2019. The Mortgage Credit Directive became applicable in the EEA only at the date of entry into force of the EEA Joint Committee Decision No 125/2019 of 8 May 2019 (the Joint Committee Decision).<sup>3</sup> That Decision entered into force on 1 November 2021 i.e. after the date of conclusion of the Mortgage Agreement.
11. In addition, the Joint Committee Decision introduced a number of adaptations to the Mortgage Credit Directive as it applies to the EEA. One such adaptation concerns the transitional provision in Article 43(1) of the Mortgage Credit Directive.

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<sup>3</sup> Pursuant to Article 7 of the EEA agreement “Acts referred to or contained in (...) decisions of the EEA Joint Committee shall be (...) made, part of their internal legal order as follows: (...) (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”. At the same time it should be borne in mind that fundamental principles of Union law like direct effect and primacy do not apply in the EEA (see for instance Articles 102 and 103 of the EEA agreement). All provisions of Union law applicable in the EEA must therefore be read in the light of the modifications stipulated under the EEA agreement.

12. For the Union, Article 43 (1) of the Mortgage Credit Directive provides:

*Transitional provisions*

*“1. This Directive shall not apply to credit agreements existing before 21 March 2016”*

13. In the Union, the effect of Article 43 (1) of the Mortgage Credit Directive is that any credit agreement concluded prior to 21 March 2016 does not fall within the scope of application of that directive for the duration of the term of that credit agreement. There is no provision of the Mortgage Credit Directive which limits the application of Article 43(1) after a period of time.<sup>4</sup> Therefore, the Mortgage Credit Directive is entirely forward looking and it does not apply retroactively to credit agreements that existed before the date stipulated in Article 43(1).

14. As adapted by the Joint Committee Decision, Article 43(1) of Directive 2014/17/EU when applied to the EEA states reads:

*“This Directive shall not apply to credit agreements existing before 1 November 2021.”*

15. The date of 1 November 2021 reflects the date of entry into force of the Mortgage Credit Directive in EEA law.

16. The consequences of the above are twofold for the dispute before the District Court:

- first, at the relevant date of the conclusion of the disputed Mortgage Agreement, the Mortgage Credit Directive was not part of EEA law<sup>5</sup>; and
- second, by virtue of the adaptation to Article 43(1) of the Mortgage Credit Directive by the Joint Committee Decision given that the Mortgage Agreement existed prior to 1 November 2021, it is excluded entirely from the scope of application of the rules laid down in that directive for the duration of the term of 480 months.

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<sup>4</sup> Provisions of this type are sometimes described as “grandfather clauses” or “grandfather in”.

<sup>5</sup> This case raises exactly the same question as Case E- which is pending before this Court. and following the hearing in that case, it is also now apparent to the Commission that *ratione temporis* the Mortgage Credit Directive was also not part of EEA law at the time of the relevant facts of Case E-

17. The incorporation of the terms of the Mortgage Credit Directive in Icelandic law predates its inclusion in the EEA legal order. That was the choice of the Icelandic legislature which does not change the outcome i.e. that the Mortgage Credit Directive does not apply *ratione temporis* to the Mortgage Agreement, as a matter of EEA law.
18. Indeed, it would constitute a retrospective application of the Mortgage Credit Directive in circumstances where the application of that directive to existing agreements prior to the date stipulated in Article 43(1) is expressly excluded.
19. This would also mean that as the Mortgage Credit Directive does not apply, the relationship between that Directive and the Consumer Credit Directive as addressed in the text of the Mortgage Credit Directive would not require assessment. And in any event, as the Consumer Credit Directive excludes mortgages from the scope of application by its Article 2, no separate consideration of the Consumer Credit Directive would be required.
20. As the Icelandic law by its text reflects the content of the Mortgage Credit Directive its application is a question of national law. That said, nothing precludes the national courts from drawing upon any sources or methods of statutory interpretation in line with their legal tradition, including traditional canons of statutory interpretation, such as the legislative history and purpose of the Icelandic legislation in question. In that context, the national court may decide to, nevertheless, rely on the content of the Mortgage Credit Directive as a basis for interpreting the relevant national provisions. In this context, the EFTA Court could also, if and where appropriate, provide elements of interpretation of the Mortgage Credit Directive which the national court could take into account.
21. The Commission notes that this case raises exactly the same question as Case E-13/22 which is pending before this Court and where judgment is awaited following the hearing in March 2023. In its Written Observations in Case E-13/22, the Commission focused on the question of the referring court which was also the District Court of Reykjavik. Following the hearing in that case, it is now apparent to the Commission that *ratione temporis* the Mortgage Credit Directive was also not part of EEA law at the time of the relevant facts of Case E-13/22. Nevertheless, and for the sake of completeness, the EFTA Court may wish to refer

to the Commission's Written Observations in Case E-13/22 and the points the Commission made at the hearing in relation to the Mortgage Credit Directive and its relationship with the Consumer Credit Directive.

22. On the other hand, another directive which was fully in force in the EEA at the relevant date i.e. the Unfair Contract Terms Directive fully applies *ratione temporis* to the Mortgage Agreement. In which case, the Commission is of the view that the dispute can be resolved by reference to the Unfair Contract Terms Directive.
23. Accordingly, in order to provide the District Court with a useful reply, the Commission would respectfully submit that the Question could be reformulated as follows:

*“Is a term of a consumer mortgage loan with variable interest, according to which the adjustments of the borrowing rate will take account of factors including operating costs and other unforeseen costs to be considered unfair, in the light of Article 3(1) of Directive 93/13/EEC [the Unfair Contract Terms Directive]?”*

### **3. OBSERVATIONS ON THE QUESTION AS REFORMULATED**

24. For the purposes of replying to the Question, as reformulated, the Commission will address, inter alia, certain of the arguments before the District Court in relation to the Unfair Contract Terms Directive.
25. The Plaintiffs consider that in the light of the case law of the Court of Justice, Articles 4 and 5 of the Unfair Contract Terms Directive must be interpreted as meaning that the creditor must explain accurately the method used to calculate the interest rate. The Plaintiffs have also argued that the District Court should consider whether Articles 36 a-d of Act No 7/1936, which transpose the Unfair Contract Terms Directive into Icelandic law, should be applied including determining which conditions applying to variable interest should be met in order to be considered just and fair, and what is meant by the requirement that terms must be stated in clear and comprehensible language and what consequences follow if this requirement is not met.

26. These arguments pertain to the assessment of the transparency and of the fairness of the contract term providing for the grounds of adjustment of the variable interest rate.
27. Articles 4 and 5 of the Unfair Contract Terms Directive provide:

*Article 4*

*“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.*

*Article 5*

*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).”*

28. In the light of the abundant case law of the Court of Justice on the scope of the Articles 4 and 5 (and indeed the entirety) of the Unfair Contract Terms Directive, it is settled case law that the District Court should carry out an assessment consisting of the following steps and criteria set out below.

*Does the concerned term constitute the main subject-matter or an essential obligation of the contract?*

29. As a starting point, it should be recalled that, in accordance with Article 4(2) of the Unfair Contract Terms Directive:

*the “[a]ssessment 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”.*



30. Therefore, at the outset, the District Court is required to determine whether the disputed term concerns, or not, the main subject matter (or, as the Court of Justice has also defined it, (“*an essential obligation*”) of the contract. In that regard, insofar as Article 4(2) of the Unfair Contract Terms Directive lays down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for in the system of consumer protection put in place by that directive, that provision must be strictly interpreted.<sup>6</sup>
31. In line with such a strict interpretation, the Court of Justice has held,<sup>7</sup> for instance, in a case concerning foreign currency mortgage loans that the exclusion set out in Article 4(2) does not apply to a term relating to a mechanism for amending the prices of the services provided to the consumer. Similarly, it could be argued that a term determining the way in which –and the basis on which- an interest rate can be adjusted (but not the interest rate itself) would equally fall outside of the exclusion set out in Article 4(2).
32. Nevertheless, it will be for the District Court to determine, having regard to the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context, whether a term such as the one in the main proceedings (Article 2 of the terms) constitutes an essential element of the debtor’s obligations.

*Is the term drafted in plain intelligible language?*

33. Should the District Court conclude that the disputed term could be considered an essential element of the contract, then that court would need to assess whether it is drafted in plain and intelligible language or, in other words, whether the term is transparent.
34. In that regard, it is settled case law that the transparency requirement imposed by Article 4(2) has to be interpreted broadly.<sup>8</sup> The Court has equated this requirement with the one set out in Article 5 as applicable to all the terms of the contract.<sup>9</sup>

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<sup>6</sup> Case 26/13, *Kasler*, paragraph 42, ECLI:EU:C:2014:282.

<sup>7</sup> See, for instance case C-472/10, *Invitel*, paragraph 23 ECLI:EU:C:2012:242.

<sup>8</sup> Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska*, paragraph 72 ECLI:EU:C:2020:631; Case C-621/17 *Kiss and CIB Bank*, paragraph 36 ECLI:EU:C:2019:820; Case C-125/18 *Gómez del Moral Guasch*, paragraph 46. ECLI:EU:C:2020:138.

35. According to the Court's case law, the transparency requirement entails that sellers and suppliers have to provide sufficient and accurate information to consumers on contract terms and their implications/consequences before the conclusion of the contract, to enable the consumer to evaluate the risk of potentially significant adverse economic consequences of contractual terms on his or her financial obligations.<sup>10</sup> The Court has repeatedly emphasised the fundamental importance of such information so that consumers can understand the extent of their rights and obligations under the contract before being bound by it.<sup>11</sup>
36. In particular, in the context of mortgage loans running for a long period and containing monthly instalments which may vary (such as loans indexed to a foreign currency), hence quite similar to the case in the main proceedings, the Court has pointed out<sup>12</sup> that the fact that exchange rates may change in the long term cannot justify a failure to mention, in the contractual provisions and in the context of the information provided by the seller or supplier at the time of negotiation of the contract, the criteria used by the bank to set the exchange rate that is applicable for calculating the repayment instalments, thereby enabling the consumer to determine that exchange rate at any time. The Court thus concluded that the transparency requirement laid down by the Unfair Contract Terms Directive must be understood as enabling borrowers to understand what they are committing themselves to, in particular the method of calculating the monthly repayments of the loan taken out by them.<sup>13</sup>
37. Similarly, in order to determine whether the term at stake in the main proceedings complies with the transparency requirement set out in Articles 4(2) and 5 of the Unfair Contract Terms Directive, the District Court would need to verify whether it enables a consumer (who is reasonably well informed and reasonably observant and circumspect) to understand, on the basis of clear and intelligible criteria, the

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<sup>9</sup> *Kásler*, paragraph 71-72; Case C-186/16 *Andriiciuc*, paragraph 44 ECLI:EU:C:2017:703; *Gómez del Moral Guasch*, paragraph 50.

<sup>10</sup> Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance SA*, paragraphs 78 and 83 ECLI:EU:C:2021:470.

<sup>11</sup> Case C-92/11 *RWE Vertrieb*, paragraph 44 ECLI:EU:C:2013:180; *Kásler*, paragraph 70; Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, paragraph 50 ECLI:EU:C:2016:980; *Andriiciuc*, paragraph 48.

<sup>12</sup> Case 212/20, A., S.A., paragraph 53 ECLI:EU:C:2021:934.

<sup>13</sup> *Idem*, paragraph 54.

way in which the adjustments in the borrowing rate used to calculate the amount of the repayment instalments is set, in order that that consumer is able to determine himself or herself, at any time, the rate applied by the seller or supplier.

38. It is solely for the District Court to carry out the necessary checks to establish whether the contract term related to the variable interest rate was transparent in the light of all the relevant information and circumstances surrounding the conclusion of the contract.<sup>14</sup> In particular, the District Court will need to establish whether a general reference in the contract term to the “operating costs” and “other unforeseen costs” as a basis for calculating the variable interest rate allowed the consumers, in this case the Plaintiffs, to estimate the total cost of the mortgage loan at the moment when they decided to conclude the contract with the bank.
39. If, in the light of the foregoing, the District Court reaches the conclusion that the contested contract term does not pertain to the main subject-matter of the contract, or (where it does) that the term at stake is not transparent for the purposes of Article 4(2) of the Directive, then it must proceed with the unfairness assessment in accordance with Article 3(1) of the Directive.<sup>15</sup> That is of course without prejudice to the possibility for national law, in line with the principle of minimum harmonisation set out in Article 8 of the Unfair Contract Terms Directive to provide that a lack of transparency can amount to lack of fairness and that a contract term that does not comply with the requirements of transparency under Article 4(2) and 5 of the Directive is not binding on the consumer, which is for the national court to verify.<sup>16</sup>

*Is the term unfair?*

40. Article 3(1) of Directive 93/13 provides as follows:

### *Article 3*

*“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*

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<sup>14</sup> *Gomez del Moral Guasch*, paragraph 52.

<sup>15</sup> E.g. Case C-421/14 *Banco Primus*, paragraph 62-67 ECLI:EU:C:2017:60; Case C-119/17 *Lupean*, paragraphs 22-31 ECLI:EU:C:2018:103, or Case C-118/17 *Dunai*, paragraph 49 ECLI:EU:C:2019:207.

<sup>16</sup> See for instance, C-395/21, *D.V.*, paragraph 50.

*significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*"

41. With respect to the “*good faith*” criterion, the 16th recital of the Unfair Contract Terms Directive clarifies that the national court must assess whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations<sup>17</sup>:

*“Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;”*

42. With respect to the “*significant imbalance*” criterion, the Court stated that if there are supplementary rules from which the contractual term deviates, those will be the primary yardstick for assessing a significant imbalance in the rights and obligations of the parties. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force.<sup>18</sup> The Court held that the existence of a significant imbalance can result solely from a sufficiently serious impairment of the legal situation of the consumer.<sup>19</sup>
43. In that regard, the Commission is of the view that the District Court should take into account its own domestic law and, in particular, Article 34 of the Consumer Property Mortgage Act N° 118/2016 as a yardstick. According to that provision, creditors may only use reference values, indexes or reference rates that are clear, accessible, objective and verifiable. Further, if the adjustment of the interest rate is

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<sup>17</sup> Case C-415/11 *Aziz*, paragraphs 68-76 ECLI:EU:C:2013:164; *Banco Primus*, paragraphs 59-61. See also *PNB Paribas Personal Finance SA*, paragraph 93.

<sup>18</sup> *Banco Primus*, C-421/14, paragraph 59.

<sup>19</sup> Case C-226/12 *Constructora Principado*, paragraph 30 ECLI:EU:C:2014:10.

not based on a reference value, index or reference interest rate, then the mortgage credit agreement shall state the conditions and procedure for adjustment of the interest rate.

44. Thus, in order to determine whether the term at stake creates a significant imbalance in the parties' rights and obligations to the detriment of the consumer, the referring court should compare the legal situation in which the consumer is put by the disputed contractual term with his/her legal situation under the applicable national law. In particular, it should assess whether, in the first place, the fact that the adjustments to that rate would be done pursuant to changes to operating costs or other unforeseen costs allows an average consumer to foresee with a sufficient degree of predictability the conditions and procedure for such adjustment and secondly, whether the possibility for the bank to unilaterally adjust the interest rate on those grounds impairs sufficiently seriously the consumer' legal situation under the applicable rules.
45. It must be recalled, in that regard, that the annex to the Unfair Contract Terms Directive provides an indicative and non-exhaustive list of contract terms which may be regarded as unfair under Article 3(1). In that connection, by reference to the Annex points 1(j) and 2(b), the District Court should assess whether a contract term providing for a variable interest rate based on non-clearly defined parameters such as "*operating costs*" and "*other unforeseen costs*" does not amount to a unilateral change of the interest rate by the bank that would create a significant imbalance to the detriment of the consumer in the absence of a valid reason and of a prior notice given by the bank to the consumers in order to allow them to dissolve the contract should they wish to.
46. Furthermore, the assessment to be performed by the District Court pursuant to Article 3(1) of Unfair Contract Terms Directive must also take into account the potential lack of transparency of the disputed contract term (as explained above).
47. Indeed, according to settled case law of the Court, while a lack of transparency does not automatically lead to the unfairness of a given contract term under Article 3(1) of the Unfair Contract Terms Directive, where a contract term is not plain and intelligible can indeed contribute to finding it unfair or even indicate unfairness in

certain cases.<sup>20</sup> Actually, the Court has, on different occasions, referred to a lack of transparency as an element in the assessment of the unfairness of contract terms or even referred to the lack of transparency and unfairness of contract terms in one breath.<sup>21</sup> Therefore, it would even be possible that a lack of transparency may lead, on its own, to the unfairness of the term where such a lack of transparency is at the origin of the significant imbalance.<sup>22</sup>

48. Importantly, the Court has stressed the significance of transparency for the fairness of contract terms, in particular, with regard to clauses which allow the seller or supplier to change the rates to be paid by consumers in long-term contracts,<sup>23</sup> or terms which determine the consumer's core obligations in loan agreements. In the Commission's view, the disputed term could be thus categorised.<sup>24</sup>
49. It will be therefore for the District Court to determine, taking account of the criteria laid down in Article 3(1) and Articles 4(2) and 5 of the Unfair Contract Terms Directive, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive.<sup>25</sup>
50. If, in light of the above, the District Court finds that the disputed term is unfair in the sense of Article 3(1) of Unfair Contract Terms Directive then in accordance with Article 6(1) it must simply exclude the application of that unfair contractual term in order for it not to produce binding effects with regard to the consumer, without being authorised to revise its content. However, in accordance with the Article 6(1), the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair term.

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<sup>20</sup> E.g. *Invitel*, paragraph 28 and end of point 1 of the operative part; *RWE Vertrieb*, point 2 of the operative part.

<sup>21</sup> E.g. Case C-191/15 *Verein für Konsumenteninformation v Amazon*, paragraph 65; Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria and Bankia*, paragraph 50; Joined Cases C-419/18 and C-483/18 *Profi Credit Polska*, paragraph 53; Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance SA*, paragraph 93.

<sup>22</sup> As happened in *Verein für Konsumenteninformation v Amazon*, see above.

<sup>23</sup> *Invitel*, paragraphs 21-31; *RWE Vertrieb*, paragraphs 40-55.

<sup>24</sup> See *Lupean*, paragraphs 22-31, *Kásler* and *Andriciu*, and Case C-348/14 *Bucura* ECLI:EU:C:2015:447.

<sup>25</sup> See, inter alia, *Profi Credit Polska*, paragraph 53.

51. Since the District Court does not inquire about the consequences of the finding of unfairness under Article 6(1) of the Unfair Contract Terms Directive, the Commission will not further develop its reasoning.
52. Consequently, in the light of the foregoing, the Commission considers that the question, as reformulated, should be answered as follows: that a term such as the one disputed in the main proceedings, according to which the adjustments of the borrowing rate will take account of factors including operating costs and other unforeseen costs, may be declared unfair in accordance with Article 3(1) of the Unfair Contract Terms Directive where that term causes a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer, and provided that that same term does not fall within the exception provided for in Article 4(2) of the Directive, which it is for the national court to verify.
53. The examination of unfairness must be carried out by the District Court in the light of national rules which, in the absence of an agreement between the parties, are applicable, the means which the consumer has at his disposal under national law to bring an end to the use of that type of term, the nature of the goods or services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract.

#### **4. CONCLUSION**

54. The Commission respectfully proposes that the Question of the District Court be answered as follows:

*A term such as the one disputed in the main proceedings, according to which the adjustments of the borrowing rate will take account of factors including operating costs and other unforeseen costs, may be declared unfair in accordance with Article 3(1) of the Unfair Contract Terms Directive where that term causes a significant imbalance in the parties' rights and obligations under a contract to the detriment of the consumer, and provided that that same term does not fall within the exception provided for in Article 4(2) of the Directive, which it is for the national court to verify.*

*The examination of unfairness must be carried out by the District Court in the light of national rules which, in the absence of an agreement between the parties, are applicable, the means which the consumer has at his disposal under national law to bring an end to the use of that type of term, the nature of the goods or services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract.*

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