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Case No: 90752
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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by

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acting as Agents,

IN CASE E-4/23

Neytendastofa

v

Íslandsbanki hf.

In which the Court of Appeal (*Landsréttur*) 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 Articles 5 and 10 of Directive 2008/48/EC of the European Parliament and of the Council *on credit agreements for consumers*.

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1 INTRODUCTION

1. The Agreement on the European Economic Area ("**the EEA Agreement**") sets out several objectives for the European Economic Area ("**the EEA**"), one of those being *a high level of consumer protection*.[1]
2. In order to ensure a high level of consumer protection in the EEA, numerous acts concerning various aspects of consumer protection have been incorporated into the EEA Agreement, including 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 ("**the CCD**"),[2] which is the topic of the present request for an Advisory Opinion ("**the Request**").
3. The CCD was introduced in order both to ensure that all consumers in the EEA enjoy a high and equivalent level of protection of their interests, and to facilitate the emergence of a well-functioning market in consumer credit.[3] It contains, *inter alia*, provisions on the information to be provided to the consumer at the pre-contractual stage, and the information to be provided in the credit agreement itself, both topics of the present Request.
4. More specifically, the Request raises seven questions as to the information which must be provided to the consumer pursuant to the CCD concerning, firstly, changes to the borrowing rate, secondly, the calculation of the annual percentage rate of charge ("**the APRC**"), thirdly, the cost of the credit and fourthly, the charges to be paid in the case of late payment. These questions pertain to the requirements to such information both in standard information forms before a consumer credit agreement is concluded, and in the terms of the consumer credit agreement.

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[1] See Recital twelve to the EEA Agreement, which states that the Contracting Parties are "[d]*etermined to promote the interests of consumers and strengthen their position in the market place, aiming at a high level of consumer protection*".

[2] Incorporated into the EEA Agreement by Joint Committee Decision No 16/2009 of 5 February 2009, in point 7h of Annex XIX to the Agreement (OJ L 73, 19.3.2009, p. 53), applicable in the EEA as of 1 November 2011.

[3] See Recital seven and nine and the judgment of the Court of Justice of the European Union ("**CJEU**") of 5 September 2019 in Case C-331/18, *Pohotovosť*, EU:C:2019:665, paragraph 41, with further references.

2 THE FACTS OF THE CASE

5. By a letter dated 12 March 2019, the Icelandic Consumer Agency *Neytendastofa* (the appellant in the main proceedings, "**the Appellant**") requested from Íslandsbanki hf. (the defendant in the main proceedings, "**the Defendant**") a copy of its standard form and credit agreement, in accordance with Articles 7 and 12 of Act No 33/2013 on consumer credit ("**Act No 33/2013**" or "**the Icelandic Consumer Credit Act**").[4]
6. Following the receipt of the documents requested on 18 March 2019, the Appellant in a letter dated 28 June 2019 raised criticism of the information on the standard information form that is presented to the consumer at the pre-contractual stage. The criticism was countered by the Defendant in a letter of 19 July 2019.
7. In a decision of 26 November 2019, the Appellant concluded that the Defendant, by providing inadequate information on its standard form, had breached Article 7(4)(f), (g), (i) and (l) of the Icelandic Consumer Credit Act. The Appellant furthermore concluded that, by providing inadequate information in its credit agreement, the Defendant had breached Article 12(2)(f) and (k) of the same act. The Appellant instructed the Defendant to comply with the Article, and, warned that a failure to comply within four weeks could result in a fine.
8. On 10 December 2019, the Defendant referred the Appellant's decision to the Consumer Affairs Appeals Committee. The Appeals Committee delivered its ruling on 13 October 2020, in Case No 11/2019. In this ruling, the Appellant's decision was upheld.
9. On 8 January 2021, the Defendant brought an action before Reykjavík district Court, seeking the setting aside of the ruling of the Consumer Affairs Appeals Committee. The Appellant's plea in the district court was to be exonerated of the Defendant's claims.
10. In its judgment in Case No E-127/2021, Reykjavík District Court took the view that the Appeals Committee's ruling in Case No 11/2019 was vitiated by such material flaws, and moreover that procedure in the case before the Committee had been so deficient that it had no alternative but to set aside the ruling in its entirety. The Appellant was ordered to pay the Defendant ISK 1.000.000,- in legal costs.

[4] See link to Act 33/2013: https://www.althingi.is/lagas/nuna/2013033.html.

11. An appeal in this case was lodged with the Court of Appeal ("**the Referring Court**") on 24 February 2022. On 12 May 2022, the Appellant's counsel sent the Referring Court a letter requesting a session of the court to discuss whether it would be appropriate to request an advisory opinion from the EFTA Court. The session was held at the Referring Court on 11 October 2022, at which counsels for the parties presented their arguments for requesting such an opinion. On 23 April 2023, the Referring Court granted their request.

3 EEA LAW

3.1 The CCD

12. The CCD lays down harmonised provisions on consumer credit agreements. Recital seven reads:

> *"In order to facilitate the emergence of a well-functioning internal market in consumer credit, it is necessary to make provision for a harmonised* [EEA][5] *framework in a number of core areas. In view of the continuously developing market in consumer credit and the increasing mobility of European citizens, forward-looking* [EEA] *legislation which is able to adapt to future forms of credit and which allows Member States the appropriate degree of flexibility in their implementation should help to establish a modern body of law on consumer credit."*

13. Recital eight reads:

> "*It is important that the market should offer a sufficient degree of consumer protection to ensure consumer confidence. Thus, it should be possible for the free movement of credit offers to take place under optimum conditions for both those who offer credit and those who require it, with due regard to specific situations in the individual Member States*."

14. Recital nine reads, in relevant parts:

> *"Full harmonisation is necessary in order to ensure that all consumers in the* [EEA] *enjoy a high and equivalent level of protection of their interests and to create a genuine internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid*

[5] Adapted by ESA – in the Directive worded "Community". This adaptation has been done consequently throughout these Written Observations.

down in this Directive. However, such restriction should only apply where there are provisions harmonised in this Directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation. […]*"*

15. Recital eighteen reads, in relevant parts:

"[…] *However, this Directive should contain specific provisions on advertising concerning credit agreements as well as certain items of standard information to be provided to consumers in order to enable them, in particular, to compare different offers. Such information should be given in a clear, concise and prominent way by means of a representative example.* […]"

16. Recital thirty-two reads, in relevant parts:

"*In 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. During the contractual relationship, the consumer should further be informed of changes to the variable borrowing rate and changes to the payments caused thereby*.[…]"

17. Article 1 states that the purpose of the CCD is to harmonise certain aspects of the laws, regulations and administrative provisions of the EEA States concerning agreements covering credit for consumers.

18. Article 5 is entitled "*Pre-contractual information*", and provides, in relevant parts:

"1. In good time before the consumer is bound by any credit agreement or offer, the creditor and, where applicable, the credit intermediary shall, on the basis of the credit terms and conditions offered by the creditor and, if applicable, the preferences expressed and information supplied by the consumer, provide the consumer with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement. Such information, on paper or on another durable medium, shall be provided by means of the Standard European Consumer Credit Information form set out in Annex II. The creditor shall be deemed to have fulfilled the information requirements in this paragraph and in Article 3, paragraphs (1) and (2) of Directive 2002/65/EC if he has supplied the Standard European Consumer Credit Information.

The information in question shall specify:

[…]

(f) 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;

(g) 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; if a credit agreement provides different ways of drawdown with different charges or borrowing rates and the creditor uses the assumption set out in point (b) of Part II of Annex I, he shall indicate that other drawdown mechanisms for this type of credit agreement may result in higher annual percentage rates of charge;

[…]

(i) 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 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;

[…]

(l) the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default;"

19. Article 10, which is entitled "*Information to be included in credit agreements*" and lists information that is to be included in credit agreements, provides in relevant parts:

"1. Credit agreements shall be drawn up on paper or on another durable medium.

All the contracting parties shall receive a copy of the credit agreement. This Article shall be without prejudice to any national rules regarding the validity

of the conclusion of credit agreements which are in conformity with [EEA] *law.*

2. 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 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;

[…]

(k) 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 payment for both payment transactions and drawdowns, and any other charges deriving from the credit agreement and the conditions under which those charges may be changed;

[…]"

3.2 The UCTD

20. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ("**the UCTD**")[6] lays down provisions on effective consumer protection by adopting uniform rules of law in the matter of unfair terms, allowing the EEA States to have the option to afford consumers a higher level of protection through national provisions.[7]

21. Articles 3, 4, 5 and 6 UCTD read 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 significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

[6] Incorporated into the EEA Agreement by Joint Committee Decision No 7/94 of 21 March 1994 in point 7a of Annex XIX (OJ L 160, 28.6.1994, p. 1–158).

[7] See Recitals ten and twelve to the UCTD.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a preformulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

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 supplies 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).

Article 6

1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States."

4 NATIONAL LAW

22. Act No 33/2013 transposes the CCD into the Icelandic legal order.[8] Article 7[9] transposes Article 5 of the CCD and states which information is to be provided prior to conclusion of an agreement:

"The creditor shall, with suitable notice, provide the consumer with the information necessary to compare dissimilar offers and to take an informed decision on whether to enter into a credit agreement before the consumer is bound by a credit agreement or offer. This information shall be provided on the basis of the credit terms, the conditions offered by the creditor and, if applicable, any wishes expressed or information provided by the consumer. Such information shall be provided on paper or other durable medium, on a standard form which is published in a regulation issued by the minister.

The creditor shall be regarded as having met the information requirements of Articles 5 and 6 of the Distance Marketing of Consumer Financial Services Act, No 33/2005, if it has provided information on a standard form in accordance with the second paragraph.

The following shall be stated in the information:

[…]

[8] In the preparatory works attached to the legislative bill which became Act 33/2013, it is stated that the legislative bill implements the CCD.

[9] In the preparatory works attached to the legislative bill which became Act 33/2013, it is stated that Article 7 of the legislative bill implements Article 5 of the CCD.

f. the borrowing rate, the conditions governing its application and, where available, an index or reference rate that may influence the initial borrowing rate, and also the periods, conditions and procedure for changing the borrowing rate; if different borrowing rates apply in different circumstances the above information shall be provided regarding all of the rates;

g. 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 the percentage rate; if 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; if a credit agreement provides different ways of drawdown with different charges or borrowing rates, the creditor shall use shall use the highest charges and the [highest] rate applying to the most common credit agreements and state that other assumptions could result in a higher annual percentage rate of charge;

[…]

i. where applicable, the charges for maintaining one or more credit lines, in which both payment transactions and drawdowns are recorded, unless the opening of a credit line is optional, together with the charges for using a means of payment for both payment transactions and drawdowns, any other charges deriving from the credit agreement and the conditions2 under which those charges may be changed; […]

l. the interest rate applying in the case of late payments and the arrangements for its adjustment and, if applicable, charges payable in the event of default;

[…]"

23. Article 12(2)(f) and (k) of Act No 33/2013 constitutes the transposition of Article 10(2)(f) and (k)[10] of the CCD and provides that the following is to be stated, clearly and concisely, in the credit agreement:

[10] In the preparatory works attached to the legislative bill which became Act 33/2013, it is stated that Article 12 of the legislative bill implements Article 10 of the CCD.

"*f. the borrowing rate, the conditions governing the application of that rate and, where appropriate, any index or reference 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 in respect of all the applicable rates*,"

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

24. Icelandic Regulation No 921/2013 transposed Annex II and III of the CCD into its national legal order.[11]

5 THE QUESTIONS REFERRED

25. An advisory opinion of the EFTA Court is sought by the Referring 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 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

[11] See link to the Icelandic Regulation No 921/2013 with the Annexes: https://island.is/reglugerdir/nr/0921-2013 and https://files.reglugerd.is/pdf/0921-2013/current.

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?"

6 LEGAL ANALYSIS

6.1 Introductory remarks

26. The Request raises seven questions concerning the interpretation and application of Article 5 of the CCD, regarding the pre-contractual information to be provided to the consumer, and Article 10 of the CCD, concerning the information to be provided in the credit agreement itself.
27. ESA at the outset notes that the Request from the Referring Court in the present case is similar to that raised in the requests for advisory opinions from the district court of Reykjanes in Iceland in Case E-1/23 and the district court of Reykjavik in Iceland in Case E-13/22. These cases concern different aspects of consumer credit agreements. The main differences between the previous two cases and this one is the fact that in the present case we are interpreting a consumer credit agreement and mainly the CCD while the previous two cases concerned a mortgage credit agreement and mainly the mortgage credit directive ("**the MCD**").[12] The present case moreover concerns both the terms of the agreement itself and the requirements of pre-contractual information to be provided to the consumer.
28. In accordance with settled case-law, it is necessary, when interpreting provisions of EEA law, such as, for the purposes of the present Request, Articles 5 and 10 of the CCD, to consider not only their wording but also the context and the objectives of the legislation of which they form part.[13]
29. The CCD forms part of the broader context of the EEA business-to-consumer acquis, and is like related directives, such as the UCTD and Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (the UCPD),[14] based on the idea that the consumer is in a position of weakness vis-à-vis the seller

[12] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 *on credit agreements for consumers relating to residential immovable property* and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 – MCD, incorporated into points 31g and 31j of Annex IX and point 7h of Annex XIX of the EEA Agreement with a Joint Committee Decision No 125/2019 (OJ L 321, 12.12.2019, p. 176), applicable in the EEA as of 1 November 2021.

[13] See e.g., judgment of the CJEU of 9 September 2021 in Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, EU:C:2021:736, paragraph 130 with further references, concerning the interpretation of Article 10(2) CCD.

[14] Incorporated into the EEA Agreement by Joint Committee Decision No 93/2006 of 7 July 2006 in point 30d of Annex IX and in points 7g, 2, 3a, 7d and 7f of Annex XIX to the Agreement (OJ L 289, 19.10.2006, p. 34), applicable in the EEA as of 1 February 2009.

and supplier/trader.[15][16] Both of these Directives could, according to the circumstances, be of relevance to questions arising under consumer credit agreements.[17][18]

30. With regard to the UCTD, the CJEU has held that, to rectify the imbalance of power between the parties in business-to-consumer contracts, information, before concluding a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for consumers.[19]

31. This principle of transparency has been concretely expressed in the CCD by the requirements on the creditor to provide the consumer, before the conclusion of any credit contract, with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement (Article 5 CCD), as well as to ensure transparency on the terms of the credit agreement itself (Article 10 CCD).

32. As held by the CJEU, the obligation to provide the information set out in Article 10(2) of the CCD contributes, along with *inter alia* the obligations prescribed under Article 5 of the Directive, to the attainment of the CCD's objective of providing full and mandatory harmonisation[20] in a number of key areas concerning consumer credit, which is regarded as necessary to ensure that all consumers in the EEA enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning market in consumer credit.[21]

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[15] As concerns the UCTD, see e.g., judgment of the CJEU of 13 July 2023 in Case C-265/22, *Banco Santander, SA*, EU:C:2023:578, paragraph 52 with further references.

[16] As concerns the UCPD, see, e.g. the EFTA Court judgment of 14 December 2019 in Case E-1/19, *Andreas Gyrre v the Norwegian Government*, paragraph 66, with further references.

[17] As for the UCPD, this follows from Recital eighteen and Article 4 of the CCD.

[18] Although the UCTD is not mentioned in the CCD, it is applicable in general, to "*terms in contracts concluded between a seller or supplier and a consumer*" see Article 1 UCTD. Where sector specific legislation has been adopted after the UCTD, as is the case for the CCD, such legislation can exclude the application of the UCTD only insofar it provides so explicitly, see Case C-290/16 *Air Berlin*, EU:C:2017:523, paragraphs 45 and 46. As noted by the European Commission, this will normally not be the case, so that the UCTD will generally apply in addition to sector specific rules, see Commission Notice Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, (2019/C 323/04) of 27 September 2019, page 16. See link to the Commission Notice Guidance: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2019.323.01.0004.01.ENG&toc=OJ%3AC%3A2019%3A323%3AFULL .

[19] See Case C-265/22, *Banco Santander, SA*, cited above, paragraph 51.

[20] See the Opinion of the Commission regarding the proposal for the CCD, under Subsection 3, on p. 3, where it is stated that: "*Pre-contractual and contractual information and the annual percentage rate of charge are fully harmonised*.", available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2008%3A0117%3AFIN .

[21] See Case C-331/18, *Pohotovost'*, cited above, paragraph 42, concerning both Articles 5 and 10, judgment of the CJEU of 18 December 2014 in Case C-449/13, *CA Consumer Finance SA*,

33. ESA submits that it is against this background that the questions at issue in the present Request must be regarded.

6.2 Questions 1, 2 and 3: Requirements regarding the information to be provided at the pre-contractual stage and in the contract terms with regard to changes in the borrowing rate

34. By Questions 1, 2 and 3 the Referring Court seeks, in essence, to ascertain whether Articles 5(1)(f) and 10(2)(f) of the CCD must be interpreted as meaning that information provided to the consumer prior to entering into a consumer credit agreement and in the consumer credit agreement itself, respectively, must specify in an exhaustive manner the conditions on which the creditor's decisions to raise or lower the borrowing rate on credit that bears variable interest may be based, and that, accordingly, such conditions may not include general references, such as to "an unforeseen increase in the creditor's costs" and to open-ended terms, such as "etc". Questions 1, 2 and 3 will in the following be answered collectively.
35. "*Borrowing rate*" is defined in Article 3(j) of the CCD as meaning the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down. It appears from the Request that the contract term at issue in the present case concerns a variable borrowing rate.[22]
36. According to the contract term concerning changes in the borrowing rate in the present case, as it was presented both in the standard information form and the credit agreement itself, adjustments to the borrowing rate 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.*"[23]
37. The Referring Court asks in this respect, in particular, whether the general reference to unforeseen increases in the creditor's costs and the open ending of the provision, which ends its listing of factors that adjustments to the borrowing rate can be based on, with "etc.", meets the requirements of Articles 5(1)(f) and 10(2)(f) of the CCD.

EU:C:2014:2464, paragraph 21, concerning Article 5 and judgment of the CJEU of 21 April 2016 in Case C-377/14, *Radlinger and Radlingerová*, EU:C:2016:283, paragraph 61, concerning Article 10. See also Recitals seven and nine to the CCD.

[22] The Request, e.g., on p. 3.

[23] See the Request, p. 3, paragraph 12 (concerning the standard information form) and p. 3–4, paragraph 13 (concerning the credit agreement itself).

38. ESA submits that the requirements set out in Articles 5(1)(f) and 10(2)(f) are specific expressions of the broader transparency objective pursued by the CCD,[24] and EEA consumer protection law more generally, as set out in the introductory remarks in Section 6.1 above. This is evident, *e.g.,* from the wording of Article 5(1) of the CCD, which specifies that the objective of requiring the creditor to provide the specific information listed in Article 5(2)(a) to (s) is to enable the consumer to "*compare different offers in order to take an informed decision on whether to conclude a credit agreement*".[25] The principle of transparency is also expressed in Recital thirty-two to the CCD, which states that the requirements to provide the consumer with information concerning the borrowing rate, both at a pre-contractual stage and when the credit agreement is concluded, are necessary in order to "*ensure full transparency*".
39. The aim of Article 5 of the CCD is to protect all consumers in the EEA, and to ensure that they enjoy a high and equivalent protection of their interests.[26] At the pre-contractual stage, the specific wording of Article 5(1)(f) of the CCD requires that the information provided to the consumer on the standard information form shall specify *inter alia*, the periods, conditions and procedure for changing the borrowing rate and can hence be interpreted as indicating that strict transparency requirements apply to changing interest rate under that provision.[27]
40. In the same vein, and in order to ensure that the consumer is aware of his or her rights and obligations, Article 10(2)(f) of the CCD requires that the credit agreement itself shall specify "*in a clear and concise manner*" the conditions governing the application of the borrowing rate and the periods, conditions and procedures for changing it.[28]
41. As held in the Opinion of Advocate General Hogan in *Volkswagen Bank* with regard to the obligation to indicate "*the interest rate applicable in the case of late payments*" pursuant to Article 10(2)(l) of the CCD, which is also among the information to be

[24] See Recital nineteen to the CCD, as referred to above, and the judgment of the CJEU of 26 February 2015 in Case C-143/13, *Matei,* EU:C:2015:127, paragraph 48, where the CJEU noted that transparency is one of the main objectives pursued by the CCD. See also the judgment of the CJEU of 6 June 2019 in Case C-58/18, *Michel Schyns v Belfius Banque SA*, EU:C:2019:467 paragraph 44.
[25] See also Recital eighteen to the CCD.
[26] See Case C-449/13, *CA Consumer Finance SA*, cited above, paragraph 44.
[27] See Recital thirty-two.
[28] See Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, cited above, paragraph 70, concerning the information requirements set out in Article 10(2) of the CCD in general.

provided at the pre-contractual stage in accordance with Article 5(1)(l), this obligation must be interpreted in such a way as to satisfy the transparency objectives pursued by both Article 10(2)(l) and Article 5(1)(l) of the CCD.[29] ESA submits that the same applies when interpreting other information requirements from both Articles 5 and 10 of the CCD, including, for the purposes of answering Questions 1, 2 and 3 from the Referring Court, the requirements to provide information regarding changes in the borrowing rate under Article 5(1)(f) and Article 10(2)(f) of the CCD.

42. Unlike Article 10(2)(l) and Article 5(1)(l) of the CCD on the interest rate applicable in the case of late payments, Articles 5(1)(f) and 10(2)(f) of the CCD on the borrowing rate and any reference rates have not been subject of specific consideration neither from the EFTA Court nor from the CJEU thus far. Given that the specific information requirements listed in Article 5(2)(a) to (s) and 10(2)(a) to (v) share the fundamental objective of ensuring consumer protection through requiring creditors to provide consumers with the information needed to take informed decisions, ESA submits that case-law pertaining to any of the information requirements listed in these provisions can be of relevance to the understanding of Articles 5(1)(f) and 10(2)(f).

43. The CJEU has held, in its interpretation of the obligation laid down in Article 10(2)(l) of the CCD to include in the credit agreement in a clear and concise manner the 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 its easy-to-access official journal, a reference in that agreement to that base rate is such as to enable an average consumer who is reasonably observant and circumspect to ascertain and understand the arrangements for varying the rate of late-payment interest, provided that the method of calculating the rate of late-payment interest is set out in the credit agreement. In that regard, one condition that must be met is that the method of calculation must be set out in a way which is readily understood by an average consumer who does

[29] See the Opinion of Advocate General Hogan of 15 July 2021 in Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, EU:C:2021:629, paragraph 65. See also the judgment in Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, cited above, paragraphs 93-95.

not have specialist knowledge in the financial field, and which enables him or her to calculate the rate of late-payment interest based on the information provided in the credit agreement.[30]

44. The CJEU has furthermore held, regarding the requirement to specify in the credit agreement in a clear and concise manner the existence or absence of a right to withdrawal and the conditions governing the exercise of that right, see Article 10(2)(p) of the CCD, that the consumer must be aware of the conditions, time limit and procedures for exercising the right of withdrawal beforehand, in order to fully benefit from that information.[31]

45. The interpretation of the requirements derived from the provisions setting out the transparency requirements in the CCD is similar to that developed by the CJEU with regard to the transparency requirements under the UCTD. In that regard, the CJEU has held that the information provided to the consumer before the conclusion of a contract, on the terms of the contract and the consequences of concluding it, is of "*fundamental importance*" for a consumer.[32] The Court has similarly, also in a case concerning the UCTD, held that it is "*of crucial importance for a consumer to obtain adequate information on a contract's terms and consequences before concluding it.*"[33] ESA submits that this applies equally – potentially even more so – under the CCD.[34]

46. With regard to the transparency requirements set out by the UCTD, the CJEU has consistently held that the term in question must not only be "*formally and grammatically intelligible to the consumer*", but also that an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term and thus evaluate, on

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[30] See Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, cited above, paragraph 94.

[31] See judgment of the CJEU of 26 March 2020 in Case C-66/19, *Kreissparkasse Saarlouis*, EU:C:2020:242, paragraph 37.

[32] See Case C-265/22, *Banco Santander*, cited above, paragraph 51.

[33] See judgment of the EFTA Court of 28 August 2014 in Case E-25/13, *Engilbertsson*, [2014] EFTA Ct. Rep. 524, paragraph 141.

[34] See to the same effect the Opinion of Advocate General Hogan in Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, cited above, paragraph 43, where the Advocate General held that when using case law concerning provisions of the UCTD to interpret provisions of the CCD, particular attention must be given to the fact that the CCD prescribes more extensive information requirements than the UCTD. The CJEU did not go into this assessment in the judgment like the Advocate General did.

the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations.[35]

47. Specifically, with regard to the compatibility of a contract term concerning adjustments of a variable borrowing rate in a credit agreement with *inter alia* Articles 3 and 5 of the UCTD, the CJEU stated that it is of "*fundamental importance*", for the purpose of complying with the requirement of transparency, to determine whether the loan agreement sets out transparently the reasons for and the particularities of the mechanism for altering the interest rate and the relationship between that mechanism and the other terms relating to the creditor's remuneration, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from it.[36]

48. In that case, where the contract term at issue *inter alia* allowed a bank to alter a variable interest rate in cases of "[…] *significant changes in the money market*", the CJEU went on to note that "*the question arises as to the foreseeability for the consumer of increases in that rate which may be made by the lender according to the criterion, which is prima facie not transparent, relating to 'significant changes in the money market', even if that formulation is in itself grammatically plain and intelligible*".[37]

49. ESA submits that the contract term at issue in the present case, which states that adjustments to the borrowing rate can be made due to a list of factors that are not exhaustive, but includes "*amongst other things*" a reference to the bank's "*unforeseen costs*", ending the listing of relevant factors with the term "*etc.*" notably does not:

    i. put the consumer in a position to understand the specific functioning of that term; nor

    ii. put the consumer in a position to calculate the borrowing rate based on the information provided in the credit agreement; or

[35] See judgment of the CJEU of 10 June 2021 in Joined Cases C-776/19 to C-782/19, *BNP Paribas Personal Finance*, EU:C:2021:470, paragraph 64 with further references. See also judgment of the EFTA Court of 24 November 2014 in Case E-27/13, *Gunnarsson*, [2014] EFTA Ct. Rep. 1090, paragraph 88, concerning the predecessor to the CCD, Directive 87/102/EEC, where the Court noted that the borrower at the time of concluding a credit agreement must have to hand "*all relevant information which could have a bearing on the implications of his undertaking*.".

[36] See Case C-143/13, *Matei,* cited above, paragraph 74, with further references.

[37] *Ibid*, paragraph 76.

iii. set out transparently the reasons for and the particularities of the mechanism for adjusting the borrowing rate, including the conditions for adjusting it and the procedures for doing so,

thus leaving the consumer in a position where he or she cannot evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations, or to compare different offers in order to take an informed decision on whether to conclude a credit agreement, contrary to the transparency requirements set out by the CCD, and EEA consumer protection law more generally.

50. ESA recalls that, as described in our introductory remarks in Section 6.1, EEA consumer legislation is based on the idea that the consumer is in a position of weakness vis-à-vis the creditor/supplier. As concerns credit agreements between a creditor and a consumer, such as the one at issue in this case, there will be significant differences between the creditor's and the consumer's level of financial expertise and experience.

51. ESA submits that for the consumer, who is per definition *´acting for purposes which are outside his trade, business or profession´* including such open-ended references to unforeseen cost increases and terms such as "etc" among the conditions that a creditor[38] may take into account when adjusting variable interest rates of contract terms, precisely because of his or her lack of expertise and experience in agreements covered by the CCD,[39] is unclear. It is therefore likely that it will also be impossible for the consumer to assess the possible impacts of such terms on his or her economic interests, in view of the fact that the list is open-ended, and the extent to which those conditions will influence the borrowing rate is unspecified.

52. ESA submits that allowing for such open-ended and general contract terms would place all risks associated with events that are unknown at the time of conclusion of the contract on the consumer. Given that the system introduced by EEA consumer protection law is based on the premise that consumers are in a weaker position vis-a-vis traders, and in the case of the CCD specifically, that consumers generally have less expertise and knowledge of financial risks and mechanisms than their

[38] See Article 3(b) of the CCD.
[39] See Article 3(a) of the CCD.

professional contractual counterparts, accepting such contract terms would contradict the very protection ensured by the CCD.[40]

53. In particular, contract terms stating that adjustments to the borrowing rate can be made due to a list of factors that are not exhaustive, but includes "*amongst other things*" the bank's "*unforeseen costs*", ending the listing of relevant factors with "*etc.*", would nullify the consumer protection effects of the transparency requirements of Articles 5(1)(f) and 10(2(f) of the CCD, contrary to their purpose of compensating for the consumers' lack of expertise when it comes to understanding the implications to their economic interests of entering into credit agreements.
54. ESA consequently, on the basis of the above, submits that Articles 5(1)(f) and 10(2)(f) of the CCD must be interpreted as meaning that the creditor is to specify, in an exhaustive listing in the standard information 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 rate may be based and how or to what extent these conditions can influence the borrowing rate. Accordingly, terms permitting adjustments to the borrowing rate on the basis of a contract term referring to "*amongst other things*" general factors such as "*and/or other unforeseen costs*", and open-ended terms such as "*etc.*", does not meet the transparency requirements of Articles 5(1)(f) and 10(2)(f) of the CCD.

6.3 Question 4: The extent to which the APRC must be illustrated in the standard information form

55. By Question 4, the Referring Court asks whether the APRC must be illustrated in the standard information form with a representative example where all the assumptions used to calculate the percentage are stated, despite all components of the credit which the consumer intends to take already being known.
56. "*Annual percentage rate of charge*" is defined in Article 3(i) of the CCD as the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2) of the CCD. It is settled case-law that the APRC must be expressed as a percentage, by reference to a precise figure.[41]

[40] See e.g., Recitals eight, eighteen, thirty-one and thirty-two to the CCD.
[41] See judgment of the CJEU of 19 December 2019 in Case C-290/19, *Home Credit Slovakia*, EU:C:2019:1130, paragraph 24.

57. In accordance with the wording of Article 5(1)(g), first sentence, of the CCD, the pre-contractual information provided to the consumer shall, as a starting point, specify the APRC 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.
58. Article 5(1)(g), second sentence, of the CCD furthermore provides that in instances where the consumer has informed the creditor of one or more components of his or her preferred credit, such as the duration of the credit agreement and the total amount of credit, the creditor shall take those components into account.
59. To ESA's understanding, the question from the Referring Court is, in essence, whether the APRC must be *illustrated* in the standard information form, even though all the components of the credit are stated elsewhere in the standard information form.
60. ESA in accordance with the wording of Article 5(1)(g), first sentence, submits that the APRC must be illustrated in the standard information form by means of a representative example.
61. This interpretation is firstly supported by, as held by the CJEU, that the requirement to make reference to the various assumptions used in order to calculate the APRC makes it possible to obtain the objective referred to in Article 5(1) of the CCD of providing the consumer with the information needed to compare different offers in order to make an informed decision on whether to conclude a credit agreement.[42]
62. Secondly, as also noted by the CJEU, it should in this respect be recalled that it is evident from Recital nineteen that the CCD seeks, *inter alia*, to ensure that consumers receive adequate information, prior to the conclusion of the credit agreement, "*in particular on the APRC throughout the* [EEA], *to enable them to compare the rates applied*".[43]
63. Lastly, the CJEU has noted with regard to Directive 87/102/EEC, the predecessor to the CCD, that the failure to mention the APRC in a credit agreement may be a decisive factor in the assessment by the national court of whether a term of a credit agreement concerning the cost of that credit is drafted in plain, intelligible language

[42] See judgment of the CJEU of 16 July 2020 in Case C-686/19, *Soho Group*, EU:C:2020:582, paragraph 48.
[43] *Ibid,* paragraph 49, with further references.

within the meaning of Article 4 of the UCTD.[44] The CJEU has in that regard equated credit agreements which contains only a mathematical formula for the calculation of the APRC without the information necessary to make that calculation, with credit agreements that fail to mention the APRC altogether. The reason being that in such situations, the consumer cannot be regarded as having full knowledge of the terms of the future performance of the agreement at the time of concluding such an agreement, and, therefore, as having all the information which could have a bearing on the extent of his or her liability.[45]

64. ESA on the basis of the above submits that all the information needed to give the consumer full knowledge of the terms of the future performance of the agreement and in order to enable the consumer to compare the different offers to make an informed decision on whether to conclude a credit agreement must be included in the standard information form, entailing that the APRC must be illustrated by a representative sample in the standard information form mentioning all the assumptions used in order to calculate that rate, even if the relevant information is stated elsewhere in the standard information form.

6.4 Questions 5 and 6: Requirements to the information to be provided at the pre-contractual stage and in the contract terms concerning other charges deriving from the credit agreement

65. By Questions 5 and 6, the Referring Court in essence asks whether Articles 5(1)(i) and Article 10(2)(k) of the CCD are to be interpreted as requiring 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, and if so, whether the requirement to specify what other charges derives from the credit agreement is met by referring to the creditor's schedule of charges, which may undergo change, and whether it is necessary to specify clearly in the standard form itself what the charges are and what they will be in the future.

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[44] See judgment of the CJEU of 20 September 2018 in Case C-448/17, *EOS KSI Slovensko,* EU:C:2018:745, paragraphs 64, 65 and 66. The EFTA Court has noted the same with regard to Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, see Case E-27/13, Gunnarsson, cited above, paragraph 95.

[45] See Case C-448/17, *EOS KSI Slovensko,* cited above, paragraphs 66 and 67.

66. It follows from Articles 5(1)(i) and 10(2)(k) of the CCD, respectively, that both the pre-contractual information provided to the consumer and the credit agreement itself shall specify, *inter alia*, "*any other charges deriving from the credit agreement and the conditions under which those charges may be changed*."
67. As noted by Advocate General Hogan in his Opinion in *Volkswagen Bank* referred to in ESA's reply to Questions 1, 2 and 3 in Section 6.2 above, to the extent that Articles 5 and 10 of the CCD require the creditor to provide the same information in the standard information form and in the credit agreement itself, those information requirements must be interpreted in such a way as to satisfy the objectives pursued by both Articles 5 and 10.[46]
68. It is in this regard settled case-law from the CJEU that Article 10(2) provides for full harmonisation as regards the information which must be included in the credit agreement.[47] There is no exception from the obligation to specify any other charges deriving from the credit agreement in Article 10(2) of the CCD for situations where the credit is of such a type that both payment transactions and drawdowns of the credit are recorded.
69. Although, as noted by the CJEU, the CCD does not specifically define the concept of *´charges´*, the *´total cost of the credit to the consumer´*, as defined by Article 3(g) of the CCD, covers all the costs which he or she is required to pay in connection with the credit agreement and which are known to the creditor. This particularly broad definition meets the objective pursued by the CCD in so far as it provides for extended consumer protection.[48]
70. Having regard to both the purpose of Article 5(1) of the CCD in providing the consumer with the information needed *inter alia* to compare different offers in order to take an informed decision on whether to conclude a credit agreement,[49] and the purpose of Article 10(2) of the CCD in ensuring that the consumer is made aware of his or her rights and obligations in a clear and concise manner,[50] ESA submits that only an interpretation of Articles 5(1)(i) and 10(2)(k) of the CCD to the effect

[46] See Section 6.2 above, referring to the Opinion of Advocate General Hogan in Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, cited above, paragraph 65.
[47] See judgment of the CJEU of 3 September 2020 in Joined Cases C-84/19 *Profi Credit Polska*, C-222/19 *BW* and C-252/19 *QL*, EU:C:2020:631, paragraph 56, with further references.
[48] See judgment of the CJEU of 8 December 2016 in Case C-127/15, *Verein für Konsumenteninformation*, EU:C:2016:934, paragraph 34.
[49] Cf. Section 5(1) of the CCD.
[50] See Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, cited above, paragraph 70.

that any other charges deriving from the credit agreement must always be clearly specified, both in the standard information form and the credit agreement itself, contributes to the attainment of the purposes of Articles 5 and 10 of the CCD, and the broader purpose of the CCD itself in ensuring that all consumers in the EEA enjoy a high and equivalent level of protection of their interests.[51]

71. Furthermore, having regard to what has been described by the CJEU as a "*particularly broad definition*" of "*the total cost of the credit to the consumer*" in Article 3(g) of the CCD as covering "*all the costs*" which the consumer is required to pay in connection with the credit agreement,[52] ESA submits that this necessarily entails that what the charges are must be specified clearly, both in the pre-contractual information and in the credit agreement itself.

72. Moving to the Referring Court's question whether the requirement to specify what other charges derives from the credit agreement can be met by referring to the creditor's schedule of charges, which may undergo change, a distinction must in ESA's view be drawn between the requirements, on the one hand, to the information provided at the pre-contractual stage in the standard information form pursuant to Article 5(1) of the CCD, and on the other, to the information provided in the credit agreement itself pursuant to Article 10(2) of the CCD.

73. Considering, firstly, the requirements to the information provided in the credit agreement itself pursuant to Article 10(2) of the CCD, it is settled case-law from the CJEU that the credit agreement does not necessarily have to be drawn up *in a single document*, as long as all the information listed in Article 10(2) of the CCD is set out on paper or another durable medium *and incorporated into the credit agreement*.[53]

74. Importantly, in situations where all of the information set out in Article 10(2) of the CCD is not drawn up in a single document, considering that the information referred to in Article 10(2) of the CCD nevertheless must be included in the credit agreement in a "*clear and concise manner*", the credit agreement must contain a clear and precise cross-reference to the other paper, or other durable media containing the

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[51] See to the same effect Case C-686/19, *Soho Group*, cited above, paragraph 50, where the Court notes that *inter alia* Articles 5(1)(i) and 10(2)(k) of the CCD "*make it possible to implement the objective, set out in recital 43 of that directive, that the directive should clearly and comprehensively define the total cost of the credit for the consumer, and to preserve the effectiveness of that directive*.".

[52] See Case C-127/15, *Verein für Konsumenteninformation*, cited above, paragraph 34.

[53] See Case C-42/15, *Home Credit Slovakia*, cited above, paragraph 33.

information that was actually given to the consumer prior to the conclusion of the agreement so as to give him or her the opportunity to be genuinely apprised of all his or her rights and obligations.[54]

75. ESA on the basis of the above submits that the requirement to specify what other charges derives from the credit agreement pursuant to Article 10(2) of the CCD can be met by referring to the creditor's schedule of charges insofar as the schedule of charges is, firstly, set out on paper or another durable medium that is incorporated into the credit agreement, and, secondly, the credit agreement contains a clear and precise reference to the schedule of charges. It is for the Referring Court to determine whether the schedule of charges at issue in the present case meets the above criteria.[55]

76. Considering, secondly, the requirements to the information provided in the standard information form pursuant to Article 5(1), of the CCD, which establishes that the information the creditor is required to provide the consumer with pursuant to Article 5(1) must be provided "*by means of the Standard European Credit Information form set out in Annex II.*"

77. When comparing the creditor's obligation to provide adequate explanations to the consumer pursuant to Article 5(6) of the CCD, on the one hand, and the information requirements pursuant to Article 5(1) of the CCD, on the other, the CJEU has noted that "*Article 5(6)* [CCD] *unlike Article 5(1), does not specify in what form the adequate explanations to which it refers must be given to the borrower. It therefore does not follow from the wording of Article 5(6) or from the objective which it pursues that those explanations must be provided in a specific document* […]".[56]

78. Consequently, on the basis of the above statements of the CJEU, the clear wording of Article 5(1) of the CCD, which states that the information must be provided "*by means of the Standard European Credit Information form set out in Annex II*" and the specific form set out in Annex II to the CCD, ESA submits that Article 5(1) must be interpreted as requiring that all the information required to be provided to the consumer at the pre-contractual stage pursuant to Article 5(1) of the CCD, must be provided solely by means of the Standard European Credit Information form set out in Annex II to the CCD.

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[54] See Joined Cases C-33/20, *Volkswagen Bank*, C-155/20, *Volkswagen Bank and Skoda Bank* and C-187/20, *BMW Bank and Volkswagen Bank*, cited above, paragraph 85, with further references.
[55] See to the same effect *ibid*, paragraph 86.
[56] See Case C-449/13, *CA Consumer Finance SA*, cited above, paragraph 47.

6.5 Question 7: Requirements to specify in the standard information form the charges to be paid in the case of late payment

79. By Question 7, the Referring Court seeks to ascertain whether Article 5(1)(l) of the CCD must be interpreted as requiring that the charges to be paid in the case of late payment must be specified in the standard information form, or whether it is sufficient that the creditor makes a general reference to its schedule of charges, which may undergo changes.
80. "*Where applicable, any charges payable for default*", is amongst the information that shall be provided to the consumer in the standard information form prior to the conclusion of a credit agreement pursuant to Article 5(1)(l) of the CCD, in the same vein as the information set out in Articles 5(1)(i) of the CCD, as discussed above in Section 6.4 concerning Questions 5 and 6 from the Referring Court.
81. Consequently, the requirements to provide the consumer with information concerning any charges payable are the same as those for information concerning "*other charges deriving from the credit agreement*".
82. ESA therefore refers to the answer given above to Questions 5 and 6 from the Referring Court and on the same basis submits that the charges to be paid in the case of late payment must be specified in the standard information form. It is not sufficient that the creditor makes a general reference to its schedule of charges.

7 CONCLUSION

Accordingly, ESA respectfully requests the Court to answer the questions from the Referring Court as follows:

> **1. Articles 5 and 10 of Directive 2008/48/EC, and particularly Articles 5(1)(f) and 10(2)(f) thereof, must be interpreted as meaning that the creditor is to specify, in an exhaustive listing in a Standard European Consumer Credit Information 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 and how these conditions can influence the borrowing rate.**

2. 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 is not met if, among the conditions for changing the borrowing rate that are specified in the Standard European Consumer Credit Information form, there is a general reference to an unforeseen increase in the creditor's costs.

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 is not met if, among those conditions, there is a general reference to an unforeseen increase in the creditor's costs.

3. 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 is not met if the wording of a provision in the standard form includes general and open-ended references such as "*etc.*"

4. It follows from Article 5(1)(g) of Directive 2008/48/EC that the APRC 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. It follows from Articles 5(1)(i) and 10(2)(k) of Directive 2008/48/EC that "*other charges deriving from the credit agreement*" are always to be specified, irrespective of whether the credit is of such a type that both payment transactions and drawdowns of the credit are recorded.

6. The requirement to specify "*other charges deriving from the credit agreement*" pursuant to Article 10(2)(k) of Directive 2008/48/EC is met

by a reference in the credit agreement to the creditor's schedule of charges, if (i) the schedule of charges is set out on paper or another durable medium that is incorporated into the credit agreement and (ii) the credit agreement contains a clear and precise reference to the schedule of charges.

The requirement to specify "*other charges deriving from the credit* agreement" pursuant to Article 5(1)(i) of Directive 2008/48/EC can only be met by being provided by means of the Standard European Credit Information form set out in Annex II to the CCD.

7. It follows 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 European Consumer Credit Information form. It is not sufficient that the creditor makes a general reference to its schedule of charges.

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