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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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Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-1/23

Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson

v

Íslandsbanki hf.

in which the Reykjanes District Court (Héraðsdómur Reykjaness) 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, in particular, Article 24 of 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, as appropriate, on Article 10(2)(f) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 *on credit agreements for consumers.*

ESA | EFTA Surveillance Authority

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1 INTRODUCTION

1. The Agreement on the European Economic Area ("**the EEA Agreement**") has numerous objectives. One of those is a high level of consumer protection, as set out in Recital twelve of the Preamble, which states that the Contracting Parties are determined "*to promote the interests of consumers and to strengthen their position in the market place, aiming at a high level of consumer protection*". Another objective, which is set out in Recital fifteen of the Preamble, is "*to arrive at, and maintain, a uniform interpretation and application* […]" of the EEA Agreement and those provisions of the European Union legislation which are substantially reproduced in it "[…] *to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.*"
2. The desired high level of consumer protection for consumer credit agreements relating to residential immovable property, which is the topic of the present case, is ensured through 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 ("**the MCD**").[1]
3. The MCD was introduced to specifically protect consumers in the process of buying residential immovable property, and to add a protection that had not been provided for in 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] and Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts* ("**the UCTD**"),[3] both which also apply to consumer credit agreements.[4] Together the MCD, the CCD and the UCTD will be referred to as "**the Acts**" in these Written Observations.

[1] Incorporated into the EEA Agreement by Joint Committee Decision No 125/2019 of 8 May 2019, in points 31g and 31j of Chapter IX and in point 7h of Chapter XIX. (OJ L 60, 28.2.2014, p. 34). Joint Committee Decision No 125/2019 entered into force 1 November 2021.
[2] Incorporated into the EEA Agreement by Joint Committee Decision No 16/2009 of 5 February 2009, in point 7h of Chapter XIX (OJ L 133, 22.05.08, p. 66).
[3] Incorporated into the EEA Agreement by Joint Committee Decision No 7/94 of 21 March 1994 in point 7a of Chapter XIX (OJ L 95, 21.4.1993, p. 29).
[4] The UCTD applies to contract terms in consumer agreements in general, whereas the CCD applies to consumer credit agreements, however credit agreements which are secured by a mortgage on immovable property are excluded from the scope of the CCD, see further in Sections 6.1 and 6.3 below.

4. The present case raises questions regarding the interpretation of provisions such as, *inter alia*, Article 24 of the MCD and Article 10(2)(f) of the CCD. The need for a uniform interpretation of EEA law and the principle of equality requires that the terms of a provision of EEA law which makes no specific reference to national law concerning the meaning to be given to it, such as the above provisions, for the purposes of determining the meaning and scope of those provisions, must be given an autonomous and uniform interpretation throughout the EEA, which must take into account the context of that provision and the purpose of the legislation in question.[5]
5. It is against this background that the Request for an advisory opinion in the present case (“**the Request**”) asks the EFTA Court to answer the question of whether a contractual term in a mortgage credit agreement with variable interest issued by Íslandsbanki hf. (“**the Defendant**”), which state that adjustments of the borrowing rate will take account of factors including “**operating costs”** and **“other unforeseen costs”**[6] is compatible with Article 24 of the MCD and, as appropriate, Article 10(2)(f) of the CCD.

2 THE FACTS OF THE CASE

6. Ms. Elva Dögg Sverrisdóttir and Mr. Ólafur Viggó Sigurðsson (“**the Plaintiffs**”) signed a mortgage deed dated 21 January 2021 in connection with a non-indexed property mortgage loan with variable interest that they took from the Defendant (“**the Agreement**”).
7. It was stated in the terms of the Agreement how the Defendant could adjust the interest rate. Article 1 of the terms of the Agreement read *inter alia* “[…] *that the debt was to be repaid with equal payments of interest; however, as the interest rate was variable, the lender 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*

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[5] See judgment of the Court of Justice of the European Union (**“CJEU**“) of 19 December 2013 in Case C-279/12, *Fish Legal and Shirley*, EU:C:2013:853, paragraph 42 and judgment of the EFTA Court of 14 December 2021 in Case E-2/*21 Norep AS v Haugen Gruppen AS*, paragraphs 30 and 31.

[6] See the Request, page 7. Emphasis made by ESA.

adjustments could result in an increase or a decrease of each instalment, and would consequently have an impact on the total amount repaid."[7]

8. Article 2 of the terms of the Agreement read *inter alia*: "[…] *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."*[8]

9. The Request from the District Court of Reykjanes (**"the Referring Court"**) in the present case concerns the interpretation of the above terms of the Agreement, and whether the term in the Agreement regarding the adjustment of variable interest is compatible with the provisions of the Icelandic Consumer Property Mortgage Act No 118/2016 ("**Act 118/2016**") interpreted in conformity with the MCD, and in light of the CCD.

3 EEA LAW

3.1 The UCTD

10. The UCTD 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.[9]

11. 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.*
>
> *2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one*

[7] See the Request, page 1.
[8] See the Request, page 2.
[9] See Recitals ten and twelve of the UCTD.

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."

3.2 The CCD

12. The CCD lays down harmonised provisions on consumer credits agreements.[10] Notably, Article 2(2)(a) states that the CCD does not apply to credit agreements which are secured either by a mortgage or by another comparable security commonly used in an EEA State on immovable property or secured by a right related to immovable property.
13. Article 10(2)(f) provides for information to be included in credit agreements, and states that:

    "[t]*he credit agreements 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;"*

3.3 The MCD

14. The MCD provides protection for consumers relating to credit agreements to residential immovable property.[11]
15. Recital nineteen states:

    "For reasons of legal certainty, the [EEA] *legal framework in the area of credit agreements relating to residential immovable property should be consistent with and complementary to other* [EEA] *acts, particularly in the areas of*

[10] See Recital seven of the CCD.

[11] There is a cross reference from the MCD to the CCD in Recital nineteen of the MCD. In accordance with Recital nineteen of the MCD, certain definitions such as 'consumer', and 'borrowing rate' in the MCD should be in line with the same definitions in the CCD. See the full text of Recital nineteen in Section 3.3 on the MCD below.

consumer protection and prudential supervision. Certain essential definitions including the definition of 'consumer', and 'durable medium', as well as key concepts used in standard information to designate the financial characteristics of the credit, including 'total amount payable by the consumer' and 'borrowing rate' should be in line with those set out in Directive 2008/48/EC so that the same terminology refers to the same type of facts irrespective of whether the credit is a consumer credit or a credit relating to residential immovable property. Member States should therefore ensure, in the transposition of this Directive, that there is consistency of application and interpretation in relation to those ***essential definitions and key concepts****."*[12]

16. Article 2(1) describes the level of harmonisation provided for by the MCD:

"This Directive shall not preclude Member States from maintaining or introducing more stringent provisions in order to protect consumers, provided that such provisions are consistent with their obligations under [EEA] *law."*[13]

17. Article 3 defines the scope and states in the first paragraph that the MCD shall apply to:

"(a) credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on residential immovable property or secured by a right related to residential immovable property;"

18. Article 7(1) states the conduct of business obligations when providing credit to consumers:

"1. Member States shall require that when manufacturing credit products or granting, intermediating or providing advisory services on credit and, where appropriate, ancillary services to consumers or when executing a credit agreement, the creditor, credit intermediary or appointed representative acts honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers. In relation to the granting, intermediating or

[12] Emphasis made by ESA.

[13] See furthermore Recital seven which states*: "In order to create a genuine internal market with a high and equivalent level of consumer protection, this Directive lays down provisions subject to maximum harmonisation in relation to the provision of precontractual information through the European Standardised Information Sheet (ESIS) standardised format and the calculation of the APRC.* […]".

provision of advisory services on credit and, where appropriate, of ancillary services the activities shall be based on information about the consumer's circumstances and any specific requirement made known by a consumer and on reasonable assumptions about risks to the consumer's situation over the term of the credit agreement. In relation to such provision of advisory services, the activity shall in addition be based on the information required under point (a) of Article 22(3)."

19. Article 13 provides for general information that shall be made available to consumer and states:

"1. Member States shall ensure that clear and comprehensible general information about credit agreements is made available by creditors or, where applicable, by tied credit intermediaries or their appointed representatives at all times on paper or on another durable medium or in electronic form. In addition, Member States may provide that general information is made available by non-tied credit intermediaries.

Such general information shall include at least the following:

(a) the identity and the geographical address of the issuer of the information;

(b) the purposes for which the credit may be used;

(c) the forms of security, including, where applicable, the possibility for it to be located in a different Member State;

(d) the possible duration of the credit agreements;

(e) types of available borrowing rate, indicating whether fixed or variable or both, with a short description of the characteristics of a fixed and variable rate, including related implications for the consumer;

(f) where foreign currency loans are available, an indication of the foreign currency or currencies, including an explanation of the implications for the consumer where the credit is denominated in a foreign currency;

(g) a representative example of the total amount of credit, the total cost of the credit to the consumer, the total amount payable by the consumer and the APRC;

(h) an indication of possible further costs, not included in the total cost of the credit to the consumer, to be paid in connection with a credit agreement;

(i) the range of different options available for reimbursing the credit to the creditor, including the number, frequency and amount of the regular repayment instalments;

(j) where applicable, a clear and concise statement that compliance with the terms and conditions of the credit agreement does not guarantee repayment of the total amount of credit under the credit agreement;

(k) a description of the conditions directly relating to early repayment;

(l) whether a valuation of the property is necessary and, where applicable, who is responsible for ensuring that the valuation is carried out, and whether any related costs arise for the consumer;

(m) indication of ancillary services the consumer is obliged to acquire in order to obtain the credit or to obtain it on the terms and conditions marketed and, where applicable, a clarification that the ancillary services may be purchased from a provider that is not the creditor; and

(n) a general warning concerning possible consequences of non-compliance with the commitments linked to the credit agreement.

2. Member States may oblige the creditors to include other types of warnings which are relevant in a Member State. They shall notify those requirements to the Commission without delay."

20. Article 17(6) describes the information that must be provided to the consumer with regards to mortgage credit agreements with variations in the borrowing rate:

"6. Where the credit agreement allows for variations in the borrowing rate, Member States shall ensure that the consumer is informed of the possible impacts of variations on the amounts payable and on the APRC at least by means of the ESIS. This shall be done by providing the consumer with an additional APRC which illustrates the possible risks linked to a significant increase in the borrowing rate. Where the borrowing rate is not capped, this information shall be accompanied by a warning highlighting that the total cost of the credit to the consumer, shown by the APRC, may change. This provision shall not apply to credit agreements where the borrowing rate is fixed for an initial period of at least five years, at the end of which a negotiation on the borrowing rate takes place in order to agree on a new

fixed rate for a further material period, for which an additional, illustrative APRC is provided for in the ESIS."

21. Article 24 concerns variable rate credits:

    "Where the credit agreement is a variable rate credit, Member States shall ensure that: (a) any indexes or reference rates used to calculate the borrowing rate are ***clear, accessible, objective and verifiable*** *by the parties to the credit agreement and the competent authorities; and (b) historical records of indexes for calculating the borrowing rates are maintained either by the providers of these indexes or the creditors."*[14]

22. Article 27(1) and (2) provide for information concerning changes in the borrowing rate:

    "1. Member States shall ensure that the creditor informs the consumer of any change in the borrowing rate, on paper or another durable medium, before the change takes effect. The information shall at least state the amount of the payments to be made after the new borrowing rate takes effect and, in cases where the number or frequency of the payments changes, particulars thereof.
    2. However, the Member States may allow the parties to agree in the credit agreement that the information referred to in paragraph 1 is to be given to the consumer periodically where the change in the borrowing rate is correlated with a change in a reference rate, the new reference rate is made publicly available by appropriate means and the information concerning the new reference rate is kept available in the premises of the creditor and communicated personally to the consumer together with the amount of new periodic instalments."

4 NATIONAL LAW

4.1 Act on Interest and Indexation No 38/2001

23. The Act on Interest and Indexation No 38/2001[15] sets out the way interest rates are calculated, the frequency of changes as well as the indexation of savings and loans.
24. Chapter II provides for rules regarding general interest rates. Article 4 states that when interest is payable according to Article 3, but the percentage or interest reference is otherwise not specified, the interest rate is at all times to be equal to the interest rate determined by the Central Bank of Iceland, taking into account the

[14] Emphasis made by ESA.
[15] Lög nr. 38/2001 um vexti og verðtryggingu.

lowest interest rate on new general non-indexed loans from credit institutions and published in accordance with Article 10.

25. Chapter V provides for several provisions on interest. Article 10 states:

> *"A Credit Institution must inform the Central Bank of Iceland of offering of interest rates and changes to them with such a form and notice as decided by the Central Bank. The Central Bank shall before the end of each month publish in the Legal Gazette information on interests of unindexed and indexed loans in accordance with Article 4 and interests of damage claims in accordance with Article 8 and shall each notification be used as a base rate in accordance with this Act for the next month or until the next notification is published."*[16]

4.2 Act 33/2013 on consumer loans

26. Act 33/2013 transposed the CCD into the Icelandic legal order and entered into force 1 November 2013. The Act was initially extended to apply also to credit agreements for immovable property. Article 7(4)(f) transposed Article 10(2)(f) of the CCD. Article 7(4)(f) states what information is to be provided before a credit agreement is made:

> *"The information shall contain the following:*
>
> […]
>
> *f. the borrowing rate, the conditions for its application and, if appropriate, any index or reference interest rate that may affect the initial borrowing rate, and also the period, conditions, and procedure for changing the borrowing rate; if various borrowing rates apply under various circumstances, the aforementioned information shall be provided on them all,* […]*"*

4.3 Act 118/2016 on mortgage credit agreement for consumers

27. Act No 118/2016 transposed the MCD into Icelandic law. When it entered into force on 1 April 2017,[17] Act No 33/2013 was amended to no longer apply to mortgages.[18]

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[16] ESA's translation of: *"Lánastofnunum ber að tilkynna Seðlabanka Íslands um öll vaxtakjör og breytingar á þeim í því formi og með þeim fyrirvara sem Seðlabankinn krefst. Seðlabankinn skal fyrir lok hvers mánaðar birta í Lögbirtingablaði vexti af óverðtryggðum og verðtryggðum útlánum skv. 4. gr. og vexti af skaðabótakröfum skv. 8. gr. og skal hver tilkynning lögð til grundvallar í samræmi við lög þessi næsta mánuðinn eða uns næsta tilkynning birtist*.[..]"

[17] See Article 62 of Act No 118/2016. See link: https://www.althingi.is/lagas/nuna/2016118.html.

[18] See Article 63 of the legislative bill that later became Article 64(1) of Act No 118/2016 and Article 3(1)k of Act 33/2013.

ESA notes, as is assessed in Section 6.2 below, that Iceland decided to implement the MCD into the Icelandic legal order before it was incorporated into the EEA Agreement on 1 November 2021.

28. The second sentence of Article 34(1) has a similar provision as stated in point f of Article 7(4) of Act 33/2013. Article 34(1) of Act No 118/2016 is based on Article 24 MCD, and provides:

> *"If a property mortgage agreement contains a provision stating that reference values, indexes or reference index rates are to be used for determining variable interest rates, the creditor may only use reference values, indexes or reference interest rates that are* ***clear, accessible, objective and verifiable****, both by the parties to the agreement and by the Consumers' Agency. In case the decision of variable interest rate does not take into account reference values, indexes or reference index the property mortgage agreement shall provide the condition and the procedure concerning the change of interest."*[19]

5 THE QUESTION REFERRED

29. An advisory opinion of the EFTA Court is sought by the Referring 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?"*

6 LEGAL ANALYSIS

6.1 Preliminary remarks

30. The Request asks whether the term in the Agreement entered into between the Defendant and the Plaintiffs concerning the adjustment of a variable interest rate is compatible with, in particular, Article 24 of the MCD, interpreted in light of Article 10(2)(f) of the CCD. The Request also makes reference to Article 13 MCD and the UCTD.

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[19] Emphasis made by ESA.

31. ESA at the outset notes that the question from the Referring Court in the present case is very similar to that raised in the Request for an advisory opinion from Reykjavik District Court on 4 November 2022 in Case E-13/22 *Birgir Þór Gylfason and Jórunn S. Gröndal v Landsbankinn hf.*[20] The main differences between case E-13/22 and the present case are that the mortgage in the present case is still outstanding and being repaid, and that it was signed after the Joint Committee Decision incorporating the MCD into the EEA Agreement had been adopted.[21] The terms of the two mortgage credit agreements are, however, very similar. ESA on this basis notes that these written observations are complimentary to ESA's position as set out in its written observations submitted to the Court on 17 January 2023 in Case E-13/22 insofar as they are relevant to the present case.
32. All the three Acts referred to in the Request – the MCD, the CCD and the UCTD – apply to different aspects of consumer credit agreements. The *MCD* applies to credit agreements which are secured by a mortgage on residential immovable property, such as the Agreement at issue in the present case.[22] Such credit agreements are excluded from the scope of application of the *CCD*.[23] The aim of the *UCTD* is to approximate the laws, regulations and administrative provisions of the EEA States relating to unfair terms in contracts concluded between a seller or supplier and a consumer,[24] and requires more generally that the EEA States provide that unfair terms shall not bind the consumer.[25] With regard to the UCTD, the CJEU has held that it is "*a general directive for consumer protection, intended to apply in all sectors of economic activity*".[26]

[20] In Case E-13/22, Reykjavik District Court asked the EFTA Court whether "[it is] *compatible with Directive 2014/17/EU, in particular, Article 24 of the Directive, and, as appropriate, Article 10(2)(f) of Directive 2008/48/EC (cf. recital 19 of the Preamble to Directive 2014/17/EU), that the terms of a consumer property mortgage, in which the interest rate is variable, state that adjustments of the interest rate are to take account of, amongst other things, the Central Bank of Iceland's interest rate, interest rates on the market and other terms of finance available to the creditor?*", see page 16 of the Request for an Advisory Opinion in that case.

[21] The JCD was adopted on 8 May 2019, see further on the incorporation of the MCD into the EEA Agreement in Section 6.2 below.

[22] See Article 3(1)(a) of the MCD.

[23] See Article 2(2)(a) of the CCD.

[24] See Article 1(1) of the UCTD.

[25] See e.g., Article 6(1) of the UCTD and Recitals eight, ten and eleven of the UCTD. As noted by the CJEU, the UCTD is a "*general directive for consumer protection, intended to apply in all sectors of economic activity.*"

[26] See judgment of the CJEU of 6 July 2017 in Case C-290/16, *Air Berlin*, EU:C:2017:523, paragraph 44.

33. The UCTD introduced a system of consumer protection that is further developed by the CCD and the MCD based on the idea that the consumer is in a weaker position *vis-a-vis* the seller/supplier both with regards to knowledge and bargaining power.[27]
34. The aim of the MCD is to ensure a high level of consumer protection,[28] and it was adopted to cater to the particularities of mortgage credit agreements relating to immovable property and is as such complementary to the UCTD and the CCD.[29] Notably, as follows from Recital nineteen of the MCD, the MCD is "*complementary to other* [EEA] *acts, particularly in the areas of consumer protection*".
35. A main element in ensuring high consumer protection is the principle of transparency, which is at the core of the present case, and which Article 24 of the MCD must be seen as an expression of. As held by the CJEU, in accordance with settled case law of the Court on the requirement of transparency, information provided to the consumer before the conclusion of a contract, on the terms of the contract and the consequences of concluding the contract, is of "*fundamental importance*" to the consumer.[30]
36. ESA on the basis of the above submits by way of preliminary remarks, and as will be further set out in Sections 6.3 and 6.4 below, that the transparency requirements of Article 24 of the MCD must be interpreted and applied in accordance with the transparency requirements set out in both the UCTD and the CCD.[31]
37. ESA in this regard finds it pertinent to recall that in accordance with the Court's settled case law, Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("**SCA**")

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[27] See Recital nineteen of the UCTD and judgment of the CJEU of 9 February 2023 in Case C-555/21, *UniCredit Bank Austria AG v Verein fur Konsumenteninformation,* EU:C:2023:78, paragraph 28 and, concerning the UCTD, judgment of the CJEU of 25 November 2020 in Case C-269/19, *Banca B. SA v A.A.A,* EU:C:2020:954, paragraph 28.

[28] See Recital fifteen of the MCD and judgment of the CJEU of 15 October 2020 in Case C-778/18, *Association française des usagers de banques*, EU:C:2020:831, paragraphs 34 and 51.

[29] See Recital nineteen of the MCD and Case C-555/21, *UniCredit Bank Austria*, cited above, paragraph 28. See also page 4 of the proposal for the directive from the Commission under the heading "*Consistency with the EU's other policies and objectives of the Union*": "*This proposal complements the Consumer Credit Directive by creating a similar framework for mortgage credit. The proposal largely draws on the conduct of business provisions in the Consumer Credit Directive; however, where appropriate the specific features of mortgage credit have been taken into account, for example by introducing risk warnings in the pre-contractual information provisions and by strengthening creditworthiness assessment provisions*".
Link: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2011%3A0142%3AFIN.

[30] See judgment of the CJEU of 3 March 2020 in Case C-125/18, *Gómez del Moral Guasch,* EU:C:2020:138, paragraph 49 and Recital sixty-seven of the MCD.

[31] ESA in this respect notes that the provisions of the UCTD and case law in connection to those are both relevant for the interpretation of the transparency requirements of the MCD (see Sections 6.3 and 6.4 below), as well as the UCTD applying in parallel to the MCD as a general directive for consumer protection (see Section 6.6 below).

"*establishes a special means of judicial cooperation*" between the Court on the one hand and the national courts on the other.[32] The aim of this judicial cooperation is to provide national courts with the necessary interpretation of elements of EEA law to decide the cases before them.[33] It is in this respect settled case law that:

> "[i]*n order to give assistance to national courts in cases in which they have to apply provisions of EEA law, the Court may extract from all the factors provided by the national court the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute.*"[34]

38. Thus, although the question by the Referring Court is limited to the MCD and the CCD, the Court can decide to address any other elements of EEA law it deems relevant to answer the question, such as, for the purposes of the present case, *inter alia*, the UCTD.
39. If questions regarding the competence of the EFTA Court to interpret the provisions of the MCD prior to incorporation of the MCD into the EEA Agreement were to be raised, ESA provides its answer to this in Section 6.2 below, and on the question of the applicability of Article 24 MCD to a contract term such as the one at issue in the present case in Section 6.5 below.
40. ESA on the basis of the above submits that the Agreement at issue in the present case must be assessed under the MCD, interpreted and applied in light of the UCTD and the CCD (see further Sections 6.3 and 6.4 below). In the alternative, and insofar as the MCD or certain provisions of it is not applicable in the present case, ESA submits that the contract term at issue would in any event have to be assessed under the UCTD (see further Sections 6.2 and 6.6 below).
41. ESA will address the following topics in these Written Observations: The jurisdiction of the Court to interpret the provisions of the MCD prior to the entry into force of the Joint Committee Decision incorporating the MCD into the EEA Agreement (Section 6.2), how the three Acts relate to one another (Section 6.3), how Article 24 of the MCD should be interpreted in light of the CCD and the UCTD (Section 6.4), the elements of the contract term at issue in the present case assessed in light of the requirements of Article 24 MCD (Section 6.5), the applicability of the UCTD in the event that the MCD should not apply (Section 6.6) and finally briefly what happens

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[32] See e.g., judgment of the EFTA Court of 23 November 2021 in Case E-16/20, *Q and Others*, paragraph 33.
[33] *Ibid.*
[34] *Ibid*, paragraph 34, with further references.

to the Agreement in the present case should the contract term at issue not be compatible with Article 24 of the MCD and/or be unfair under the UCTD (Section 6.7).

6.2 The incorporation of the MCD into the EEA Agreement

42. The MCD was incorporated into the EEA Agreement by Joint Committee Decision No 125/2019 of 8 May 2019 ("**the JCD**"), which entered into force on 1 November 2021.[35] At the time when the Agreement at issue in the present case was signed on 21 January 2021, the JCD had therefore been *adopted* but not yet *entered into force*. This raises the question of the Court's jurisdiction to deliver an advisory opinion on the application of the MCD in the present case. On this point ESA would like to submit the following remarks.
43. In the aftermath of the financial crisis in 2008, the European Commission drafted a proposal for a Directive of the European Parliament and the Council on credit agreements relating to residential property, dated 31.3.2011.[36] The European legislators discussed the proposal for almost three years before finally adopting the MCD in 2014. It subsequently entered into force in the EU in February 2014. The transitional period was over two years, and in accordance with Article 43 of the MCD, it should not apply to credit agreements existing before 21 March 2016.
44. Act No 118/2016, which implemented the MCD into the Icelandic legal order, entered into force on 1 April 2017.[37] In accordance with Article 63 of the Act, mortgage credit agreements issued before the entry into force of the Act would follow the previous legislation which it was issued under.[38]
45. ESA notes that Iceland in this instance decided voluntarily to introduce provisions from EU law into their domestic legal order before the adoption and entry into force of the JCD incorporating the MCD into the EEA Agreement. ESA in this regard furthermore notes, importantly, that Iceland was under no *obligation* to implement the MCD into its national legal order before 1 November 2021.
46. ESA submits that in these circumstances, where an EEA EFTA State on its own merits has decided to implement an EEA relevant EU act that is already in force in

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[35] The reason for the delay of the Joint Committee Decision entering into force was caused by the fact that constitutional requirements were flagged by the EEA EFTA States.
[36] See the link to the initial proposal: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0142.
[37] Article 62 of Act No 118/2016, available here: https://www.althingi.is/lagas/nuna/2016118.html.
[38] Article 63 of Act No 118/2016, see link above.

the EU into its national legal framework before the entry into force of the JCD, the same principle must apply as this Court has held applies in instances where an EEA EFTA State adopts in its domestic legislation the same or similar solutions as those adopted in EEA law when regulating purely internal situations.[39]

47. These situations have in common that the EEA EFTA State in question has, in some way, given provisions coming from EU or EEA law a wider application than what is required at a certain point in time. In the Court's existing case law cited in footnote 39, the extension concerns the material scope, whereas, in the present case, the extension concerns the temporal scope. ESA submits that provisions or concepts taken from EU and EEA law should be interpreted uniformly in both situations.[40]

48. The opposite conclusion could lead to EEA relevant provisions or concepts taken from EU law potentially being given a different interpretation in an EEA EFTA State, at the same time as those rules apply in a uniform way in the EU Member States, going against the objective of uniform interpretation and the very intention of the national legislator, such as in the present case where the preparatory works confirm that the clear intention of the national legislator was to incorporate the MCD into Icelandic law.[41]

49. ESA furthermore submits that regard must be held to the fact that it in this case is the Referring Court that has asked the EFTA Court for an interpretation of the provisions of EEA law it deems relevant to decide the questions before it, including *inter alia* the MCD. In light of the judicial dialogue envisaged by Article 34 SCA and the Court's settled case law on the presumption of relevance of the questions referred to it, it is for the Referring Court to "*interpret national law and to define and assess the accuracy of the factual and legislative context in the case before it.*"[42]

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[39] This is settled case law by the EFTA Court, as most recently held in the Court's judgment of 19 April 2023 in Case E-9/22 *Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga and Lyfjafræðingafélag Íslands.v the Icelandic State*, paragraph 25. See also e.g., Cases E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz and Gemeinde Vaduz* (Municipality of Vaduz) [2015] EFTA Ct. Rep. 512, paragraphs.70 and 74; E-25/13 *Gunnar V. Engilbertsson v Íslandsbanki hf.* [2014] EFTA Ct. Rep. 524, paragraphs. 53 and 54 and case law cited; and E-3/97 *Jan and Kristian Jæger AS, supported by the Norwegian Association of Motor Car Dealers and Service Organisations v Opel Norge AS* [1998] EFTA Ct. Rep. 1, paragraphs. 29 to 32: Case E-17/11 *Aresbank S.A v Landsbankinn hf., the Financial Supervisory Authority and Iceland* [2012] EFTA Ct. Rep. 916, paragraph 45, and case law cited.

[40] See judgment of the CJEU of 19 December 2013 in Case C-279/12, *Fish Legal and Shirley*, cited above, paragraph 42 and Case E-2/21 *Norep AS v Haugen Gruppen AS*, cited above, paragraphs 30 and 31.

[41] See the preparatory works with the legislation bill implementing the MCD into the Icelandic legal order. See the introduction part I at link https://www.althingi.is/altext/145/s/0519.html .

[42] See Case E-9/22 *Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga and Lyfjafræðingafélag Íslands.v the Icelandic State*, cited above, paragraph 26.

As held by this Court, "[a]*ny other conclusion would undermine the purpose of the judicial dialogue envisaged by Article 34 SCA*."[43] ESA on this basis submits that the Court can decide to answer the question referred to it in the present case on the basis of the MCD.

6.3 The interrelation between the MCD, the CCD and the UCTD

50. It follows from Recital nineteen of the MCD that: "[f]*or reasons of legal certainty, the [EEA] legal framework in the area of credit agreements relating to immovable property should be consistent with and complementary to other* [EEA] *acts, particularly in the areas of consumer protection and prudential supervision.* […]"[44] In *UniCredit Bank Austria,* the CJEU held with regard to Recitals nineteen and twenty of the MCD that:

> "[…] *it is apparent from recitals 19 and 20 of Directive 2014/17 that, for reasons of legal certainty, it is necessary to ensure that the directive is consistent with and complementary to other acts adopted in the area of consumer protection. Nevertheless, it is also apparent from recital 22 of the directive that it is important to take into consideration the specificities of credit agreements relating to residential immovable property, which justify a differentiated approach.*"[45]

51. As is apparent from the CJEU's reasoning in *UniCredit Bank Austria*, the provisions of the MCD that are worded identical or almost identical to provisions of *inter alia* the CCD, must be interpreted and applied in conformity with those other provisions.
52. On the basis of Recital nineteen of the MCD, and the common objective of the MCD, the CCD and the UCTD to protect consumers *vis-à-vis* sellers,[46] the transparency requirements enshrined in Article 24 of the MCD must therefore be interpreted and applied in the same way as the transparency requirements set out in Article 10(2)(f)

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[43] *Ibid.*
[44] Furthermore, as stated in Recital nineteen of the MCD, certain essential definitions in the MCD, such as "borrowing rate", must be interpreted in line with the same definitions in the CCD, in order for the consumer to enjoy the same high level of protection, irrespective of whether the credit is credit relating to residential immovable property or a consumer credit covered instead by the CCD.
[45] See Case C-555/21, *UniCredit Bank Austria*, cited above, paragraph 28.
[46] See e.g., on the UCTD, Case C-125/18, *Gómez del Moral Guasch,* cited above, paragraph 50 and on both UCTD and CCD, judgment of the CJEU of 21 April 2016 in Case C-377/14, *Radlinger and Radlingerová,* EU:C:2016:283, paragraph 63.

CCD[47] and Article 5 UCTD,[48] notwithstanding the differences in wording between the three provisions. Case law concerning the interpretation of Article 10(2)(f) CCD and Article 5 UCTD is therefore relevant also for the interpretation of Article 24 MCD.

53. The European Commission has developed its understanding of the interplay between the UCTD and other EEA legislation in a 2019 Guidance document on the UCTD. The Commission comments, *inter alia*, that, given that the UCTD applies to contracts between traders and consumers in all economic sectors:

> ”[…] *also other provisions of EU law, including other consumer protection rules, may apply to a given contract, depending on the type of contract in question”.* […] *Similarly, rules relating to particular types of contracts may apply in addition to the UCTD, for instance, Directive 2008/48/EC on credit agreements for consumers,* […] *Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property*, […].[49]

54. In the light of the above, ESA submits that case law concerning the interpretation of provisions of the UCTD and CCD can be transposed by analogy to the MCD insofar as the wording, context and objectives of the legislative provisions in question are nearly identical. It is however essential to note, as held by the CJEU in *UniCredit Bank Austria* that it is important to take into consideration the specificities of mortgage agreements which justify a differentiated approach.[50]

55. ESA therefore submits that to the extent the MCD prescribes more extensive consumer protection than the UCTD[51] and the CCD, the level of protection of the MCD must go beyond the protection provided by the UCTD and the CCD in the field of mortgage credit agreements.[52] This is consistent with the nature of mortgage

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[47] Recital thirty-two of the CCD thereto explains that: “[i]*n order to ensure full transparency, the consumer should be provided with information concerning the borrowing rate, both at a pre-contractual stage and when the credit agreement is concluded.* […]*”. It furthermore states: ”*[…] *During the contractual relationship, the consumer should further be informed of changes to the variable borrowing rate and changes to the payments caused thereby.* […]*”.*

[48] See Case C-125/18, *Gómez del Moral Guasch*, cited above, paragraphs 48–50.

[49] See Section 1.2.4 of the Guidance document on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts. See link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)

[50] See Case C-555/21, *UniCredit Bank Austria AG v Verein fur Konsumenteninformation*, cited above, paragraph 28.

[51] See also e.g. Recital twelve of the UCTD, where it is explicitly stated that the EEA States can afford consumers a higher level of protection than that provided by the UCTD.

[52] See in the same direction the Opinion 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 43?, where he held that when using case law concerning provisions of the UCTD to interpret provisions of the CCD, particular attention must

credit agreements, which run for a longer time and involve higher amounts of money. If anything, the duration of mortgage credit agreements increases the importance of transparency requirements of total costs and a variable borrowing rate.[53]

6.4 Article 24 of the MCD, interpreted in light of the CCD and the UCTD

56. Article 24(1)(a) MCD states that, where the credit agreement is a variable rate credit, EEA States shall ensure that:

> *"(a) any indexes or reference rates used to calculate the borrowing rate are **clear, accessible, objective and verifiable** by the parties to the credit agreement and the competent authorities;".*[54]

57. The Directive is silent on both what a "variable rate credit" is, and what a "reference rate" is. In such instances, the notions of what a "variable rate credit" and "reference rate" is, must be regarded as autonomous concepts of EEA law, and they must be given a uniform interpretation throughout the EEA, taking into account the context of the provision and the purpose of the legislation in question.[55]
58. The present case concerns a term in a non-indexed property mortgage loan with a variable interest rate.[56] "Variable rate" must, in line with the ordinary meaning to be given to the words, be interpreted as covering any rate that varies or changes, as opposed to fixed rates.[57]
59. ESA submits as regards "reference rate", that for example, a bank can issue a mortgage loan at a reference rate (e.g. *the main Central Bank interest rate for mortgage loans*)[58] such that if the reference rate rises, so does the cost of the loan, and if the reference rate falls, the cost of the loan also decreases.
60. Contrary to what is held by the Defendant in the Request, contract terms that base changes in the borrowing rate on a unilateral decision by the creditor cannot be excluded from the scope of application of the transparency requirements of Article 24 MCD simply because it is made by way of an internal decision by the bank, as

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be given to the fact that the CCD prescribes more extensive information requirements than the UCTD. The Court did not go into this assessment like the Advocate General did.

[53] See Case C-555/23, *UniCredit Bank Austria AG v Verein fur Konsumenteninformation*, cited above, paragraphs 33-38 and Recitals twenty-one to twenty-three of the MCD.

[54] Emphasis made by ESA.

[55] See judgment of the CJEU of 26 February 2015 in Case C-143/13, *Matei,* EU:C:2015:127, paragraph 50.

[56] See the Request page 1.

[57] Cf. also e.g. Article 11(2)(c) of the MCD, that distinguishes between variable and fixed borrowing rates.

[58] See CBI website on interest rates: https://www.sedlabanki.is/annad-efni/meginvextir-si/ .

opposed to being determined by an external factor. Such an interpretation would encourage less transparent contract terms, which goes directly against the aim of the MCD, and EEA consumer protection law more generally.

61. In accordance with Article 2 of the terms of the Agreement, 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*."[59]

62. ESA submits that each of these individual elements of the contract term in the Agreement constitutes "**reference rates**", because they can be used to calculate and change the borrowing rate. Each element therefore falls within the scope of Article 24 MCD. Any other interpretation of the scope of Article 24 would go against the normal meaning of its wording and would impede the MCD's broader objectives of providing high consumer protection and providing "[…] *clarity for consumers on the nature of the commitments* […]".[60] Such an interpretation could also open for circumvention[61] of the provisions of MCD and leave the consumer without legal certainty,[62] which are both core principles of EEA law.

63. In the case of a variable borrowing rate which is adjusted in accordance with multiple indexes, reference rates or other elements used to calculate the borrowing rate, such as the ones at issue before the Referring Court, ESA submits that these elements must be compatible with Article 24 of the MCD both individually, and in the way they are applied together.

64. The interpretation of the words "*clear, accessible, objective and verifiable*", for the purpose of Article 24 MCD, must be uniform throughout the EEA. In accordance with settled case law in interpreting autonomous concepts of EEA law, the Court must take into account the context of the provision and the purpose of the legislation of which it forms part.[63] Furthermore, as stated in Section 6.3 above, ESA considers that even though there is no case law concerning the interpretation of Article 24 MCD itself, the case law concerning the interpretation of the parallel provisions in the CCD and the UCTD are relevant for the interpretation of Article 24.

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[59] See the Request page 2.
[60] See Recital sixty-seven of the MCD.
[61] See e.g., Case E-16/20, *Q and Others*, cited above, paragraph 61 with further references.
[62] See by analogy judgments of the EFTA Court of 23 November 2004 in Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37; and of 16 July 2012 in Case E-09/11 *ESA v Norway* [2012] EFTA Ct. Rep. 442, paragraph 99.
[63] See, specifically as regards the MCD, Case C-778/18, *Association francaise des usagers de banques,* cited above, paragraph 49.

65. First, the objective of the MCD is a high level of consumer protection for consumers concluding mortgage credit agreements and protecting the ability of consumers to make informed choices.[64] The MCD relies on the assumption that the consumer is in a weaker position in relation to the seller particularly with regard to the level of information and as regards experience with legal matters.[65]
66. Second, Article 24 MCD must be interpreted in the context of the other provisions in the MCD. Article 7(1) provides *inter alia* that when manufacturing credit products or granting, or when executing a credit agreement, the creditor is to act honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers and the activities are *inter alia* to be based on information on reasonable assumptions about risks to the consumer´s situation over the term of the credit agreement.[66]
67. Furthermore, Article 13 of the MCD states the general information that the EEA States shall ensure the consumer has publicly available concerning credit agreements. The Article *inter alia* lays out requirements on general transparency. In this regard it is important to note that the terms of mortgage credit agreements, such as the one in the present case, are not negotiated between the Plaintiff and the Defendants, they are drafted unilaterally by the Plaintiff.
68. In addition, Article 17(6) MCD sets out clear rules on information that is to be provided for the consumer regarding credit agreements with variations in the borrowing rate such as possible impacts of variations on the amounts payable and on the APRC[67] at least by means of the ESIS.[68] This is to be done with an additional APRC illustrating the possible risks linked with a significant increase in the borrowing rate and, where the borrowing rate is not capped, the information is to be accompanied by a warning highlighting that the total cost of the credit to the consumer, shown by APRC, may change.

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[64] *Ibid*, paragraph 51.

[65] See by analogy to the UCTD judgment of the CJEU of 20 September 2017 in Case C-186/16, *Andriciuc and Others*, EU:C:2017:703, paragraph 44 and by analogy to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practises in the internal market, the EFTA Court judgment of 14 December 2019 in Case E-1/19, *Andreas Gyrre v the Norwegian Government*, paragraph 66.

[66] See judgment of the CJEU of 15 July 2021 in Case C-911/19, *FBF*, EU:C:2021:599, paragraphs 117 and 118.

[67] The annual percentage rate of charge, see Recital one of the MCD.

[68] The European Standardised Information Sheet, see paragraph 17 above.

69. Furthermore, Article 27(1) MCD requires the EEA States to ensure that the creditor informs the consumer of any change in the borrowing rate on paper or another durable medium before the changes take effect.
70. ESA submits that, assessed in light of the MCD's objective of high consumer protection, and in the context of other provisions of the MCD, such as Articles 7(1), 13, 17(6) and 27(1), the criteria of providing *"clear, accessible, objective and verifiable"* reference rates in Article 24 must be interpreted in in light of the objective of providing a high standard of consumer protection, meaning that the consumer is to be given all relevant information of risk in order to be able to determine, access and verify any potential changes in the borrowing rate.
71. ESA notes that this Court has previously held, when assessing Articles 3(3) and 5 UCTD, that the clarity and quality of the information which the seller provides the consumer with at the time when the contract is concluded is particularly relevant for the assessment.[69]
72. Article 5 of the UCTD, which provides that *"*[…] *contract terms must always be drafted in plain, intelligible language* […]*"*, has been interpreted by the CJEU in particular regarding variable borrowing rate terms in credit agreements.[70] For the purpose of complying with the requirement of transparency it is of fundamental importance to determine whether the loan agreement sets out transparently the reasons, and the particularities of the mechanism, for altering the interest rate.[71] As regards the requirement of transparency of contractual terms laid down by the UCTD, the CJEU has held that it is of fundamental importance for the consumer[72] and held that these cannot be reduced merely to being formally and grammatically intelligible but must be understood in a broad sense.[73]

[69] See Case E-25/13, *Gunnar V. Engilbertsson v Íslandsbanki hf.,* cited above, paragraph 98.
[70] See e.g. Section 3.3.2 of the Commission Guidance on Directive 93/13 where the Commission states in a more general comment on the transparency requirement that: "[…] *for instance, in relation to EU consumer credit legislation, the Court has stressed the importance of borrowers having to hand in all information which could have a bearing on the extent of their liability and, thereby, of presenting the total cost of the credit in the form of a single mathematical formula. Therefore, the failure to indicate the annual percentage rate of charge (APR) as required under EU consumer credit rules is 'decisive evidence' as to whether the term of the agreement relating to the total cost of the credit is drafted in plain intelligible language*". See also judgment of the CJEU of 26 February 2015 in Case C-143/13, *Matei,* cited above, paragraphs 74 and 76.
[71] *Ibid,* paragraph 74.
[72] See Case C-125/18, *Gómez del Moral Guasch*, cited above, paragraph 49.
[73] See judgment of the CJEU of 30 April 2014 in Case C-26/13, *Kásler and Káslerné Rábai*, EU:C:2014:282, paragraphs 71 and 72.

73. With regard to the transparency requirements in Article 5 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 the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations* […]".[74]

74. This means, in particular, that the contract should:

> "[…] *set out transparently the specific functioning of the mechanism to which the relevant term relates and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms, so that the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from the contract* […]".[75]

75. Specifically with regard to a contractual term setting a variable interest rate under a mortgage credit agreement, the CJEU has held that information that is particularly relevant for the purposes of carrying out the assessment of whether a contract term complies with these transparency requirements as set out above, includes:

> "[…] *(i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and (ii) the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated.*"[76]

76. In a case concerning, *inter alia*, a contract term allowing a bank to alter a variable interest rate in cases of "significant changes in the money market", the CJEU noted 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*

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[74] 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.
[75] *Ibid*, paragraph 65, with further references.
[76] See Case C-125/18, *Gómez del Moral Guasch*, cited above, paragraph 56.

in the money market', even if that formulation is in itself grammatically plain and intelligible."[77]

77. Furthermore, as regards the obligation laid down in Article 10(2)(f) CCD to include in the credit agreement in a clear and concise manner the arrangements for adjusting the rate of late-payment interest, the CJEU has held that a reference in a credit agreement to a base rate set by the central bank of a Member State and published in its easy-to-access Official Journal 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, two conditions must be met: First, that method of calculation must be set out in a way which is readily understood by an average consumer, who does not have specialist knowledge in the finance field and which enables him or her to calculate the rate of late-payment interest based on the information provided in the credit agreement. Secondly, the frequency with which the base rate may be varied, which is determined by national provisions, must also be set out in that agreement.[78]

78. ESA submits, on the basis of the above considerations, that the terms "clear, accessible, objective and verifiable" for the purposes of Article 24 MCD must be interpreted as requiring that the mortgage credit agreement must set out a transparent mechanism for altering the interest rate which puts the consumer in a position to understand the specific functioning of the term, and, furthermore, puts the consumer in a position to evaluate the potential economic consequences of the specific term for his or her financial obligations.[79]

6.5 The compatibility of the elements of the contract term in the Agreement with Article 24 MCD

79. The contract term at issue in the main proceedings states that the following elements will be taken into account when adjusting the borrowing rate:

- *"amongst other things,*
- *changes in the bank's financing costs,*

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[77] See Case C-143/13, *Matei*, cited above, paragraph 76.

[78] 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*, EU:C:2021:736, paragraph 94.

[79] See, in particular, Joined Cases C-776/19 to C-782/19, *BNP Paribas Personal Finance*, cited above, paragraphs 64 and 65.

- *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"*[80]

80. ESA submits that all of these elements must be assessed individually and collectively against the requirements of being "*clear, accessible, objective and verifiable*" within the meaning of Article 24 MCD. Furthermore, and in line with Section 6.4 above, these elements must individually and collectively put the consumer in a position to understand the specific functioning of the term, and in a position to evaluate the potential economic consequences of the specific term for his or her financial obligations. Moreover, the burden of proving whether the contractual term comply with the requirements set out in Article 24 MCD is not to be borne by the consumer.
81. With regard to the elements of the term referred to specifically in the question from the Referring Court, namely the bank's "**operating costs**" and "**other unforeseen costs**", ESA submits that both of these elements are by their very nature not clear, accessible, objective or verifiable for an average consumer. By including these elements in a contract term on the adjustment of the borrowing rate, it is neither possible for an average consumer to understand the specific functioning of the contract term, nor to evaluate the potential economic consequences of the term for his or her financial obligations. As such, these two elements of the contract term entail **in themselves** that the contract term as such is **not transparent**.
82. ESA furthermore notes with regard to the first element of the term, "amongst other things", that this element, in the same vein as the two elements assessed above, also fails both to put the consumer in a position to understand the specific functioning of the term and of putting the consumer in a position to evaluate the potential economic consequences of the specific term for his or her financial obligations, because it makes the term open ended, allowing the Defendant to unilaterally decide which factors to take into account when calculating the borrowing rate.
83. ESA on this basis submits that, while it is for the Referring Court to ascertain the factual and legal circumstances of the present case, it would appear that the

[80] See the Request, page 2.

contract term in the Agreement at issue in the present case does not fulfil the transparency requirements set out in Article 24 MCD.

6.6 The UCTD in any event applies

84. In the alternative, should the Court find that either the MCD altogether, or Article 24 of the MCD, is not applicable to the contract term at issue in the present case, ESA submits that the UCTD in any event applies, and furthermore that the assessment under the UCTD **is the same**.

85. As noted in paragraph 32 above, the CJEU has held that the UCTD is "*a general directive for consumer protection, intended to apply in all sectors of economic activity*".[81] As such, should the Court find that the MCD or specific provisions of the MCD are not applicable in the present case, the contract term at issue in the present case must in any event be assessed under the UCTD.

86. Article 4(1) of the UCTD specifies that the unfairness test of a contract term shall be made whilst "[…] *taking into account the nature of the goods or services for which the contract was concluded* […]".[82] This in ESA's view indicates, in line with case law concerning the transparency requirements under the UCTD, that the transparency test will be particularly strict when it comes to mortgage credit agreements.

87. In accordance with Article 5 of the UCTD, which is an expression of the principle of transparency in the same vein as Article 24 MCD, contract terms must always be drafted in "*plain, intelligible language.*" In accordance with the case law of the CJEU, as for instance held in Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance*, Article 5 of the UCTD requires 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 the basis of clear, intelligible criteria, the potentially significant* ***economic consequences of such a term*** *for his or her financial obligations.* […]"[83] More generally, ESA here refers to our submissions concerning the interpretation of Article 24 MCD in light of the CCD and the UCTD in Section 6.4 above, which, in

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[81] See Case C-290/16, *Air Berlin*, cited above, paragraph 44.

[82] See judgment of the CJEU of 21 January 2021 in Joined Cases C-229/19 and C-289/19, *Dexia Nederland BV v XXX (C-229/19) and Z (C-289/19)*, EU:C:2021:68, paragraph 51.

[83] See Joined Cases C-776/19 to C-782/19, *BNP Paribas Personal Finance,* cited above, paragraph 64, with further references.

the absence of case law relating to the transparency requirements of the MCD, relies on the case law concerning, in several instances, Article 5 of the UCTD.

88. ESA on the basis of the above therefore submits that the contract term at issue in the present case fail to fulfil the requirements also of Articles 4 and 5 of the UCTD.

6.7 Consequences for the Agreement if the contract term is not compatible with the MCD and/or the UCTD

89. Should the Court find that the contract term in the Agreement at issue in the present case is not compatible with Article 24 MCD and/or Article 5 UCTD, ESA has the following remarks concerning the consequences for the Agreement as such.

90. As is settled case law, Advocate General Collins recently noted in the Opinion in Case C-520/21 *Bank M* that in accordance with the second part of Article 6(1) UCTD, when a contract term is deemed unfair, *"the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence **without the unfair terms**."*[84] Hence, the purpose of Article 6(1) UCTD is not to annul all contracts that contain unfair terms, but to restore the balance between the parties while in principle preserving the validity of the contract as a whole. The contract in question in principle continues to exist without any modification other than that the removal of the unfair terms requires, in so far as, in accordance with domestic law, that continuity is legally possible, which is to be verified objectively.[85]

91. However, where an agreement concluded between a seller or supplier and a consumer is *not capable* of continuing in existence following the removal of the unfair term, the CJEU has acknowledged that Article 6(1) of the UCTD does not prevent the national court from removing, in accordance with the principles of contract law, the unfair term and replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, and consequently exposing the consumer to unfavourable consequences, so that the consumer would thus be penalised.[86]

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[84] See Opinion of Advocate General Collins of 16 February 2023 in Case C-520/21, *Arkadiusz Szcześniak v Bank M. SA, joined parties: Rzecznik Praw Obywatelskich, Rzecznik Finansowy, Prokurator Prokuratury Rejonowej Warszawa – Śródmieście w Warszawie Przewodniczący Komisji Nadzoru Finansowego*, EU:C:2023:120, paragraph 42, with further references. Emphasis made by ESA.

[85] *Ibid.*

[86] See in that regard judgments of the CJEU in Case C-26/13, *Kásler and Káslerné Rábai*, cited above, paragraphs 80 and 83; and of 26 March 2019 in Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria and Bankia*, EU:C:2019:250, paragraph 56; and of 3 October 2019,

92. ESA submits that the same applies as regards contract terms that do not meet the requirements of the MCD, *inter alia*, its Article 24.

93. ESA submits that in circumstances such as those in the main proceedings, the national court must assess whether the mortgage credit agreement at issue can continue to legally exist after the incompatible or unfair terms in question have been removed. In this regard, it is relevant whether there are any supplementary provisions of national law or provisions applicable where the parties to the contract at issue so agree which may replace those terms. If not, the high level of consumer protection which must be ensured under both the UCTD and the MCD demands that, in order to restore the effective balance between the reciprocal rights and obligations of the parties, the national court must take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the loan agreement in question.[87]

94. In that regard, it must be clarified that, in circumstances such as those in question in the main proceedings, nothing precludes the national court from, *inter alia*, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that it sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties to the mortgage credit agreement taking into account in particular the objective of consumer protection.[88]

7 CONCLUSION

95. Accordingly, ESA respectfully requests the Court to answer the question from the Referring Court in the following way:

1. The terms “clear, accessible, objective and verifiable” for the purposes of Article 24 of Directive 2014/17/EU *on credit agreements for consumers relating to residential immovable property* must be interpreted as requiring that the mortgage credit agreement sets out a transparent mechanism for altering the interest rate which puts the consumer in a position to understand

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Case C-260/18, *Dziubak,* EU:C:2019:819, paragraph 48, and Case C-125/18, *Gómez del Moral Guasch,* cited above, paragraph 61.

[87] See concerning the UCTD Case C-269/19, *Banca B.SA v A.A.A*, cited above, paragraphs 41-42.

[88] *Ibid.*

the specific functioning of the term, and, to evaluate the potential economic consequences of the specific term for his or her financial obligations.

2. While it is for the national court to determine the facts of the case before it, a term in a consumer mortgage credit agreement which states that the adjustment of a variable interest rate should take account of “operating costs” and “other unforeseen costs”, cannot be considered to be "clear, accessible, objective and verifiable" as required by Article 24 of Directive 2014/17/EU.

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