



EUROPEAN COMMISSION

Brussels; 17 January 2023
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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

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

EUROPEAN COMMISSION

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

in Case E-13/22

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

Birgir P or Gylfason and J orunn S. Gr ondal

Plaintiff

against

Landsbankinn hf.

Defendant

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

¹ OJ L 60, 28.2.2014, p. 34–85

² OJ L 133, 22.5.2008, p. 66–92

1. FACTS AND PROCEDURE

1. The main action before the Reykjavik District Court is a claim by two individuals Birgir Þór Gylfason and Jórunn S. Gröndal (the Plaintiffs) against their mortgage provider, Landsbankinn hf (the Defendant) for the sum of ISK 83 627 which constitutes penalty interest under Article 6(1) of Act No 38/2001 on Interest and Indexation³.
2. On 4 July 2019, the Plaintiffs signed a mortgage deed form (the Mortgage Deed) prepared by the Defendant covering a loan that the Plaintiffs took out from e Defendant. The heading of the form stated that this was a non-indexed bridge [sic] loan (*viðbótarlán*) with variable interest. The underlying dispute concerns the particular terms of this Mortgage Deed which deal with the determination of variable interest rates.
3. It was stated in the Mortgage Deed that variable mortgage interest was to apply. This was recorded at 6.60% when the mortgage bond was drawn, and the interest rate which applied to the first repayment date in August 2019 was 6.4%.
4. The Mortgage Deed contained particular terms covering the Defendant's authority to adjust the interest rate. These read as follows:

“Variable mortgage interest shall be paid on this loan in accordance with the interest determined by Landsbankinn on non-indexed bridge loans at any given time. Interest shall be paid retrospectively, on the same dates as the repayment instalments, unless another arrangement is agreed.

Landsbankinn may, at any time during the loan period, raise or lower the aforementioned interest rate in accordance with Landsbankinn's interest-rate decisions at any given time. Interest-rate decisions shall take account, amongst other things, of the Central Bank of Iceland's interest rate, interest rates on the market and other financing terms available to Landsbankinn. Changes to the interest rate shall be announced on paper or via another durable medium, e.g. in an on-line bank, and shall take effect 30 days after the date of the announcement. The aforementioned 30-day notice period may be changed in accordance with the relevant provisions of law. An adjustment involving a lowering of the interest rate may be scheduled to take effect on the date of the announcement, but this is not obligatory.

If the drawer (mortgagor) is not willing to accept adjustments as provided for in item 2, he or she may repay the outstanding balance on the terms that were in

³ The Plaintiff, one assumes, is provided with a cause of action against their creditor under Article 6(1) of Act No 38/2001 on Interest and Indexation. There is nothing in the order which explains the basis of the claim for penalty interest made by the Plaintiffs against the Defendant.

effect prior to the adjustment, provided that the entire outstanding balance is repaid within 30 days of the date of the announcement from Landsbankinn.”

5. Against that backdrop, the District Court heard argument from both parties about the terms of the Mortgage Deed including:
 - the compatibility of the particular terms in the Mortgage Deed with the Consumer Credit Directive in relation to the conditions and procedure for changing the borrowing rate and the arrangements for the adjustment of penalty interest;
 - the compatibility of the particular terms referred to above at paragraph 4 with Article 24 (1) of the Mortgage Credit Directive with the obligation to apply indexes or reference rates that are clear, accessible, objective and verifiable;
 - the method of calculating interest rates.
6. The parties disagree as to whether the terms in the Mortgage Deed are compatible with the Icelandic Consumer Property Mortgage Act No 118/2016 when read in conformity with the Mortgage Credit Directive; and the Icelandic Consumer Credit Act No 33/2013 when read in conformity with the Consumer Credit Directive.
7. The Plaintiffs argues that a number of questions should be put to the EFTA Court for an advisory opinion whilst it is the Defendant’s case that it is not necessary to seek an advisory opinion at all.
8. The District Court considers that the heart of the dispute is Article 34 (1) of the Icelandic Consumer Property Mortgage Act No 118/2016. In the view of the District Court, Article 34(1) of that Act derives from both the Mortgage Credit Directive and the Consumer Credit Directive. The District Court, however, is unclear about the relationship between both directives and the impact that this has on the interpretation of the Consumer Property Mortgage Act No 118/2016.
9. The District Court has sought an advisory opinion on only one of the issues heard in argument and has asked the question below.

2. THE QUESTION

10. By order of 4 November 2022 (the Order), the District Court of Reykjavík decided to refer the following question:

Is it compatible with Directive 2014/17/EU [the Mortgage Credit Directive], in particular, Article 24 of the Directive, and, as appropriate, Article 10(2)(f) of Directive 2008/48/EC [the Consumer Credit Directive](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?

3. THE APPLICABLE LAW

3.1. EEA Law

3.1.1. Directive 2014/17 (the Mortgage Credit Directive)

11. 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 text with EEA relevance (the Mortgage Credit Directive) provides as follows, in relevant part:

- (19) *For reasons of legal certainty, the Union legal framework in the area of credit agreements relating to residential immovable property should be consistent with and complementary to other Union acts, particularly in the areas of consumer protection and prudential supervision. Certain essential definitions including the definition of 'consumer', and 'durable medium', as well as key concepts used in standard information to designate the financial characteristics of the credit, including 'total amount payable by the consumer' and 'borrowing rate' should be in line with those set out in Directive 2008/48/EC so that the same terminology refers to the same type of facts irrespective of whether the credit is a consumer credit or a credit relating to residential immovable property. Member States should therefore ensure, in the transposition of this Directive, that there is consistency of application and interpretation in relation to those essential definitions and key concepts...*
- (22) *At the same time, it is important to take into consideration the specificities of credit agreements relating to residential immovable property, which justify a differentiated approach. Given the nature and the possible consequences of a credit agreement relating to residential immovable property for the consumer, advertising materials and personalised pre-contractual information should include adequate specific risk warnings, for instance about the potential impact of*

exchange rate fluctuations on what the consumer has to repay and, where assessed as appropriate by the Member States, the nature and implications of taking out a security. Following what already existed as a voluntary approach by the industry concerning home loans, general pre-contractual information should be made available at all times in addition to the personalised pre-contractual information. Furthermore, a differentiated approach is justified in order to take into consideration the lessons learnt from the financial crisis and in order to ensure that credit origination takes place in a sound manner. In this respect, the provisions on the creditworthiness assessment should be strengthened in comparison to consumer credit, more precise information should be provided by credit intermediaries on their status and relationship with the creditors in order to disclose potential conflicts of interest, and all actors involved in the origination of credit agreements relating to immovable property should be adequately admitted and supervised.

Article 3

1. *This Directive 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; [...]

3. *Member States may decide not to apply:*

(d) this Directive to bridging loans

Article 4 Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) ‘Consumer’ means a consumer as defined in point (a) of Article 3 of Directive 2008/48/EC.

(2) ‘Creditor’ means a natural or legal person who grants or promises to grant credit falling within the scope of Article 3 in the course of his trade, business or profession.

(3) ‘Credit agreement’ means an agreement whereby a creditor grants or promises to grant, to a consumer, a credit falling within the scope of Article 3 in the form of a deferred payment, loan or other similar financial accommodation.

(14) ‘Total amount payable by the consumer’ means the total amount payable by the consumer as defined in point (h) of Article 3 of Directive 2008/48/EC.

(16) ‘Borrowing rate’ means the borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC.

(23) 'Bridging loan' means a credit agreement either of no fixed duration or which is due to be repaid within 12 months, used by the consumer as a temporary financing solution while transitioning to another financial arrangement for the immovable property

Article 24 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.

3.1.2. Directive 2008/48 (the Consumer Credit Directive)

12. 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 Consumer Credit Directive) provides as follows, in relevant part:

Article 2 Scope

2. *This Directive shall not apply to the following:*

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

Article 3 Definitions

For the purposes of this Directive, the following definitions shall apply:[...]

(h) 'total amount payable by the consumer' means the sum of the total amount of the credit and the total cost of the credit to the consumer;

(j) 'borrowing rate' means the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down;

Article 10 Information to be included in credit agreements

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

3.2. National Law

Article 34 (1) of the Consumer Property Mortgage Act

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

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

4. PRELIMINARY REMARKS

13. At the outset, the Commission would like to point out that of particular significance to the Question posed by the District Court is the actual nature of this loan. The Order is not clear as to which type of loan underlies the contract concluded between the consumers and the lender and which is set out in the Mortgage Deed. Of course, this would be for the District Court to verify but the Commission would make the following remarks on the information set out in the Order.
14. According to the Order, the Mortgage Deed is entitled “bridge [sic] loan” (*viðbótarlán*); and the sum itself is for an amount of ISK 6 500 00. Whether the dispute actually concerns a bridging loan is not dealt with at any other point in the reasoning. The issue is not without relevance as bridging loans are subject to particular provisions in the Mortgage Credit Directive which give a discretion to EEA States as to how such loans are dealt with.
15. Article 3(1) (a) of the Mortgage Credit Directive provides that

“1. This Directive 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”

16. A bridging loan is defined in the Mortgage Credit Directive as :

“(23) ‘Bridging loan’ means a credit agreement either of no fixed duration or which is due to be repaid within 12 months, used by the consumer as a temporary financing solution while transitioning to another financial arrangement for the immovable property”

17. If indeed the loan in question is a bridging loan, then EEA States are free to decide that the Mortgage Credit Directive does not apply to bridging loans, as defined. However, even if the dispute did concern a bridging loan, the Commission assumes that Iceland has not made use of this possibility as it is not mentioned by the District Court. Once again, this would be for the District Court to verify.
18. Next, if the credit agreement in question concerns not a mortgage as such, nor a bridging loan but another form of secured credit, it would also fall within the scope of Article 3 (1) (a) of the Mortgage Credit Directive provided that it is secured by *'another comparable security commonly used in a Member State on residential immovable property or secured by a right related to residential immovable property'* (*'comparable security'*).
19. A *'comparable security'* within the meaning of Article 3(1) (a) could be a secured top up loan which enables the consumer to make up the additional funds i.e. a loan in addition to the principal sum i.e. a mortgage required to purchase a house. Once again, it would be for the District Court to verify whether this loan is a credit agreement for a mortgage or comparable security within the meaning of that provision.
20. Moreover, as this concerns a Mortgage Deed which has already been concluded by the parties, no issue seems to have been raised in the Order with respect to the pre-contractual requirements which need to be fulfilled under the Mortgage Credit Directive prior to conclusion of the Mortgage Deed⁴. The pre-contractual requirements stipulate, inter alia, that the consumer should be made aware that where the borrowing rate is not fixed for the duration of the contract, it should be highlighted that this amount is illustrative and may vary in particular in relation with the variation in the borrowing rate. In particular, the information in Annex II on the *'total amount to be reimbursed'* should have been shown to correspond to the total amount payable by the consumer and shown as the sum of the credit amount and the total cost of the credit to the consumer. The pre-contractual requirements would also have a bearing on the interpretation of the Mortgage Deed.

⁴ Article 11 (h), Article 13 (g), Annex II (8)

21. Accordingly, the Commission assumes that the consumer received appropriate representative samples i.e. projections and simulations of the total amount payable by the consumer based on a variable credit for the duration of the loan prior to signing the Mortgage Deed.
22. Last of all, the Mortgage Credit Directive is a directive addressed to EEA States. As a directive, it is not an instrument that is directly applicable which would be the case with a regulation. EEA States are required to implement the Mortgage Credit Directive's provisions into national law. The District Court seems to acknowledge this implicitly in its reasoning where it states that the heart of the dispute is Article 34 (1) of the Icelandic Consumer Property Mortgage Act No 118/2016 which is the means by which Iceland implemented its obligations under the Mortgage Credit Directive.
23. Nevertheless, the Question of the District Court does not address that underlying national provision but seeks to interpret the Mortgage Deed directly in the light of the Mortgage Credit Directive. The District Court has asked only about the compatibility with the Mortgage Credit Directive of certain terms in the Mortgage Deed when read in the light of Recital 19 of the Consumer Credit Directive.
24. In order to provide the District Court with an answer that is of use to it in the present dispute, the Question of the District Court must be understood as asking whether on the basis of the national legislation that applies to credit agreements and mortgage loans, Article 24 of the Mortgage Credit Directive must be interpreted as precluding a credit agreement for a mortgage or another comparable security which applies a variable rate credit and which states 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 constitute indexes or reference rates used for calculating the borrowing rate.
25. The national legislation should be interpreted in conformity with the Mortgage Credit Directive.

5. OBSERVATIONS

26. Subject to the verification that will have to be made as to the particular type of loan in issue in this case, the Commission starts from the premise that the credit agreement in question is one that concerns either a mortgage or another comparable security within the meaning of Article 3(1) (a) of the Mortgage Credit Directive.
27. By its Question which refers expressly to Recital 19, and as appropriate, Article 10(2) (f) of the Consumer Credit Directive, the Commission understands that the District Court is asking to what extent the ‘*essential definitions*’ and ‘*key concepts*’ referred to in Recital 19 have to be taken into account in interpreting Article 24 of the Mortgage Credit Directive.
28. Article 2(2)(a) of the Consumer Credit Directive provides that it does not apply to credit agreements secured by a mortgage or another comparable security used to purchase real property:
- “2. This Directive shall not apply to the following:*
- (a) credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property[...]*”
29. The relationship between the Mortgage Credit Directive and the Consumer Credit Directive is set out in Recital 19 of the Mortgage Credit Directive. That Recital refers to certain ‘*essential definitions*’ and ‘*key concepts used in standard information to designate the financial characteristics of the credit, including ‘total amount payable by the consumer’ and ‘borrowing rate’*’ which are provided for in the Consumer Credit Directive and which are explicitly incorporated by reference into the later act which is the Mortgage Credit Directive.
30. The Consumer Credit Directive and the Mortgage Credit Directive both provide for a high level of consumer protection. The particular objective of the Mortgage Credit Directive is to ensure that consumers entering into credit agreements relating to immovable property benefit from a high level of protection (Recital 15)⁵.

⁵ The first report on the application of the Mortgage Credit Directive was adopted on 11.05.2021 COM (2021) 229

31. The Mortgage Credit Directive takes into consideration the specificities of credit agreements relating to residential immovable property, which justify a differentiated approach given the significant consequences not only for consumers but also for creditors. See to this end Recital 22:

“(22) At the same time, it is important to take into consideration the specificities of credit agreements relating to residential immovable property, which justify a differentiated approach. Given the nature and the possible consequences of a credit agreement relating to residential immovable property for the consumer, advertising materials and personalised pre-contractual information should include adequate specific risk warnings, for instance about the potential impact of exchange rate fluctuations on what the consumer has to repay and, where assessed as appropriate by the Member States, the nature and implications of taking out a security. Following what already existed as a voluntary approach by the industry concerning home loans, general pre-contractual information should be made available at all times in addition to the personalised pre-contractual information. Furthermore, a differentiated approach is justified in order to take into consideration the lessons learnt from the financial crisis and in order to ensure that credit origination takes place in a sound manner. In this respect, the provisions on the creditworthiness assessment should be strengthened in comparison to consumer credit, more precise information should be provided by credit intermediaries on their status and relationship with the creditors in order to disclose potential conflicts of interest, and all actors involved in the origination of credit agreements relating to immovable property should be adequately admitted and supervised.”

32. As Recital 22 makes clear, there are different obligations, and requirements that apply to mortgage credit and any comparable security in the light of the text but also the aim and objective of the Mortgage Credit Directive. In particular, what is different is the nature/type of information that is requested of the consumer e.g. creditworthiness assessment compared to consumer credit requirements; and also the information which is supplied to the consumer e.g. advertising materials and personalised pre-contractual information should include adequate specific risk warnings, for instance about the potential impact of exchange rate fluctuations on what the consumer has to repay and, where assessed as appropriate by the Member States, the nature and implications of taking out a security.
33. These obligations are set out in Chapter 4 entitled Information and Practices Preliminary to the Conclusion of the Credit Agreement including Article 16 on Adequate explanations; Chapter 5 Annual Percentage Rate of Charge (Article 17);

Chapter 6 entitled Credit Worthiness Assessment (Articles 18-20) Chapter 9 entitled Foreign Currency Loans and Variable Rate Loans where a borrowing rate is offered to the consumer in the case of a variable rate credit (Articles 23-24); Chapter 10 entitled Sound Execution of Credit Agreements and Related Rights (Articles 25-28); and finally in the Annex.

34. The present dispute concerns the information obligations in Article 24 in Chapter 9 “Foreign Currency Loans and Variable Rate Loans” where a borrowing rate is offered to the consumer in the case of a variable rate credit.
35. In line with Recital 19, although this credit agreement falls outside the scope of the Consumer Credit Directive in the light of Article 2 (2) (a) of that Directive, a ‘*key concept*’ from the Consumer Credit Directive has been included in the text of Article 24 and that is the definition of ‘*borrowing rate*’. The key concept of ‘*borrowing rate*’ in Article 3(j) of the Consumer Credit Directive is incorporated by reference in Article 4 (16) Mortgage Credit Directive. It is defined as the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down.
36. Recital 19 states that the same terminology should apply irrespective of whether the credit is a consumer credit or a credit relating to residential immovable property, and that EEA 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.
37. Therefore, consistent with Recital 19, the key concept of ‘*borrowing rate*’ is the same for both directives. However, the obligations set out in Article 10 (2) (f) of the Consumer Credit Directive which refer, inter alia, to the borrowing rate, have not been incorporated into the Mortgage Credit Directive.

38. Article 24 provides as follows:

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.

39. The text of Article 24 should be read in the context of all the obligations in the Mortgage Credit Directive. It follows from the text of that provision that where a variable rate credit applies, the indexes or reference rates used for the borrowing rate need to be clear, accessible, objective and verifiable by the parties to the credit agreement and the competent authorities (Article 24 (a)); and that historical records should be retained (Article 24 (b)).

40. In addition, the obligations set out in Article 24 (a) and (b) are cumulative.

41. As the Question of the District Court focuses on Article 24 (a), the Commission will limit itself to interpreting that provision.

42. In order to comply with Article 24 (a), '*indexes or reference rates*' used to calculate the borrowing rate should cumulatively satisfy the requirements of being clear, '*accessible, objective and verifiable*'. In relation to the latter term '*verifiable*', this should be by reference to the parties and also the competent authorities. Should the '*indexes or reference rates*' fail on any of these requirements, then the obligations in Article 24 (a) would not be met.

43. In the present case, the term '*borrowing rate*' read in the light of Article 4 (16) of the Mortgage Credit Directive would be the interest rate expressed as a *variable* (and not fixed in this case) percentage applied on an annual basis to the amount of credit drawn down. That aspect of the definition in Article 4 (16) of the Mortgage Credit Directive which pertain to a '*fixed*' percentage would not be relevant for present purposes.

44. However, there is no definition of a number of key notions such as '*variable rate credit*'; '*indexes*' '*reference rates*' which would be used to calculate the borrowing

rate; or indeed what criteria apply to determine whether these are ‘*clear, accessible, objective and verifiable*’.

45. It is settled case law that it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (Judgment of the Court (Grand Chamber), 3 September 2014 in *Deckymn*, ECLI:EU:C:2014:2132 paragraphs 14 and 15 and the case-law cited).
46. It is clear from that case-law that the concepts which appear in a provision of a directive that does not contain any reference to national laws, must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union.
47. Accordingly, in the context of the Mortgage Credit Directive in the absence of any definition and where there is no reference to the law of Member States, the notions of ‘*variable rate credit*’; ‘*indexes or reference rates*’ and the test of whether these are ‘*clear, accessible, objective and verifiable*’ should be treated as autonomous notions of Union law. Their meaning should be determined by the context in which they appear in the light of the objectives of the Mortgage Credit Directive.
48. The plain meaning of the term ‘*variable rate credit*’ would imply a rate in a credit agreement that is not fixed. Therefore, when read in the context of Article 24, a ‘*variable rate credit*’ should be considered a credit agreement which has a fluctuating rate. Article 27 of the Mortgage Credit Directive provides for further obligations with respect to information concerning changes in the borrowing rate in credit agreements.
49. The term ‘*indexes*’ appears in a few other instances in the Mortgage Credit Directive but in different contexts. It is commonly understood that a non-indexed loan is an amount at a fixed rate, so a loan which is indexed is linked to factors which are subject to change. These can be Central Bank interest rates but not only

⁶. Therefore, in the context of Article 24 (a), the term ‘*indexes*’ supports a broad reading.

50. As far as the term ‘*reference rates*’ is concerned, this is likewise not defined. However, there are specific information obligations elsewhere in the Mortgage Credit Directive notably in Article 27 which concerns the information obligation imposed on creditors with respect to changes in the ‘*reference rates*’. In a similar way to Article 24, the notion of ‘*reference rates*’ in Article 27 is not defined. Pursuant to Article 27 (2), Member States are required to impose a duty on creditors to inform consumers of any change in the borrowing rate where it is linked to changes in the reference rate before it takes effect. The information obligation in Article 27 pertains to the ‘*changes in the borrowing rate*’ which should reveal the adjustment factors.

51. Article 27 (2) reads as follows:

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.

3. Creditors may continue to inform consumers periodically where the change in the borrowing rate is not correlated with a change in a reference rate where this was allowed under national law before 20 March 2014.[...]”

52. In the submission of the Commission, there is nothing to preclude the information obligations in Article 27 which pertain to reference rates from informing the interpretation of Article 24. This would mean that *reference rates* could include any factor which changes the borrowing rate.

⁶ <https://dsbb.imf.org/sdds/dqaf-base/country/ISL/category/INR00>
See for example World Bank data on Iceland and indexes.

53. Therefore, the terms ‘*indexes or reference rates*’ would allow for a broad interpretation when considered in the context of the objective of the Mortgage Credit Directive and in particular the obligations placed on the creditor vis a vis the consumer and also the competent authority. That broad interpretation of Article 24 (1) (a) would not exclude any means available to the creditor from the scope of ‘*indexes or reference rates*’.
54. Notwithstanding the broad interpretation of the means i.e. the ‘*indexes or reference rates*’ used to calculate the borrowing rate for the purposes of Article 24, the obligation to ensure that these means are ‘*clear, accessible and objective and verifiable*’ would need to be fulfilled.
55. In the case of ‘*clear*’, the Commission considers that this would imply a threshold that is higher than merely understandable both to the consumer and the competent authority and which provides clarity as to the outcomes⁷. In particular, the consequences should be understandable and this may mean allowing the calculation of any sum payable to be known. It should be readily understood by an average consumer.
56. The Commission considers that the recent case of *C-125/18 Gómez del Moral Guasch* Judgment of 3 March 2020 ECLI:EU:C:2020:138 (*Gómez del Moral Guasch*), paragraph 51, could be applied by analogy. It concerned a mortgage loan agreement and the Court was asked to interpret the requirement in Directive 93/13/EEC on Unfair terms in Consumer Contracts that terms in writing “must always be drafted in plain, intelligible language”. The Court held as follows:

“51 As to a contractual term providing, under a mortgage loan agreement, for that loan to be remunerated by interest calculated on the basis of a variable rate, that requirement must thus be understood as requiring not only that the term in question must 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 the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations (see, to that effect and by analogy, judgments of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraph 75, and of 20 September 2017, Andriiciuc and Others, C-186/16, EU:C:2017:703, paragraph 51).”

⁷ Once again, the pre-contractual obligations would also have had to be satisfied. See footnote 5.

57. The Commission submits that the term '*accessible*' in Article 24 (a) should be understood as being made available to the consumer and the competent authority in a way in which the indexes or reference rates can be consulted. Once again, support for this interpretation of Article 24 (a) can be found in Article 27 (2) of the Mortgage Credit Directive as it refers explicitly to where '*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*'.
58. It follows that the consumer should be able to readily find out independently the information which constitutes the indexes or reference rates which are used to calculate the borrowing rate, at any time including the impact of the change.
59. In the case of '*objective*', this should be interpreted to the effect that the way the '*indexes or reference rates*' are determined should be without distortion or bias which favours one party i.e. not subjective.
60. The last limb of '*verifiable by the parties to the credit agreement and the competent authorities*' indicates that not only the contractual partners but the competent authority should also be in a position to check that what has been presented can be checked or demonstrated to be correct, accurate.
61. Therefore, if the term '*indexes or reference rates*' is to be interpreted in a broad way, it would include, inter alia, any means of calculation which are regulated by law and those which are market practice. Whilst the means that are regulated by law might more easily meet the requirements of being clear accessible objective and verifiable, nevertheless, all other means available to the creditor such as interest rates on the market or other financing terms should "*a fortiori*" also comply with those criteria. For those means over which only the lender has control, further steps will have to be undertaken by the creditor in order to comply with the requirements of being clear, accessible, objective and verifiable in relation to those other means.
62. It is for the District Court to determine whether in the main proceedings, the factors in the Mortgage Deed concerning '*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 constitute *indexes or reference rates* that meet the test of *'clear, accessible, objective and verifiable'* for the parties and let us not forget the competent authority. They should all be in a position to ascertain the factors which have influenced the variations in the consumer's credit amount, at any given time.

63. In the present case, the Mortgage Deed includes contractual terms which refer to a number of means available to the creditor which allow for adjustment of the borrowing rate.
64. A broad interpretation of the terms *'indexes or reference rates'* in Article 24 (a) would not exclude, *a priori* any of the means set out in this particular Mortgage Deed which states:

"Interest-rate decisions shall take account, amongst other things, of the Central Bank of Iceland's interest rate, interest rates on the market and other financing terms available to Landsbankin."

65. In the present case and on the basis of the information in the Order, the Commission assumes that the Central Bank of Iceland's interest rate could be said to be objective and accessible to the general public and verifiable (subject to verification by the national court). Whether the Central bank's interest rate has been communicated to the consumer in a way that is clear would also be for the District Court to assess.
66. However, on the basis solely of the information provided in the Order, it is not apparent to the Commission what *'among other things'* could possibly mean in the context of Article 24 of the Mortgage Credit Directive and how it can meet the test of being *clear, accessible, objective and verifiable* as it refers to something which is not identified.
67. Nor is it apparent what *'other interest rates on the market'* are referring to in relation to this Mortgage Deed. Nor indeed whether the *'other terms of finance available to the creditor'* are capable of being made known to the consumer or the competent authority or merely constitute unilateral knowledge which is available only to the creditor and which as a result do not meet the requirements of Article 24 (a). Given that in such circumstances, these indexes or reference rates are so open ended that they would then be determined unilaterally by the creditor itself

(with the exception of those set by the Central Bank or others) which has a considerable discretion to terminate the mortgage, it would be difficult to see how these could be considered as objective viewed in isolation.

68. If indeed, nothing more has been supplied to the consumer other than the Mortgage Deed, including as part of the pre-contractual obligations- then it is doubtful whether these '*indexes or references rates used to calculate the borrowing rate*' under such a Mortgage Deed would comply with the obligation to be '*clear, accessible, objective and verifiable*' within the meaning of Article 24 (a) of the Mortgage Credit Directive.
69. Therefore, the Commission concludes that Article 24 of the Mortgage Credit Directive, read in the light of recital 19 applies to a credit agreement for a mortgage or comparable security with a variable rate credit and which states 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.
70. Article 24 of the Mortgage Credit Directive, read in the light of recital 19 must be interpreted to the effect that national legislation should preclude a credit agreement for a mortgage or comparable security with a variable rate credit which states 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 unless the 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.
71. It would be for the national court to assess on the basis of the applicable national legislation in conformity with the Mortgage Credit Directive whether the indexes or reference rates used to calculate the borrowing rate are clear, accessible and objective and verifiable by the parties to the credit agreement and the competent authorities.

6. CONCLUSION

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

Article 24 of the Mortgage Credit Directive, read in the light of recital 19 must be interpreted to the effect that national legislation should preclude a credit agreement for a mortgage or comparable security with a variable rate credit which states 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 unless the 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.

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