



ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 24 April 2023

Written Observations by the Kingdom of Norway

represented by Sverre Runde, advocate at the Office of the Attorney General for Civil Affairs, and Ingeborg Collett, advisor at the Ministry of Foreign Affairs, acting as agents, submitted pursuant to the third paragraph of Article 20 of the Statute and Article 90 of the Rules of Procedure of the EFTA Court, in

Case E-1/23 – Elva Dögg Sverrisdóttir and Ólafur Viggó Sigurðsson v Íslandsbanki hf.

in which Héraðsdómur Reykjanes (Reykjanes District Court) has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) on the interpretation of 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 amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (hereinafter the “Mortgage Credit Directive” or the “MCD”) and Article 10 nr. 2 (f) of 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 (hereinafter the “Consumer Credit Directive” or the “CCD”).

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1 INTRODUCTION

- (1) Reykjanes District Court (hereinafter “the referring court”) has requested the EFTA Court to give an advisory opinion in a dispute concerning a non-indexed mortgage agreement with variable interest rate entered into between two consumers and the Icelandic bank Íslandsbanki hf. (hereinafter “Íslandsbanki”). In short, the disputed term in the mortgage agreement states that the bank can unilaterally adjust the interest rate, taking into account,

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. The complainants argue that the term does not comply with Article 24 of the Mortgage Credit Directive and Article 10 (2) (f) of the Consumer Credit Directive.

- (2) For further details on the factual background of the case, the Norwegian Government refers to page 1–2 of the request for an advisory opinion.
- (3) The referring court has submitted the following question to the EFTA Court:

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

2 CONSIDERATION OF THE QUESTION REFERRED

2.1 Preliminary remarks

- (4) The referring court essentially asks whether the aforementioned provisions prohibit a term in a mortgage agreement between an Icelandic bank and a consumer, which allows the bank to unilaterally adjust the borrowing rate considering, amongst other things, changes in the bank's financing costs, its operating costs, public levies and/or other unforeseen costs, the Central Bank of Iceland's prime rate, and changes in the consumer price index.
- (5) The referring court's question is nearly identical to the question in the request for an advisory opinion from Reykjavik District Court in case E-13/22, in relation to which the Norwegian Government already has submitted written and oral submissions. The Government maintains its positions and views provided in those submissions. However, considering that cases E-13/22 and E-1/23 are not joined cases, the Government will submit a full response in the present case.
- (6) The Norwegian Government's written observations are structured as follows:
 - Section 2.2 considers the applicability of the CCD in the present case.
 - Section 2.3 considers the applicability of the MCD, considering that the loan agreement in question was entered into before the MCD was incorporated into the EEA Agreement.
 - Section 2.4 sets out the Norwegian Government's view on the MCD Article 24 specifically.
 - Section 2.5 provides an overview of other requirements than the MCD Article 24 that apply to consumer mortgages with variable interest rates.

- Section 3 concludes and proposes an answer to the question submitted by the referring court.

2.2 Applicability of the Consumer Credit Directive in the present case

- (7) The Norwegian Government firstly remarks that the Consumer Credit Directive applies to credit agreements for consumers. It does not, however, apply to mortgages. In Article 2 (2) (a), it is clearly stated that the CCD shall not apply to the following:

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;

- (8) Oppositely, the Mortgage Credit Directive Article 3 (1) (a) states that the directive shall apply to

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;

- (9) The CCD and MCD thus regulate separate types of loan agreements and do not overlap with regard to the question that the EFTA Court is asked to provide guidance on in the present case. The Norwegian Government reiterates that although recital 19 of the preamble to the MCD sets out that the definitions and key concepts are sought to be the same in both directives, this does not entail that specific provisions in the CCD apply outside of the scope of that directive. The Norwegian Government holds that the specification requirements relating to the borrowing rate and adjustments thereof which are set out in Article 10 (2) (f) of the CCD are neither "definitions" nor "key concepts used in standard information to designate the financial characteristics of the credit" which shall apply to the MCD, cf. recital 19 to the preamble of the MCD. Consistency of interpretation does not entail that specific CCD provisions apply outside the ambit of that directive. These requirements cannot be transposed to mortgages by mere analogy.

- (10) The Norwegian Government therefore submits that the requirements set out in Article 10 (2) (f) of the Consumer Credit Directive, as such, do not apply to the mortgage agreement in the present case.

- (11) The EFTA court could nonetheless be competent to provide an interpretation of the provision if Icelandic domestic legislation, in its internal regulation of mortgage agreements, have adopted the same or similar solutions as those adopted in the CCD Article 10 (2) (f) in a clear and unconditional manner, see the EFTA Court's judgement in Case E-25/13 *Engilbertsson* paragraph 54 with further references.

- (12) However, it is unclear in the request for an advisory opinion whether this is the case in Iceland. It must therefore be up to the national courts to assess whether domestic legislation has adopted the requirements in the CCD in such a manner.

- (13) In any event, should the EFTA Court consider itself to have jurisdiction to interpret the CCD in the present case, the Norwegian Government notes that the CCD Article 10 (2) (f) only requires that the consumer is given information about the conditions and procedures for changing the borrowing rate, albeit in a “clear and concise manner”. The provision does not set out any restrictions on *which* conditions or procedures that can be used by the bank to adjust the borrowing rate. It is evident that the consumer in the present case has been given such information, i.e. that adjustments of the borrowing rate is to be decided by the bank, with account to, 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.
- (14) Regardless of whether the CCD Article 10 (2) (f) is applicable, the Norwegian Government therefore submits that the provision does not restrict the use of terms in a property mortgage agreement which entail that changes in the borrowing rate can be decided by the creditor with reference to other factors than indexes and reference rates, provided that such information is provided to the consumer in a satisfactory manner.
- (15) On this basis, the Norwegian Government submits that the CCD Article 10 (2) (f) is not applicable, and that it is up to the national courts to decide whether the CCD has been made applicable to the situation at hand by national law in a direct and unconditional way. Should the EFTA Court consider itself competent to provide an interpretation of the provision, the Norwegian Government contends that the CCD Article 10 (2) (f) does not prevent Member States from allowing the use in consumer mortgage agreements of such terms as the term in question in the present case.

2.3 Applicability of the Mortgage Credit Directive in the present case

- (16) Secondly, the Norwegian Government contends that the Mortgage Credit Directive is inapplicable, considering that the loan agreement in question was concluded before the directive entered into force as EEA law.
- (17) The MCD was incorporated into the EEA Agreement through Decision of the EEA Joint Committee No 125/2019 (hereinafter the “JCD”), which entered into force on 1 November 2021. It follows from Article 1, paragraph 2 letter h of the JCD, that the transitional provision in the MCD Article 43 nr. 1 was amended so that the directive, as regards the EFTA States, do not apply to credit agreements existing before the entry into force of the JCD. Hence, the MCD does not apply to credit agreements in the EFTA States existing prior to 1 November 2021.
- (18) The mortgage deed in question was signed in January 2021, cf. the request for an advisory opinion page 1. Accordingly, it is clear that the MCD did not apply at the time, recalling – as the EFTA Court stated in in case E-3/15 *Liechtensteinische Gesellschaft* paragraph 75 – that an obligation that follows from an EEA legal act “arises on the day the respective legal act is made part of the EEA Agreement”, cf. also the EEA Agreement Article 7.

- (19) The referring court has not elaborated on this issue in the request for an advisory opinion. Further, it is irrelevant if the mortgage is still running, as the MCD does not have retro-active effect on loan agreements entered into before 1 November 2021, cf. paragraph 17 above.
- (20) On this basis, the Government respectfully submits that the MCD cannot be taken into consideration in order to answer the questions referred.
- (21) The Norwegian Government is aware that the EFTA Court in some cases has agreed to interpret EEA law even though it is not applicable in certain so-called “internal situations”, namely “where domestic legislation, in regulating purely internal situations, adopts the same or similar solutions as those adopted in EEA law in order to avoid any distortion of competition”, see e.g. case E-25/13 *Engilbertsson* paragraph 54 and paragraph 11 above. The European Court of Justice has done the same insofar as the relevant EU law has been made applicable by national law in a “direct and unconditional way”, see case C-298/15 *Borta* paragraph 34.
- (22) However, the Government considers that this doctrine cannot be transposed to the situation in our case for two independent reasons.
- (23) Firstly, the case law governing “internal situations” presupposes, as is clear from the wording of this doctrine and its purpose, that the EEA rules at issue, even though not applicable, are in fact EEA rules, that is to say that they have been made part of EEA law at the material time. It is settled case law that “the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only”, see e.g. case E-3/16 *Follo Taxi* paragraph 27. Furthermore, it follows from the SCA Article 34 (1), cf. Article 1 (a) that “[t]he EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement”. In the Norwegian Government’s view, this must be understood as a requirement that, in order for a legal act to be subject to the EFTA Court’s jurisdiction, such legal act must have been incorporated into the EEA Agreement, and hence made part of EEA law, at the material time. The Norwegian Government is not aware that the EFTA Court has previously interpreted directives that are not part of EEA law.
- (24) Secondly, even presupposing that the doctrine concerning internal situations could be transposed by analogy to our situation, its conditions would in any event not be fulfilled.
- (25) The application of this doctrine presupposes that the relevant EEA rules have been made applicable to the situation at hand by national law in a “direct and unconditional way”, cf. case C-298/15 *Borta* paragraph 34. However, there is nothing in the request for an advisory opinion to that effect.
- (26) It is true that the Icelandic legislator at the material time had taken steps to implement the MCD with a view to fulfilling the legal obligations that would arise when the directive entered into force and the deadline for implementation had expired. It cannot be inferred from such common-place practice, however, that the Icelandic legislator thereby also, in a “direct and unconditional” manner, wanted to make the MCD applicable and binding before its entry into force. The opposite conclusion could entail a disincentive for timely

implementation of directives. The EFTA states could be encouraged to wait until the deadline before implementing a directive, in order to ensure that future directives do not de facto become binding before they have entered into force as a consequence of national implementing measures.

- (27) Accordingly, the Norwegian Government respectfully submits that, in light of the facts as they are described in the request for an advisory opinion, the MCD is inapplicable.
- (28) Should the EFTA Court nevertheless consider itself to have jurisdiction to interpret the MCD, it is important that the Court reiterates that this is without prejudice to the national court's assessment of whether the directive has been made applicable to the situation at hand by national law in a direct and unconditional way. For that matter, the Norwegian Government submits the following view on the interpretation of the MCD Article 24:

2.4 Assessment of the Mortgage Credit Directive Article 24

- (29) The Mortgage Credit Directive applies to all loans made to consumers for the purpose of buying residential immovable property. The MCD aims to enable consumers to understand available mortgage products, their different nature and the financial obligations that the consumer will commit to if entering into a mortgage agreement. Sufficient information to the consumer is important, considering that mortgage agreements often stipulate that its terms could change during the term of the agreement, e.g. allowing the creditor to raise or lower the interest rate, fees or other credit costs unilaterally.
- (30) The Norwegian Government acknowledges that there are considerable variations within the Member States with regard to the specificities of the domestic financial credit market and what types of loan agreements that are common. The MCD reflects these differences and allows the parties to a loan agreement to agree on either various types of interest rate clauses or combinations of these, e.g. a fixed interest rate for an agreed period of time, a variable interest rate consisting of a fixed margin that is combined with a variable interest rate that is adjusted according to an index or reference rate, or – as in this case – a variable interest rate adjusted according to a decision or proposal by the bank.
- (31) Mortgages that carry variable interest rates can be based on a pre-set margin and a major mortgage index such as the interbank offered rates (IBORs), e.g. EURIBOR. If so, the interest rate will fluctuate periodically based on the performance of the specific benchmark, so that the borrower's cost of the loan increases if the reference rate is adjusted upwards, and decreases if the reference rate is reduced. Such reference rates, also known as interest rate benchmarks or just benchmark rates, provide a useful and objective standard for variable rate credits that neither party can influence, thus ensuring that the value of the contract remains impartial and indisputable. This, however, presupposes that the benchmark rate is calculated in a transparent manner and that the rates are easily and publicly accessible. Historically, certain market developments have undermined the reliability of some existing benchmark rates, causing the EU legislator to launch a reform to harmonize the requirements of indexes and reference rates used in the financial markets (see Regulation

(EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016, which amended both the MCD and CCD).

(32) In other variable rate mortgage agreements, it may be agreed that it is up to the bank to set the borrowing rate based on an internal assessment, cf. the preamble to Regulation (EU) 2016/1011 recital 20: “A borrowing rate provided by a creditor is either set by an internal decision or calculated as a spread or mark-up over an index (e.g. EURIBOR).” Allowing the bank to adjust the interest rate based on internal decisions may entail less visibility for the consumer on how changes to the interest rate are calculated. However, a bank’s internal decisions will often reflect the general fluctuations in market rates, e.g. with a view to benchmark rates. Provided that the competition between banks is sustainable, the banks will compete on offering the lowest variable rate at any given time, giving consumers an opportunity to switch to the bank with the best interest rate offer. This flexibility is often not available to the consumer in a fixed interest rate mortgage, as terminating the agreement during the fixed interest rate period may entail additional costs to the consumer.

(33) A third possibility is to allow the interest rate to be adjusted on the basis of the sale of underlying bonds or other long-term financing instruments, see e.g. the MCD Article 14 (6) paragraph five. With this mechanism, the variable element of the interest rate is linked to bond prices. Similarly to interest rates where the variable element is linked to an index or reference rate, this mechanism entails the use of a fixed margin decided by the bank.

(34) The Norwegian Government emphasizes that no provision in the MCD prevents Member States from allowing banks and consumers to choose between these variations of terms within the variable rate credits. This context is important when interpreting Article 24, which in the Norwegian Government’s opinion, only applies to mortgage terms where it is agreed that changes in the borrowing rate shall be correlated to changes in an index or reference rate.

(35) The wording of MCD Article 24 reads:

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.

(36) Neither “index” nor “reference rate” is defined in the MCD. However, as explained above, indexes and reference rates are well-known concepts within the financial sector. In Directive 2015/2366/EU Article 4 (28), a “reference interest rate” is defined as the “interest rate which is used as the basis for calculating any interest to be applied and which comes from a publicly available source which can be verified by both parties to a payment service contract”. In Regulation (EU) 2016/1011 Article 3 (1) paragraph 22, an “interest rate benchmark” is

defined as a benchmark *“determined on the basis of the rate at which banks may lend to, or borrow from, other banks, or agents other than banks, in the money market.”* Thus, a reference rate or index is an external, publicly available benchmark that the parties to an individual contract do not control.

- (37) The Norwegian Government assumes that, in lack of other definitions, the terms “index” and “reference rate” in the MCD Article 24 must be understood in accordance with how they are commonly defined within the finance and credit sector and applicable EU-legislation, meaning that if the parties choose to correlate changes in the borrowing rate with changes in an index or reference rate, it is required that those benchmarks are clear, accessible, objective and verifiable etc. In the Norwegian Government’s view, the interpretation that MCD Article 24 refers to financial market rates is supported by the wording of the clause stating that indexes and reference rates shall be “clear, accessible, objective and verifiable” not only to the parties, but also to “the competent authorities”, cf. Article 24 (a) i.f.
- (38) Article 24 does not, however, prevent the parties from agreeing that changes to the borrowing rate can be decided internally by the creditor, based on other factors than indexes or reference rates, such as e.g. financial costs, operating costs or general trends in the market. The wording *“any indexes or reference rates used to calculate the borrowing rate”* (our emphasis) implies that the requirements of clarity and accessibility apply to any indexes or reference rates used to calculate the borrowing rate, but only to the extent such indexes or reference rates are in fact used to calculate the borrowing rate. The provision does not itself state that indexes or reference rates must be used to calculate the borrowing rate on a variable rate mortgage. The Government recalls that no other provision in the MCD state that variable rate credits must be connected to an index or reference rate. If the legislator intended the directive to restrict the banks' right to decide interest rates internally, such intention should have been reflected in clearer language.
- (39) In this regard, the Norwegian Government reiterates that Article 24 of the MCD was not a part of the Commission's original proposal but was amended during considerations before the Parliament, without any further explanation in the Report from the plenary sitting where the wording was first introduced.¹ The European Economic and Social Committee (the “EESC”) had previously suggested that *“certain provisions be clarified or enlarged upon in order to enhance consumer information on variable rates”*, further stating that
- usurious interest rates should be banned, that lending rates for the main residence should be capped, and that changes in interest rates should be based only on objective, reliable and public indices that are external to the lender.*²
- (40) This proposal from the EESC, i.e. that changes in interest rate should be based “only” on such indexes, was not implemented in the wording of Article 24 or any other provisions in the MCD. Thus, it is implausible that Article 24 was intended to prohibit this mechanism for

¹ Report on the proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property (COM(2011)0142 – C7-0085/2011 – 2011/0062(COD)) page 78.

² Opinion of the European Economic and Social Committee (COM(2011) 142 – 2011/0062 (COD) page 2.

adjusting interest rates in mortgage agreements. Instead, recital 67 of the preamble to the MCD sets out that "*Member States should be able to maintain or introduce restrictions or prohibitions on unilateral changes to the borrowing rate by the creditor*". For instance, it is suggested in recital 43 of the preamble that the Member States can set other requirements for what must appear in the European Standardised Information Sheet (ESIS) regarding "*the type of borrowing rate*" in order to take into account "*the specificities of the national products and market*". The MCD thus clearly presupposes that it is up to the Member States to introduce restrictions on the banks' right to adopt terms that allow for internal decisions on changes in the borrowing rate.

- (41) The Government further recalls that the MCD Article 27, concerning changes in the borrowing rate, clearly recognizes that the borrowing rate could be changed with reference to other factors than indexes or reference rates. Article 27 (1) reads:

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.

- (42) The provision does not require any justification from the bank for the adjustment. However, the bank must inform the consumer about the new borrowing rate before each adjustment, except "*where the change in the borrowing rate is correlated with a change in a reference rate*", see Article 27 (2). If the change is correlated with a change in a reference rate, and information about the reference rate is publicly available and communicated to the consumer personally, banks are allowed to inform the consumer periodically of changes in the borrowing rate. If the change in the borrowing rate is not correlated with a change in the applicable reference rate, however, periodic information is only accepted where this was allowed under national law before 20 March 2014, see Article 27 (3). This shows that MCD Article 27 clearly assumes that banks can request changes to the borrowing interest rate based on other factors than changes in a correlated index or reference rate, provided that the parties have agreed to use this mechanism.
- (43) When answering the question from the referring court, it is important to note that it is up to the national courts to interpret the agreement between the parties and decide if they have agreed to calculate the interest rate using an index or reference rate within the meaning of the MCD Article 24. In this regard, the Government emphasizes that although the bank decides the interest rate based on several factors where some of those factors – *in itself* – could be considered an index or reference rate (e.g. the Central Bank of Iceland's prime rate), this does not entail that the interest rate prescribed by the interest rate clause in the mortgage agreement as such is pegged to an index or reference rate.
- (44) Considering the interest rate clause as it is described by the referring court, the Government notes that some of the factors seem to be of a more subjective character, which make it impossible to regard the interest rate clause as a whole to fall within the scope of indexes or reference rates referred to in the MCD Article 24. The interest rate is decided by an internal

decision by the bank. As explained in paragraph 31–32 above, internal interest rate decisions must be distinguished from interest rate clauses where the parties have agreed that the interest rate is interlinked with fluctuations in an external index or reference rate outside the control of either party. Only interest rates where an external reference rate is used to calculate the interest rate, combined with a pre-set margin, are governed by the requirements in MCD Article 24.

- (45) On this basis, the Norwegian Government submits that Article 24 of the MCD does not prohibit a term in a consumer property mortgage which allows the bank to unilaterally adjust the interest rate based on an internal decision which is based on other factors than indexes or reference rates.
- (46) The Government further holds that the disputed term is compatible with the other provisions in the MCD, as elaborated on in Section 2.5 below.

2.5 General requirements that apply to consumer mortgages with variable interest rates

- (47) To protect consumers against unfair credit terms and to enable consumers to have full knowledge of the terms of mortgage agreements entered into, the MCD generally requires that the creditors give adequate information and guidance to the consumer. The MCD establishes guidelines both on marketing and advertising and provides obligations on the creditors regarding the provision of general information as well as requirements regarding the credit agreement and total cost of credit. Whether these provisions are satisfied in the present case is up to the referring court to decide, cf. the EFTA Court's judgement in case E-27/13 *Gunnarsson* paragraph 94. In the following, the Norwegian Government will nevertheless highlight some of the general requirements that apply to the mortgage term in question.
- (48) In general, Article 14 (1) of the MCD requires that creditors provide consumers with "*the personalised information needed to compare the credits available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement*". In addition, such information must be adequately explained to the consumer, cf. Article 16.
- (49) Article 11 of the MCD describes the required standard information that must be included in the banks' advertising. Information about the borrowing rate, whether it is fixed or variable, must be specified in a "*clear, concise and prominent way*", cf. Article 11 (2) (c). A representative example that specifies this information must be included, see Article 11 (3). Additionally, Article 13 (1) (e) states that the bank must provide a "*short description of the characteristics of a fixed and variable rate, including related implications for the consumer*".
- (50) Further, it follows from the MCD Article 11 (2) (e) that information about the annual percentage rate of charge (APRC) must be specified. According to Article 17 (1), the APRC shall be calculated in accordance with the mathematical formula set out in Annex I of the directive. If the borrowing rate is variable, the consumer shall receive information about the possible consequences of the variations and the annual costs that illustrate the possible risks

associated with a significant increase in the interest rate, see Article 17 (6). Such information should at least be provided through ESIS, and if an index or reference rate is not used to calculate the variable rate, an example that illustrates the highest borrowing rate the bank has offered in the last 20 years should be included, cf. Section 4 (2) of the instructions to complete the ESIS attached as Annex II to the MCD. Alternatively, banks could attach an illustration based on an example benchmark rate specified by a competent authority or the European Banking Authority (EBA). The EBA states on page 6 in its *“Final Report on the Decision of the EBA Benchmark Rate under the MCD”*, that

The implication of these MCD provisions is that, from the transposition date of the MCD of 21 March 2016 onwards, the EBA may be called upon by creditors in the European Union (EU) to provide an EBA benchmark rate.³

- (51) The EBA thus clearly presupposes that banks may offer interest rates that are not calculated using an external reference rate. If so, an example-rate from EBA could contribute as an illustration that enables the consumer to compare offers of credit.
- (52) In addition to the above-mentioned provisions regarding the duty to give sufficient information to the consumer, the MCD also requires that the Member States ensure that the consumer is able to make early repayment under the mortgage agreement prior to the expiry of that agreement, cf. Article 25. As explained in Section 2.4 above, variable rates that allow the bank to decide changes in the borrowing rate unilaterally rely on the possibility for the consumer to make early repayment under the agreement and move the mortgage to another bank. According to Article 25 (5), the Member States may only provide that withdrawal is subject to a "legitimate interest" if the borrowing rate is fixed. If the rate is variable, the Member States shall ensure that the consumer has a right to withdraw without explanation. As long as the competition on the mortgage market is sustainable, this mechanism will give the consumer an opportunity to find the lowest possible interest rate available in the market.
- (53) The Government emphasizes that the above-mentioned provisions apply irrespectively of which type of interest rate the parties have agreed upon, and that they primarily do not regulate the *subject matter* of credit agreements. Freedom of contract is the basic principle underpinning the directives on consumer credit. Variable rates are allowed, and there is limited regulation of the grounds for variation. Variable rates that are not connected to indexes or reference rates are commonly used in several Member States. Neither the wording, the context, nor the history and object of the MCD entail any restriction on the freedom of contract regarding what types of variable rates that are allowed.
- (54) Rather, the MCD primarily protects consumers by way of informational requirements, allowing them to compare the offers of credit available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement, in particular based on the expected cost of the loan. A fixed interest rate will typically provide

³ (EBA/DC/2016/145) Final Report on the Decision of the European Banking Authority specifying the benchmark rate under Annex II to Directive 2014/17/EU (Mortgage Credit Directive) page 6.

more foreseeability to the consumer, but may overall give the consumer a higher interest cost, whilst a variable interest rate provides the consumer with somewhat less foreseeability, but as a compensation for less foreseeability, the consumer will often be able to pay a somewhat lower interest rate over the term of the loan agreement.

- (55) The Government further notes that neither a fixed rate, nor the use of an index or reference rate, can provide the consumer with full transparency on all factors of how the bank calculate the interest rate that is offered. The factors enumerated by Íslandsbanki regarding its decision on changing the interest rate, i.e. that the variable interest rate could be adjusted by an internal decision by the bank considering several factors, are the same factors that typically contribute to calculate the pre-set margin included in the fixed rate or added to the reference rate if the parties have agreed on such interest rate mechanisms. All banks must incorporate the cost of risk in their products. It is evident that no provision in the MCD, including Article 24, prohibits banks from calculating the spread on the interest rate using such factors as those enumerated by Íslandsbanki – regardless of how such factors are implemented in the calculation of the interest rate.
- (56) The Norwegian Government further holds that provisions in the MCD regarding informational requirements, which contribute to the transparency of the market and enable the consumer to compare offers of credit, provide the consumer with sufficient information to make an informed decision also with regards to the requirements of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter the “UCTD”), provided that the creditor explicitly describes the term in question in the agreement. The Government recalls that unilateral changes to the interest rate is explicitly exempted from the Annex to the UCTD, the so-called “grey list” that contains an indicative list of terms which may be regarded as unfair pursuant to UCTD Article 3. The Government refers to the Annex nr. 2 subparagraph (b). The Government reiterates, however, that it is for the referring court to assess whether the term at issue is unfair, including whether the terms of the agreement were described to the consumer in a satisfactory manner, cf. the EFTA Court’s judgement in case E-25/13 *Engilbertsson* paragraph 91 and case E-27/13 *Gunnarsson* paragraph 94. The Government in this respect reiterates that the referring court has refrained from asking the EFTA Court for further guidance on the UCTD.
- (57) Considering the above, the Norwegian Government submits that the MCD does not prevent the Member States from allowing the parties to agree that the borrowing rate can be changed unilaterally, taking into account such factors as those enumerated by Íslandsbanki, provided that the terms of the agreement regarding such changes are described to the consumer in a satisfactory manner, and particularly that the economic effects of a change to the interest rate during the term of the loan is explained to the consumer prior to the consumer entering into the loan agreement.
- (58) Should the Court reach the opposite conclusion with respect to the interpretation of the MCD, i.e. so that the Member States must ensure that mortgages correlate the borrowing rate to indexes or reference rates, this would entail less flexibility for the banks when offering borrowing rates. This could result in the banks stipulating a higher margin on mortgages. It could also steer the competition between banks towards the act of granting the loan rather

than continuously offering competitive interest rates. This in turn may increase mortgage costs for consumers. Should the MCD have been intended to restrict the banks' ability to offer variable rates not based on indexes or reference rates, it would require a thorough investigation and analysis of potential consequences for the credit market and consumer rights before implementation. Seeing as neither the preparatory works, provisions in the MCD nor any existing case law have conducted such an analysis, the Norwegian Government submits that the MCD cannot be interpreted as including such a restriction.

3 ANSWER TO THE QUESTION REFERRED

- (59) On this basis, the Norwegian Government respectfully submits that the question referred to the EFTA Court is answered as follows:

Directive 2014/17/EU is inapplicable, as the mortgage agreement in question was entered into before the directive became part of the EEA Agreement. Directive 2008/48/EF Article 10 (2) (f) is inapplicable, as the provision does not apply to mortgage agreements.

- (60) Should the EFTA Court consider itself competent to provide an interpretation of the directives, the Norwegian Government submits the following answer to the question by the referring court:

Directive 2014/17/EU and Directive 2008/48/EF Article 10 (2) (f) do not restrict the use of terms in a consumer property mortgage agreement which entail that changes in the borrowing rate can be decided by the creditor with reference to other factors than indexes and reference rates, provided that the terms of the agreement regarding such changes are described to the consumer in a satisfactory manner.

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Oslo, 24/04/2023

Sverre Runde
Agent

Ingeborg Collett
Agent