

Case No:79870
Document No: 895342
Decision No: 039/18/COL

EFTA SURVEILLANCE
AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

Of 27 March 2018

closing a complaint case arising from an alleged failure by Iceland to fulfil its obligations with regard to *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 and Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit*

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Introduction

On 15 November 2016, the EFTA Surveillance Authority (“the Authority”) received a complaint (Doc No 826674) against Iceland concerning an alleged failure to correctly apply or implement the provisions 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* (“Directive 2008/48/EC”)¹ and *Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit* (“Directive 87/102/EEC”)² jointly referred to as (“the Directives”) into national law.

First, the complainant argues that the judgment of the Icelandic Supreme Court in Case No 243/2015³ incorrectly interpreted Article 12(1) of Act No 121/1994 on Consumer Loans (*Lög um neytendalán*) (“Act No 121/1994”) by allowing for a 0% inflation rate as a basis in the calculation of the total borrowing costs and annual percentage rate of charge of consumer loans even if the known inflation level on the borrowing date is not 0%.⁴ This is equivalent to leaving out all of the costs regarding indexation from such a calculation, thereby depriving the consumer of the right to obtain clear information on the biggest cost component of the most common type of loan on the Icelandic loan market. The

¹ Act referred to at point 7h of Annex XIX to the EEA Agreement, as incorporated into the EEA Agreement by Joint Committee Decision No 16/2009 of 5 February 2009.

² Incorporated into the EEA Agreement but no longer in force. Repealed by Directive 2008/48/EC.

³ Hæstaréttardómur frá 26. nóvember 2015, nr. 243/2015.

⁴ Hæstaréttardómur nr. 243/2015, section VII.

complainant thus maintains that the Icelandic Supreme Court's incorrect interpretation of Article 12(1) of Act No 121/ 1994 contravenes both Article 3 of Act No 2/1993 on European Economic Area (*Lög um Evrópska efnahagssvæðið*) and Directive 87/102/EEC as interpreted by the EFTA Court in its advisory opinion in Case No E-27/13.⁵

Second, the complainant argues that if the Authority finds that the judgment of the Icelandic Supreme Court in Case No 243/2015 is not contrary to the EEA Agreement, it means that the Icelandic Government must be seen as having incorrectly implemented the provisions of the Directives. This is because Article 12(1) of Act No 121/1994, as interpreted by the Supreme Court in Case No 243/2015, allows for the total cost of indexed loans and its annual percentage rate of charge to be calculated using the basis of 0% inflation throughout the borrowing period. This practice conveys inadequate information to the consumer about such indexed loans as it essentially excludes the cost of indexation from the information that consumers receive on the total cost of the credit. Furthermore, the complainant states that it is particularly important for the Authority to take a position on whether Article 19(4) of the Directive has been correctly implemented into the Icelandic legal order by Article 21(3) of Act No 33/2013 on Consumer Loans (*Lög um neytendalán nr. 33/2013*) ("The Consumer Loans Act").

Finally, the complainant asks whether the alleged breach of the EEA Agreement may entail State liability in accordance with settled case law of the EFTA Court and the Icelandic Supreme Court.

2 Correspondence

On 18 November 2016, the Authority informed the Icelandic Government of receipt of a complaint regarding an alleged incorrect implementation of EEA rules on consumer credit in Iceland (Doc No 827180). On 21 December 2016, the Authority sent a letter to the Icelandic Government requesting information on the implementation of EEA rules on consumer credit in Iceland (Doc No 832490).

By letter dated 2 February 2017, the Icelandic Government responded to the Authority's letter of 21 December 2016 (Doc No 840426). In the letter, the Icelandic Government stated that in the case of indexed loans, when calculating the annual percentage rate of charge, a creditor is now obliged to insert into the formula the average annual inflation rate over the previous 12 months prior to signature of the agreement. In addition, the Icelandic Government stated that the creditor must also inform the consumer of the historical developments of both the inflation index as well as the interest rates in order for the consumer to be able to take more informed decision.

On 24 March 2017, the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("The Directorate") sent the complainant a letter informing him of the Directorate's intention to propose to the Authority that the case be closed (Doc No 844609). The complainant was invited to submit any observations on the Directorate's assessment of the complaint or to present any new information.

By letter dated 30 May 2017, the Authority received the complainant's written observation to the Directorate's assessment of 24 March 2017 (Doc No 858088).

⁵ E-27/13, *Sævar Jón Gunnarsson v Landsbankinn hf.*, (2014) EFTA Ct. Rep. 1090.

On 8 June 2017, the representatives of the Authority discussed the case with the representatives of the Icelandic Government during a meeting in Iceland.

3 Legal Framework

3.1 Relevant EEA Law

Article 3(g) of Directive 2008/48/EC reads as follows:

“total cost of the credit to the consumer’ means all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs; costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed;”

Article 3(i) of Directive 2008/48/EC reads as follows:

“annual percentage rate of charge’ means the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2).”

Articles 4 - 6 of Directive 2008/48/EC require, at the time of concluding a credit agreement, that the borrower has at hand all relevant information that could have a bearing on or implication for his undertaking.⁶

Article 19(4) of Directive 2008/48/EC reads as follows:

“4. In the case of credit agreements containing clauses allowing variations in the borrowing rate and, where applicable, charges contained in the annual percentage rate of charge but unquantifiable at the time of calculation, the annual percentage rate of charge shall be calculated on the assumption that the borrowing rate and other charges will remain fixed in relation to the initial level and will remain applicable until the end of the credit agreement.”

Article 1a(1)(a) of Directive 87/102/EEC reads as follows:

“The annual percentage rate of charge, which shall be that equivalent, on an annual basis, to the present value of all commitments (loans, repayments and charges), future or existing, agreed by the creditor and the borrower, shall be calculated in accordance with the mathematical formula set out in Annex I”

Article 1(2)(d) of Directive 87/102/EEC reads as follows:

“(d) ‘total cost of the credit to the consumer’ means all the costs, including interest and other charges, which the consumer has to pay for the credit”

Article 1a(6) of Directive 87/102/EEC reads as follows:

⁶ See as example Articles 5(1)(c), 5(1)(g), 6(1)(c) and 6(1)(f) of Directive 2008/48/EC.

“In the case of credit contracts containing clauses allowing variations in the rate of interest and the amount or level of other charges contained in the annual percentage rate of charge but unquantifiable at the time when it is calculated, the annual percentage rate of charge shall be calculated on the assumption that interest and other charges remain fixed and will apply until the end of the credit contract.”

3.2 Relevant Icelandic Law⁷

The second sentence of Article 21(3) of the Consumer Loans Act reads as follows:

“If a loan agreement authorises indexation, the calculation of the annual percentage rate of charge shall be based on annual inflation, in accordance with the 12-month change in the Consumer Price Index and the assumption that the annual inflation will remain unchanged through the end of the loan period.”⁸

Article 25(1) of the Consumer Loans Act requires the creditor to provide the consumer, by paper or other permanent medium, with various information. Article 25(1)(1) requires the creditor to provide the consumer with information on *“the historical development of price levels and the impact of the development of price level on the principal and debt burden if it is an indexed based loan.”* Article 25(1)(4) requires the creditor to provide the consumer with information on *“the development of price levels and disposable income for the last 10 years.”⁹*

Article 25(3) of the Consumer Loans Act requires *“the Consumer Protection Agency (Neytendastofa) to publish yearly on its website, general information and examples that creditors shall build their information according to paragraph 1 on.”¹⁰*

4 Assessment

At the outset, it is important to clarify that the Authority, in the context of Article 31 of the Surveillance and Court Agreement (“SCA”), is only competent to assess compliance with EEA Acts that are in force. Directive 87/102/EEC was no longer in force at the receipt of the complaint.¹¹ The complainant’s written observation on this point, dated 30 May 2017,

⁷ Unofficial translations by the Authority.

⁸ 1. mgr. 21. gr. laga nr. 33/2013 um neytendalán: *“Ef lánssamningur heimilar verðtryggingu skal útreikningur árlegrar hlutfallstölu kostnaðar miðast við ársverðbólgu samkvæmt tólf mánaða breytingu vísitölu neysluverðs og þá forsendu að ársverðbólga verði óbreytt til loka lánstímans.”*

⁹ 1. mgr. 25. gr. laga nr. 33/2013 um neytendalán: *[Lánveitandi skal samhliða upplýsingum skv. 7. gr., vegna lánsamnings sem kallar á greiðslumat, veita neytanda upplýsingar, á pappír eða öðrum varanlegum miðli, um eftirfarandi:*

1. Sögulega þróun verðlags og áhrif þróunar verðlags á höfuðstól og greiðslubyrði ef lán er verðtryggt.
2. Sögulega þróun breytilegra vaxta á neytendalánum og áhrif breytinga á vöxtum á greiðslubyrði ef lán er með breytilegum vöxtum.

3. Sögulega gengisþróun viðkomandi gjaldmiðla og áhrif gengisþróunar á höfuðstól og greiðslubyrði ef lán er tengt erlendum gjaldmiðlum.

4. Þróun verðlags og ráðstöfunartekna síðustu 10 ár.

¹⁰ 3. mgr. 25. gr. laga nr. 33/2013 um neytendalán: *“Neytendastofa skal birta opinberlega á vef sínum almennar upplýsingar og dæmi sem lánveitendur skulu byggja upplýsingar sínar skv. 1. mgr. á.”*

¹¹ Directive 87/102/EEC was repealed by Joint Committee Decision No 16/2009 of 5 February 2009, with effect from 12 May 2010.

does not change this conclusion of the Authority.¹² Accordingly, the Authority does not assess whether the Icelandic Supreme Court has incorrectly interpreted, or the Icelandic Government incorrectly implemented through Act No 121/1994,¹³ Directive 87/102/EEC. Furthermore, the Authority does not evaluate whether a breach of the EEA Agreement by an EEA Member State might entail State liability. Infringement proceedings under Article 31 of the Surveillance and Court Agreement are no substitute for private enforcement actions invoking State liability under EEA Law. Consequently, the Authority's assessment will focus solely on evaluating whether Iceland has correctly implemented Directive 2008/48/EC.

Directive 2008/48/EC aims to protect consumers against unfair or misleading practices in the field of consumer lending, in particular by mandating disclosure of information by the creditor to the consumer. According to Articles 4 - 6 of Directive 2008/48/EC, at the time of concluding a credit agreement, the consumer must have at hand all relevant information that could have a bearing on or implication for his undertaking. To ensure the fullest possible transparency and comparability of credit offers, such information should include the total cost of credit to the consumer, comprising of the annual percentage rate of charge applicable to the credit.

According to Article 3(g) of Directive 2008/48/EC, the total cost of credit to the consumer is defined as “*all the costs, including interest, commissions, taxes and any other kind fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor.*” The Court of Justice of the European Union has held that informing the consumer of the total cost of credit calculated and expressed by means of annual percent rate of charge according to a single mathematical formula is of critical importance.¹⁴ According to Article 3(i) of Directive 2008/48/EC, the term “annual percentage rate of charge” means “*the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2).*”

In Case E-27/13 *Gunnarsson*, the EFTA Court assessed whether it is permissible to omit the rate of inflation when calculating the ‘total cost of the credit’¹⁵ and ‘annual percentage rate of charge’¹⁶ of indexed consumer loans. The Court held that the assumption that the rate of inflation to be indicated in a loan agreement will be 0%, at a time when the actual rate of inflation is considerably higher, does not correctly represent the charges resulting from the price indexation and thus the total cost of credit within the meaning of Article

¹² The complainant argues, in his reply to the Authority's pre-closure letter of 24 March 2017, that the Authority is capable of assessing EEA Acts that are no longer in force. The complainant's argument is that even though a directive is no longer in force, an individual might still be experiencing the consequences of incorrect implementation or interpretation of that directive, as is the case with thousands of Icelandic consumers that took loans under Act 121/1994, which implemented Directive 87/102/EEC into the Icelandic legal order (originally Act 30/1993).

¹³ It should be emphasised that, under Article 5 SCA, the Authority is entrusted with the task of ensuring the fulfilment by the EFTA States of their obligations under the EEA Agreement. If it establishes, either on the basis of its own monitoring activities or on the basis of complaints received, that a State has failed to comply with its Treaty obligations, the Authority may decide to institute the infringement procedure provided by Article 31 SCA. As the objective of this procedure is to ensure that the objectives of the EEA Agreement are effectively attained in practice, the subject of the Authority's surveillance must, of necessity, be the legislation and administrative practice currently in force. Act No 121/1994 on consumer loans (*Lög um neytendalán*), which implemented Directive 87/102/EEC, is no longer in force. It was replaced by Act No 33/2013 on Consumer Loans (*Lög um neytendalán nr. 33/2013*).

¹⁴ Case C-264/02 *Cofinoga Mérignac* [2004] ECR I-02157, paragraph 26.

¹⁵ Article 1(2)(d) and (e) of Directive 87/102/EEC.

¹⁶ Article 1a(1)(a) of Directive 87/102/EEC.

1(2)(d) of Directive 87/102/EEC.¹⁷ Accordingly, the Court found that when a credit agreement is indexed based and the cost of the credit thus changes in accordance with inflation, it is not compatible with Directive 87/102/EEC to calculate the total cost of the credit and the annual percentage rate of charge on the basis of 0% inflation if the known rate of inflation at the time of the credit agreement is not 0%.¹⁸

The Authority notes that EEA Law does not prohibit indexation of loans in contracts between a creditor and a consumer.¹⁹ Directive 2008/48/EC takes account of the fact that interest charges or other charges may be variable. Article 19(4) of Directive 2008/48/EC states that if charges contained in the annual percentage rate of charge are unquantifiable at the time of calculation, the annual percentage rate of charge shall be calculated on the assumption that the borrowing rate and other charges will remain fixed in relation to the initial level and will remain applicable until the end of the credit agreement. In such circumstances, when total cost of credit and annual percentage rate of charge cannot be strictly calculated, as is the case with indexed loans, any estimation thereof must be based on reasonable assumption, in accordance with the Judgment of the EFTA Court in Case E-27/13.²⁰

The information provided in the complaint is predominantly based on research of consumer loans in the period between 2010 and 2012. After that period, the Icelandic legislator introduced new legislation, Act No 33/2013 on Consumer Loans (*Lög um neytendalán nr. 33/2013*), which took effect on 1 November 2013 and implements Directive 2008/48/EC into the Icelandic legal order.

The Consumer Loans Act changes the way in which the calculation of the annual percentage rate of charge of indexed loans is conducted in Iceland. Previously, creditors could base their calculations of the annual percentage rate of charge on the assumption of 0% inflation from the beginning to the end of the loan period. Article 21(3) of the Consumer Loans Act now requires that creditors, when calculating the annual percentage rate of charge, insert into his formula the average annual inflation rate during the last 12 months prior to signature of the agreement in case of indexed loans, with the assumption that this annual inflation will remain unchanged through the end of the loan period.

Further, Article 25(1) of the Consumer Loans Act introduces a new obligation on the creditor to explain to the consumer, prior to the conclusion of a credit agreement, of the potential impact that inflation could have on the total cost of indexed loans. Article 25(1) of the Consumer Loans Act requires the creditor to provide the consumer with information on the historical development of price levels and the impact of the development of price level on the principal and debt burden if it is an indexed based loan²¹ and of the development of price levels and disposable income for the last 10 years.”²²

The Authority is of the opinion that the changes introduced by the Consumer Loans Act, mandating that creditors now calculate the annual percentage rate of charge of indexed loans on the basis of the average annual inflation rate during the last 12 months, fulfil the

¹⁷ The main element of the definition of ‘total cost of the credit’ of Article 3(g) of Directive 2008/48/EC is essentially the same as in Article 1(2)(d) of Directive 87/102/EEC.

¹⁸ E-27/13, *Sævar Jón Gunnarsson v Landsbankinn hf.*, cited above, paragraphs 93 and 96.

¹⁹ E-25/13, *Engilbertsson*, (2014) EFTA Ct. Rep. 524.

²⁰ E-27/13, *Sævar Jón Gunnarsson v Landsbankinn hf.*, cited above, paragraph 92.

²¹ Article 25(1)(1) of the Consumer Loans Act.

²² Article 25(1)(4) of the Consumer Loans Act.

conditions set out by the EFTA Court in Case E-27/13²³ that the annual percentage rate of charge must be calculated on reasonable assumptions when a charge is unquantifiable at the time of the calculation. Article 21(3) of the Consumer Loans Act should prevent the practice of creditors in Iceland assuming 0% inflation over the course of the loan period in their calculation of the annual percentage rate of charge.²⁴ The Consumer Loans Act should guarantee, in particular through Articles 21(3) and 25(1), that consumers are adequately informed on the conditions and cost of indexed based credits, in accordance with Articles 4 - 6 of Directive 2008/48/EC.

There are therefore on behalf of the Authority no grounds for pursuing this complaint case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Iceland to comply with Directive 2008/48/EC and Directive 87/102/EEC, is hereby closed.

For the EFTA Surveillance Authority

Bente Angell-Hansen
President

Frank J. Büchel
College Member

Högni Kristjánsson
Responsible College Member

Carsten Zatschler
Countersigning as Director,
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This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.

²³ E-27/13, *Sævar Jón Gunnarsson v Landsbankinn hf.*, cited above.

²⁴ The complainant argues that as the words “*unchanged price level*” in Article 12(1) of Act 121/1994 were carried over into Article 21(3)(1) of Act No 33/2013, the interpretation of the Supreme Court in Case 243/2015, allowing for the assumption that price inflation will be 0% when calculating the annual percentage rate of charge for consumer credit agreements, must be equally applicable to Article 21(3)(1) of Act No 33/2013. The Authority maintains that it is for the national courts to interpret how Article 21(3) of the Consumer Loans Act affects the calculation of the annual percentage rate of charge of indexed based loans.