



Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 30 April 2019¹

Joined Cases C-708/17 and C-725/17

‘EVN Bulgaria Toplofikatsia’ EAD

v

Nikolina Stefanova Dimitrova

(Request for a preliminary ruling
from the Rayonen sad Asenovgrad (District Court, Asenovgrad, Bulgaria))

and

‘Toplofikatsia Sofia’ EAD

v

Mitko Simeonov Dimitrov

in the presence of

‘Termokomplekt’ OOD

(Request for a preliminary ruling
from the Sofiyski rayonen sad (District Court, Sofia, Bulgaria))

(Reference for a preliminary ruling — District heating — Buildings in co-ownership supplied by a heat network — Consumer protection — Directive 2011/83/EU — Article 27 — Unsolicited supply — National legislation providing that co-owners are required to contribute to heating costs, even if they do not use heating in their apartments — Energy efficiency — Directive 2006/32/EC — Article 13(2) — Directive 2012/27/EU — Article 10(1) — Billing of energy on the basis of actual consumption — National legislation providing that part of the heating costs is divided between the co-owners according to the heatable volume of their apartments)

¹ Original language: French.

I. Introduction

1. By two references for a preliminary ruling, the Rayonen sad Asenovgrad (District Court, Asenovgrad, Bulgaria) and the Sofiyski rayonen sad (District Court, Sofia, Bulgaria) have referred several questions to the Court of Justice concerning, in essence, the compatibility of the Bulgarian legislation on the supply of thermal energy with Directive 2011/83/EU² on consumer rights and with Directive 2006/32/EC³ on energy end-use efficiency and energy services and Directive 2012/27/EU⁴ on energy efficiency.

2. These references have been made in the course of proceedings between, on the one hand, EVN Bulgaria Toplofikatsia EAD ('EVN') and Ms Nikolina Stefanova Dimitrova and, on the other, Toplofikatsia Sofia EAD and Mr Mitko Simeonov Dimitrov concerning the refusal of those individuals to pay their heating bills. They dispute the bills at issue by claiming that, although their building is supplied by a heat network, they have not consented to receive district heating and do not use it in their respective apartments.

3. The many questions raised by the referring courts concern essentially two issues. First, those courts are uncertain as to whether the Bulgarian legislation, in so far as it provides that co-owners of buildings in co-ownership supplied by a heat network are required to contribute to heating costs even if, like Ms Dimitrova and Mr Dimitrov, they do not use it in their apartments, requires individuals in their position to accept an unsolicited supply of district heating, contrary to Article 27 of Directive 2011/83.

4. Secondly, the Rayonen sad Asenovgrad (District Court, Asenovgrad) is uncertain as to the compatibility of the legislation in question, in that it provides that part of those costs is divided between the co-owners according to the heatable volume of their apartments, with the provisions of Directives 2006/32 and 2012/27 requiring Member States to ensure, in certain circumstances, that the billing of energy to final customers is 'based on actual consumption'.

5. In this Opinion, I shall explain why, in my view, Directives 2011/83, 2006/32 and 2012/27 do not preclude such national legislation.

II. Legal framework

A. *European Union law*

1. *Consumer law*

6. Article 3 of Directive 2011/83, entitled 'Scope', provides:

'1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.

² Directive of the European Parliament and of the Council of 25 October 2011 amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).

³ Directive of the European Parliament and of the Council of 5 April 2006 repealing Council Directive 93/76/EEC (OJ 2006 L 114, p. 64).

⁴ Directive of the European Parliament and of the Council of 25 October 2012 amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1).

...

5. This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.

...'

7. Article 27 of that directive, entitled 'Inertia selling', provides:

'The consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services, prohibited by Article 5(5) and point 29 of Annex I to Directive 2005/29/EC.⁵ In such cases, the absence of a response from the consumer following such an unsolicited supply or provision shall not constitute consent.'

8. Annex I to Directive 2005/29, entitled 'Commercial practices which are in all circumstances considered unfair', refers, in point 29, to 'demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer... (inertia selling)'.

2. *The energy efficiency directives*

9. Directive 2006/32 was replaced, with effect from 5 June 2014, by Directive 2012/27.⁶ However, in view of the periods covered by the facts of the cases in the main proceedings, both directives are applicable to them.

10. Article 13 of Directive 2006/32, entitled 'Metering and informative billing of energy consumption', provided:

'1. Member States shall ensure that, in so far as it is technically possible, financially reasonable and proportionate in relation to the potential energy savings, final customers for electricity, natural gas, district heating and/or cooling and domestic hot water are provided with competitively priced individual meters that accurately reflect the final customer's actual energy consumption and that provide information on actual time of use.

Where an existing meter is replaced, such competitively priced individual meters shall always be provided, unless this is technically impossible or not cost-effective in relation to the estimated potential savings in the long term. When a new connection is made in a new building or a building undergoes major renovations, as set out in Directive 2002/91/EC,⁷ such competitively priced individual meters shall always be provided.

2. Member States shall ensure that, where appropriate, billing performed by energy distributors, distribution system operators and retail energy sales companies is based on actual energy consumption, and is presented in clear and understandable terms. ...

...'

⁵ Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

⁶ Subject to exceptions without relevance for the present cases. See Article 27(1) and Article 28(1) of Directive 2012/27.

⁷ Directive of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings (OJ 2003 L 1, p. 65).

11. Article 9 of Directive 2012/27, entitled ‘Metering’, reproduces, in paragraph 1, the provisions of Article 13(1) of Directive 2006/32. Article 9(3) provides:

‘Where heating and cooling or hot water are supplied to a building from a district heating network or from a central source servicing multiple buildings, a heat or hot water meter shall be installed at the heating exchanger or point of delivery.

In multi-apartment and multi-purpose buildings with a central heating/cooling source or supplied from a district heating network or from a central source serving multiple buildings, individual consumption meters shall also be installed by 31 December 2016 to measure the consumption of heat or cooling or hot water for each unit where technically feasible and cost-efficient. Where the use of individual meters is not technically feasible or not cost-efficient, to measure heating, individual heat cost allocators shall be used for measuring heat consumption at each radiator, unless it is shown by the Member State in question that the installation of such heat cost allocators would not be cost-efficient. In those cases, alternative cost-efficient methods of heat consumption measurement may be considered.

Where multi-apartment buildings are supplied from district heating or cooling, or where own common heating or cooling systems for such buildings are prevalent, Member States may introduce transparent rules on the allocation of the cost of thermal or hot water consumption in such buildings to ensure transparency and accuracy of accounting for individual consumption. Where appropriate, such rules shall include guidelines on the way to allocate costs for heat and/or hot water that is used as follows:

- (a) hot water for domestic needs;
- (b) heat radiated from the building installation for the purpose of heating the common areas (where staircases and corridors are equipped with radiators);
- (c) for the purpose of heating apartments.’

12. Article 10 of Directive 2012/27, entitled ‘Billing information’, provides, in paragraph 1:

‘Where final customers do not have smart meters as referred to in (Directive 2009/72/EC⁸ and Directive 2009/73/EC,⁹ Member States shall ensure, by 31 December 2014, that billing information is accurate and based on actual consumption, in accordance with point 1.1 of Annex VII for all the sectors covered by this Directive, including energy distributors, distribution system operators and retail energy sales companies, where this is technically possible and economically justified.

...’

13. Point 1.1 of Annex VII to Directive 2012/27, entitled ‘Billing based on actual consumption’, states:

‘In order to enable final customers to regulate their own energy consumption, billing should take place on the basis of actual consumption at least once a year ...’

⁸ Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

⁹ Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

B. Bulgarian law

14. Article 133(2) of the *Zakon za energetikata* (Law on energy)¹⁰ provides that ‘the installations of customers in a building in co-ownership are connected with the written consent of owners representing at least two thirds of the ownership of the building in co-ownership’.

15. Article 142(2) of that law provides that ‘thermal energy for heating a building in co-ownership is subdivided into heat emitted by the internal system, thermal energy for heating the communal areas and thermal energy for heating the private properties’.

16. Article 149a(1) of that law states that ‘thermal energy customers in a building in co-ownership may purchase thermal energy from a supplier selected with the written consent of co-owners representing at least two thirds of the ownership of the building in co-ownership’.

17. Article 149b of that law specifies the content of the written contract provided for in the case of a sale of thermal energy by a supplier to customers residing in a building in co-ownership.

18. Under Article 153(1), (2) and (6) of the Law on energy:

‘1. All owners and holders of a right *in rem* over the use of property in a building in co-ownership connected to the subscriber substation or to an independent branch thereof are thermal energy customers and are required to install thermal energy consumption allocation devices, as referred to in Article 140(1), point 2, on the heat emitters located in their properties and to pay the costs relating to consumption of thermal energy under the conditions and in accordance with the detailed rules laid down by the order concerned, as referred to in Article 36(3).

2. Where the owners who represent at least two thirds of the ownership of the building co-ownership and who are connected to the subscriber substation or to an independent branch thereof do not wish to be customers of thermal energy for heating or hot water, they are required to declare this in writing to the thermal energy transmission company and to request the cessation of the supply of thermal energy for heating or hot water from that subscriber substation or from an independent branch thereof.

...

6. Customers residing in a building in co-ownership who disconnect the supply of thermal energy to the heat emitters located in their properties remain thermal energy customers with regard to the heat emitted by the internal system and by the heat emitters located in the common areas of the building.’

19. The *Naredba za toplosnabdyavaneto* (District Heating Order) No 16-334 of 6 April 2007, lays down the technical terms and conditions relating to district heating, to the operational management of the heating system, to the connection of producers and customers to the heat network, to the distribution, suspension and removal of connection to district heating.

20. It is apparent from Article 61(1) of that order that, in the case of buildings in co-ownership, the distribution of thermal energy consumption between the co-owners/energy customers must be carried out in accordance with the rules laid down in the method set out in the annex to that order (‘the Method provided by the District Heating Order’).

¹⁰ DV No 107 of 9 December 2003.

21. Point 6. 1. 3. of the Method provided by the District Heating Order states that ‘the quantity of thermal energy ... emitted by the internal installation is to be allocated in proportion to the heatable volume of the apartments according to the floor plan’.

III. The disputes in the main proceedings and the questions referred for a preliminary ruling

A. Case C-708/17

22. Ms Dimitrova owns an apartment in a building in co-ownership situated in the town of Plovdiv (Bulgaria). That building is equipped with an internal heating and hot water installation¹¹ connected to a district heating network.¹² EVN supplies that building, through that network, with thermal energy used for heating and hot water.

23. A third company, which is responsible for metering and allocating, between the various co-owners, the thermal energy consumption of the building in question, attributed to Ms Dimitrova’s apartment, in accordance with the method laid down by the District Heating Order, consumption of a value of Bulgarian leva 266.25 (BGN) (approximately EUR 136) for the period from 1 November 2012 to 30 April 2015.

24. On 12 July 2016, as Ms Dimitrova had not paid that sum, EVN lodged an application for an order for payment before the Rayonen sad Asenovgrad (District Court, Asenovgrad), which that court upheld.

25. Ms Dimitrova lodged a statement of opposition to that order. EVN then brought an action before the same court for a ruling declaring the existence of its claim and an order for the party concerned to pay default interest and interest at the statutory rate. Ms Dimitrova contests, in that context, the claim in question. She maintains, *inter alia*, that there is no contractual obligation between her and EVN. Ms Dimitrova also contests the bills sent to her, on the ground that they do not reflect her actual consumption of thermal energy, contrary to the provisions of Article 13(2) of Directive 2006/32.

26. In those circumstances, the Rayonen sad Asenovgrad (District Court, Asenovgrad) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does Article 13(2) of [Directive 2006/32] preclude the possibility of the district heating supplier demanding consideration for the consumed thermal energy released by the system supplied with district heating of a building in co-ownership in proportion to the heatable volume of the apartments according to the floor plan, without taking account of the quantity of thermal energy actually released in the individual apartment?’
- (2) Is a national provision that obliges consumers who are owners of apartments in buildings subject to the provisions on co-ownership to provide consideration for the thermal energy that is not used but is supplied by the building’s system provided with district heating, if they have ceased the use of the thermal energy by removing the radiators in their apartments or as a result of employees of the district heating supplier having rendered the radiator technically incapable of releasing heat at their request, compatible with Article 27 of [Directive 2011/83]?’
- (3) Does such a national provision give rise to an unfair commercial practice within the meaning of [Directive 2005/29]?’

¹¹ That is, a series of pipelines and appliances for the distribution and supply of thermal energy, including heating risers passing through each apartment.

¹² In this Opinion, the terms ‘thermal energy’ and ‘heat’ are synonymous, as are the expressions ‘district heating network’ and ‘heat network’.

B. Case C-725/17

27. Mr Dimitrov owns an apartment in a building in co-ownership situated in the town of Sofia (Bulgaria). That building is fitted with an internal heating and hot water system connected to a district heating network. Toplofikatsia Sofia supplies that building, through that network, with thermal energy used for heating and hot water.

28. Toplofikatsia Sofia brought proceedings against Mr Dimitrov before the Sofiyski Rayonen sad (District Court, Sofia) for a declaration of the existence of a debt corresponding to the supply of heat for the period from 1 May 2014 to 30 April 2016 and to the costs of the company Termokomplekt OOD which recorded and allocated the thermal energy consumption of the building. Mr Dimitrov claims, in that regard, that there is no contractual obligation between him and Toplofikatsia Sofia, since they have not signed a written contract and he does not use district heating in his apartment.

29. In those circumstances, the Sofiyski Rayonen sad (District Court, Sofia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does [Directive 2011/83], which excludes from its scope the rules of conventional contract law on the conclusion of contracts, also exclude legislation governing this extremely atypical, legally prescribed structure for the existence of a contractual relationship?
- (2) If the directive does not exclude specific legislation in that situation, does that contract fall within the scope of Article 5 of the directive or of a different instrument? In the event that it is a contract or in the event that it is not, is the directive applicable in the present case?
- (3) Are such de facto contracts covered by [Directive 2011/83], irrespective of the time they arise, or does the directive apply only to newly acquired or, even more restrictively, to newly built apartments (that is to say, user-installations requesting connection to the district heating network)?
- (4) If the directive is applicable: does the national legislation infringe Article 5(1)(f) [of that directive], read in conjunction with paragraph 2 [of that article], which provide for the right to terminate the legal relationship (or the fundamental possibility of doing so)?
- (5) Thus, in the event that a contract is concluded, is a particular form required, and what information must be provided to the consumer (understood to be the individual owner of an apartment and not the community of separate apartment owners)? Does failure to provide timely and accessible information affect the existence of a legal relationship?
- (6) In order to be a party to such a legal relationship, is a specific request necessary, thus a formally expressed intention of the consumer?
- (7) If a contract, be it formal or informal, is concluded, does heating of the common parts of the building (in particular the stairwells) form part of the subject matter of the contract and has the consumer ordered a service in that area of the building, if no request has been expressly made for that service by that consumer or even by the whole building in co-ownership (for example, when radiators have been removed — as appears to have happened in a great number of cases — the experts not mentioning that there are heating appliances in the common parts of the building)?
- (8) In the light of the above, is the fact that the heating supply is terminated in a private apartment relevant (or does it make a difference) as regards the owner’s status as a consumer who has requested heating of the common parts of the building?’

IV. Procedure before the court

30. The orders for reference are dated 6 December 2017 (C-708/17) and 5 December 2017 (C-725/17). They reached the Court on 19 and 27 of the same month, respectively.

31. By decision of the President of the Court of 8 February 2018, Cases C-708/17 and C-725/17 were joined, in the light of the connection between them, for the purposes of the written and oral procedure and of the judgment.

32. EVN, Toplofikatsia Sofia, Ms Dimitrova, the Lithuanian Government and the European Commission lodged written observations before the Court. The same parties, with the exception of the Lithuanian Government, were represented at the hearing held on 12 December 2018.

V. Analysis

A. The Court's jurisdiction and the admissibility of the questions referred for a preliminary ruling

33. EVN submits that the Court does not have jurisdiction to answer the third question referred for a preliminary ruling by the Rayonen sad Asenovgrad (District Court, Asenovgrad) in Case C-708/17. By that question, that court is asking the Court not to interpret EU law but to establish the existence of an unfair commercial practice, which is a matter for the national institutions.

34. I do not share that view. To my mind, there is nothing to prevent a national court from requesting the Court, in the context of a reference for a preliminary ruling, to rule on the classification of a given factual situation as an unfair commercial practice, within the meaning of Directive 2005/29, provided that it determines and assesses the necessary facts. The classification, in the light of EU law, of facts established by a national court involves an interpretation of that law for which, in the context of the procedure provided for in Article 267 TFEU, the Court has jurisdiction.¹³

35. EVN also challenges the admissibility of all the questions referred for a preliminary ruling by the Sofiyski Rayonen sad (District Court, Sofia) in Case C-725/17. According to that company, that court has not raised any question on which the Court might rule. Nor has that court explained why it was unsure of the scope of the provisions of EU law for which it requests an interpretation or with regard to the link it establishes between those provisions and the national legislation applicable to the dispute before it.

36. In my view, that objection must also be rejected. The questions from the Sofiyski rayonen sad (District Court, Sofia) concern, in essence, the interpretation of Directive 2011/83. That court stated, in its order for reference, the reasons why that directive is relevant to the dispute before it and explained that it has doubts as to the compatibility of the provisions of the Law on energy with, inter alia, Article 27 of that directive. Its questions therefore satisfy the requirements for admissibility.¹⁴

¹³ See, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 20 and the case-law cited). That said, in my view, that question should be examined together with those relating to Directive 2011/83 (see footnote 36 of this Opinion).

¹⁴ Requirements set out inter alia in Article 94 of the Rules of Procedure of the Court.

B. Substance

1. Preliminary observations

37. The present cases concern, in essence, the allocation of heating costs in buildings in co-ownership supplied by a district heating network.¹⁵

38. Ms Dimitrova and Mr Dimitrov are owners of apartments forming part of such buildings. The companies which are the applicants in the main proceedings, EVN and Toplofikatsia Sofia, are energy distributors¹⁶ supplying those buildings, by means of the heat networks to which they are connected, with thermal energy used for heating and hot water. That energy is distributed to those buildings by means of an internal heating and hot water installation consisting of a subscriber substation,¹⁷ and a series of pipes and distribution installations, including risers passing through each apartment.

39. The supply of heating and hot water is regulated in Bulgaria by the Law on energy and the District Heating Order. That legislation provides that where a building is supplied by a heat network, each of the co-owners whose apartments are connected to the internal heating and hot water installation is required to contribute to the costs corresponding to the thermal energy supplied to that building.¹⁸

40. In that regard, that legislation states that those costs are allocated between co-owners by separating the thermal energy used for hot water from that used for heating; the latter energy is itself subdivided into heat released by the internal installation (that is to say, the heat losses of the internal distribution network), heat used for heating the common parts (stairwells, entrance halls, shared basements, etc.) and heat used for heating the private areas.¹⁹ While the heating and hot water used in the private apartments are billed on the basis of the actual consumption of each, the heat released by the internal installation and that used for heating the common parts are allocated between the co-owners according to the heatable volume of their apartments as indicated in the floor plan of the building.²⁰

41. Ms Dimitrova and Mr Dimitrov do not use the communal heating and hot water in their apartments and are challenging the fact that they are nonetheless required to contribute to the costs of the heating used in the building, in particular those corresponding to the heat released by the internal installation.²¹ They submit, in that regard, that the provisions of the Law on energy are contrary to EU consumer law (Section 2).

¹⁵ As recital 25 of Directive 2011/83 provides, district heating consists of the supply of heat, inter alia, in the form of steam or hot water, from a central source of production through a transmission and distribution system to multiple buildings, for the purpose of heating.

¹⁶ Within the meaning of Article 2(20) of Directive 2012/27.

¹⁷ That substation includes the exchanger where energy is transferred between the heat network and the internal distribution network of the building (see Article 135(1) of the Law on energy). It is the point at which the distributors deliver the heat and is fitted with a meter which enables the quantity of heat supplied to the building to be measured. However, it is apparent from the order for reference in Case C-725/17 that the building in question in that case is a high-rise building, equipped with two distribution loops, each with a subscriber substation.

¹⁸ See Article 153(1) of the Law on energy.

¹⁹ See Article 140 a and Article 142(2) of the Law on energy.

²⁰ See point 6. 1. 3. of the Method provided for by the District Heating Order.

²¹ It is common ground that Case C-708/17 concerns only heat released by the internal installation. In that regard, Ms Dimitrova's representative stated, at the hearing, that the apartment in question is currently unoccupied and that the common parts of her building are not heated. The order for reference is also based on the premiss that Ms Dimitrova has removed her radiators. Her representative stated, however, that they are in place and usable. In any event, that detail has, in my view, no impact on the interpretation requested. Things are less clear with regard to Mr Dimitrov. The order for reference in Case C-725/17 states that he does not use heating in his apartment, but that he was billed for a certain amount of heat in that respect. The order also refers to the costs relating to the heat released by the internal installation. It then mentions radiators installed in the common parts of the building, while the seventh question in that case is based on the premiss that there are none.

42. Furthermore, Ms Dimitrova challenges the rule for allocating the costs relating to the heat released by the internal installation provided by the District Heating Order which, based on the criterion of the heatable volume of the apartments, does not take into account the quantity of energy actually consumed by each co-owner, contrary to the requirements laid down by the EU legislation on energy efficiency (Section 3).

43. I would point out, in conclusion, that these cases are far from being isolated. The question of the contribution to the district heating costs of co-owners who have decided not to use it in their apartments, according to the information contained in the orders for reference and the information provided by the parties, is generating a huge number of disputes before the Bulgarian courts. Those disputes reveal a genuine social crisis linked to the price of energy in Bulgaria. A significant part of Bulgarian housing consists of buildings with little heat insulation, built before 1989, at a time when the price of energy was closely controlled by the State. Since then, according to the statistics referred to by the Commission, that price has risen by a factor of 25 in that Member State, with the result that district heating has become unaffordable for many households.

2. Directive 2011/83 (second and third questions in Case C-708/17 and all the questions in Case C-725/17)

44. The second and third questions in Case C-708/17 and all the questions in Case C-725/17 concern, in essence, the compatibility with EU consumer law of the provisions of the Law on energy governing the supply of thermal energy in buildings in co-ownership. Those provisions may be summarised as follows.

45. Connection of the internal installation of a building in co-ownership to a heat network requires the written consent of co-owners representing at least two thirds of the co-ownership of the building in question.²² That connection gives rise to a contract²³ and the supply of thermal energy to the building is subject to general conditions.²⁴

46. When a building is connected to a heat network, Article 153(1) of the Law on energy provides that all the owners (or holders of a right *in rem* of the usufruct type or right of use) in respect of the private parts connected to the internal installation are thermal energy customers. In that capacity, they are required to contribute to the costs corresponding to the thermal energy used in the building under the conditions and in accordance with the detailed rules laid down by the District Heating Order. The same applies to owners, such as Ms Dimitrova and Mr Dimitrov, who were not part of the co-ownership at the time the decision to connect was taken.

47. Each co-owner may choose not to use, in his apartment, the thermal energy thus supplied, by turning off his radiators.²⁵ However, under Article 153(6) of the Law on energy, co-owners who have declined heating in their apartments are still required to pay part of the heating costs of the building, namely those corresponding to the heat released by the internal installation and to heat used for the common parts. This applies until the removal of the connection of the building to the heat network

²² Article 133(2) of the Law on energy.

²³ Articles 149 a and 149 b of the Law on energy. Those provisions provide that the purchase of thermal energy, decided on by the co-owners, gives rise to a written contract with a supplier which, as I understand it, is either the thermal energy distributor, as appears to be the situation in the cases in the main proceedings (EVN for Plovdiv and Toplofikatsia Sofia for Sofia) or a third-party undertaking which has itself concluded a contract with that distributor for the supply of energy purchased.

²⁴ Article 150 of the Law on energy. Those general conditions are defined by the distributors, approved by an administrative commission and must be published in at least one national daily newspaper and a local daily newspaper.

²⁵ Or even by resorting to a more radical solution, consisting of removing his radiators.

(involving the termination of the contract for the supply of district heating), which also requires the written consent of co-owners representing at least two thirds of the co-ownership of the building in question.²⁶ It is not disputed that such a decision was not taken by the co-ownership of the buildings at issue in the main proceedings.

48. Ms Dimitrova and Mr Dimitrov, joined together by the referring courts, consider that situation to be incompatible with EU consumer law, in particular with Article 27 of Directive 2011/83. They submit inter alia that the Law on energy requires co-owners who do not use the district heating in their apartments to accept an ‘unsolicited supply’ of that heating, within the meaning of that provision. That provision provides for a contractual remedy in that respect: a consumer, following such a supply ‘shall be exempted from the obligation to provide any consideration’. Ms Dimitrova and Mr Dimitrov should not therefore be required to contribute to the heating costs of their buildings.

49. In the present case, the criticisms of Ms Dimitrova and Mr Dimitrov focus on Article 153(1) and (6) of the Law on energy. First, there is the fact that, in accordance with the former paragraph, the obligation of each co-owner to contribute to the costs of communal heating and hot water does not stem from the conclusion of a contract between that co-owner and the distributor, but exists solely by reason of ownership of an apartment connected to the internal installation. In particular, owners who were not part of the co-ownership at the time the decision to connect the building to the heat network was taken had never ‘solicited’ district heating. Second, they contest the fact that the latter paragraph requires co-owners who have turned off or removed the radiators in their apartments to contribute to the heating costs of the building, even though, by so doing, they have clearly indicated their wish to forego district heating.

50. In the light of the foregoing, I consider that, in order to give a useful answer to the referring courts, it is necessary to combine and reformulate the second and third questions in Case C-708/17 and all the questions in Case C-725/17 in a single question, namely whether Directive 2011/83 precludes national legislation which provides that, in buildings in co-ownership supplied by a heat network, the co-owners are required to contribute to the heating costs of the building, even though they have not individually solicited the supply of district heating and even if they do not use it in their apartments.

51. Before ruling on that question, it is necessary, in principle, to confirm whether Directive 2011/83 is applicable in the cases in the main proceedings.²⁷ In that regard, I would point out that, as provided in Article 3(1) thereof, that directive applies, under the conditions and to the extent set out in its provisions, to ‘any contract concluded between a trader and a consumer’ including ‘contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis’. Furthermore, the directive applies, according to Article 28(2) thereof, only to ‘contracts concluded after 13 June 2014’.

52. Nevertheless, I do not think it is necessary to consider that issue in depth in the present case. In that regard, it is apparent from the orders for reference that, under Bulgarian law, the supply of heating and hot water to buildings in co-ownership by a heat network gives rise to a contract, that the co-ownership is a community without legal personality²⁸ and that each co-owner is regarded as the final customer required to pay the costs of the thermal energy used in the building.²⁹ Therefore, it is

²⁶ Article 153(2) and (3) of the Law on energy.

²⁷ As I understand it, that is the subject matter of the second, third and eighth questions referred for a preliminary ruling in Case C-725/17.

²⁸ See, also, on this point, the Opinion of Advocate General Kokott in *Kerr* (C-25/18, EU:C:2019:86, point 43).

²⁹ See point 46 of this Opinion. I would point out, in that regard, that the EU legislature, in the recent Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending [Directive 2012/27] (OJ 2018 L 328, p. 210), which is no longer applicable, distinguished between ‘final customers’ and ‘final users’. Under the new Article 10a, introduced by Directive 2018/2002, ‘final users’ are, inter alia, natural or legal persons occupying an individual building or a unit in a multi-apartment or multi-purpose buildings supplied with heating, cooling or domestic hot water from a central source who has no direct or individual contract with the energy supplier. Conversely, ‘final customers’ are *persons directly linked to the supplier*.

possible to proceed on the assumption that there is indeed, for the purposes of Directive 2011/83, a ‘contract for the supply of district heating’ between a ‘trader’ (the supplier/distributor) and a ‘consumer’ (each co-owner) and that that directive is applicable *ratione temporis*³⁰, without it being necessary to address those various aspects in detail, especially because, in my view, that directive clearly does not preclude legislation such as Article 153(1) and (6) of the Law on energy.

53. In that regard, I would point out that, *in the first place*, as stated in Article 3(5) thereof, Directive 2011/83 ‘shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive’.³¹

54. Paragraphs 1 and 6 of Article 153 of the Law on energy concern, specifically, the formation, validity and effect of the energy supply contract in respect of each co-owner and the arrangements for terminating that contract.³² They provide, in essence, that each co-owner is linked to the energy distributor and is required, as such, to contribute to heating costs (until that connection has been terminated by the agreement of a qualified majority of co-owners). In short, there is, under those provisions, as long as that decision to terminate the connection has not been taken, a *valid and effective contract* between, on the one hand, Ms Dimitrova and Mr Dimitrov and, on the other, the distributors. The provisions of Directive 2011/83 cannot call in question that fact, since the formation, validity and effects of the contract are not, as a matter of fact, in principle, questions harmonised by that directive.³³ Therefore, the directive does not, in principle, impose substantive or formal requirements for the conclusion and validity of such a contract or for its termination.³⁴

55. I accept that the mere finding that the harmonisation carried out by Directive 2011/83 is limited in nature is not an adequate answer to the question referred. Article 27 of that directive relating to unsolicited supplies concerns, to a certain extent, the formation of contractual relationships.³⁵

30 Although, as the Lithuanian Government points out, this is far from certain in the light of the periods of the facts of the cases in the main proceedings.

31 See also, to that effect, recital 14 of Directive 2011/83. Similarly, Article 3(2) of Directive 2005/29 provides that the latter directive applies without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

32 It is true that paragraphs 1 and 6 of Article 153 of the Law on energy are not, strictly speaking, ‘general provisions’ of contract law, within the meaning of the rules of ordinary law applicable to all types of contract. That objection underlies, it seems to me, the first question referred for a preliminary ruling in Case C-725/17. However, for the purposes of the exclusion provided for in Article 3(5) of Directive 2011/83, whether the rule is of a general or special nature does not matter as much as its purpose: where a national provision deals with a question relating by its very nature to contract law (formation, validity, purpose, subject matter etc.), it does not, in principle, fall within the scope of that directive.

33 I would point out, in that regard that in its proposal for a directive of the European Parliament and of the Council on consumer rights [COM(2008) 0614 final], the Commission had envisaged full harmonisation of the law relating to consumer contracts. The EU legislature ultimately effected a significantly more limited harmonisation, focused on certain specific contracts and specific issues: introduction of a general obligation to inform, recasting and standardisation of obligations to inform and of the right of withdrawal in respect of distance contracts and off-premises contracts, etc.

34 That interpretation is not called into question by the provisions referred to by the Sofiyski rayonen sad (District Court, Sofia) in its order for reference. In that regard, Article 5(1)(f) of Directive 2011/83 does not regulate the matter of the breakdown in the contractual relationship, but only the obligation for the trader to provide the consumer with *information* regarding the conditions for terminating the contract, laid down by national law. Similarly, Article 7(1) and Article 8(1) of Directive 2011/83, apart from the fact that they apply, respectively, to off-premises contracts and distance contracts, and therefore not to contracts for the supply of district heating, merely regulate the *form in which that information is to be provided*.

35 Hence the statement in Article 3(5) of Directive 2011/83, that that directive does not affect general contract law ‘in so far as’ general contract law aspects are not regulated in that directive.

56. In that respect, I note, *in the second place*, that with regard to the concept of ‘unsolicited supply’, Article 27 of Directive 2011/83 refers to point 29 of Annex I to Directive 2005/29.³⁶ That point defines ‘unsolicited supply’ as the situation in which a trader, *inter alia*, demands immediate or deferred payment for goods supplied by the trader but not solicited by the consumer. Article 27 also states that the absence of a response from the consumer following an unsolicited supply does not constitute consent.³⁷

57. Under EU law, unsolicited supplies had initially given rise to a provision of Directive 97/7/EC on the protection of consumers in respect of distance contracts,³⁸ which Directive 2011/83 replaced. The idea was to combat the practice, by a trader, of sending a given product to a consumer stating that, if it were not returned within a specific period, the trader would consider that its sale offer had been accepted and claim payment of its price from the consumer — in other words, *forcing* the consumer’s consent to purchase. By exempting the consumer from paying any consideration in the event of an unsolicited supply and by stating that his silence does not constitute consent, Article 27 of Directive 2011/83 *prohibits a contract being validly formed following such a practice*. To that extent, that provision harmonises national contract law.³⁹

58. That being so, one of the fundamental conditions for classification as an unsolicited supply, within the meaning of Article 27 of Directive 2011/83, is the fact that the supply in question has not been previously and *expressly solicited* by the consumer. In addition, that provision is designed to prevent *a trader* imposing a contractual relationship on a consumer.

59. In the present case, *first*, the supply of energy described was not carried out on the initiative of a trader but in accordance with the requirements of the Bulgarian legislature. Under the Law on energy, the energy distributor is required to connect customers who request it to the heat network⁴⁰ and to supply the connected buildings with thermal energy. I seriously doubt that a supply carried out under a legal obligation may be classified as an ‘unsolicited supply’, within the meaning of Article 27 of Directive 2011/83.⁴¹

60. *Second*, and in any event, the supply of heating is indeed a consequence, *of an express prior request*. Each co-owner is linked to the distributor provided that a qualified majority of them has expressly consented to that supply in writing. The point is that Ms Dimitrova and Mr Dimitrov dispute the fact that a certain majority of the co-owners can commit all of them (including persons becoming owners subsequently) and that the same majority is necessary for dispensing with all thermal energy supply in the building.

61. Article 153(1) and (6) of the Law on energy, far from introducing an unsolicited supply, lies within the framework of a complex ‘group situation’, the co-ownership of immovable property. In that regard, I would point out that buildings in co-ownership, such as those at issue in the cases in the main proceedings, contain private parts which are the subject of a right of sole ownership and common parts subject to a compulsory co-ownership system, of which each co-owner necessarily has a share.

³⁶ There is therefore no need, in my view, to rule separately on Directive 2005/29, as requested by the Rayonen sad Asenovgrad (District Court, Asenovgrad) by its third question. That question is raised, it seems to me, for the purpose of applying the remedy provided for by Article 27 of Directive 2011/83.

³⁷ Article 27 Directive 2011/83 was transposed in similar terms in Article 62 of the Zakon za zashtita na potrebitelite (Law on consumer protection) (DV No 99 of 9 December 2005).

³⁸ Directive of the European Parliament and of the Council of 20 May 1997 (OJ 1997 L 144, p. 19). It was Article 9 of that directive.

³⁹ Moreover, as stated in point 48 of this Opinion, that article affords the consumer a contractual remedy.

⁴⁰ See Article 133(1) of the Law on energy.

⁴¹ Indeed, that raises the unprecedented question of whether the prohibition of unsolicited supplies, as provided for in Article 27 of Directive 2011/83, may be invoked against national legislatures, that is to say whether those legislatures may be required not to place traders in a situation in which they would be forced to impose such supplies on consumers. However, the present case does not require more in-depth consideration of that question.

Those areas are, in principle, inseparable and available for the use and convenience of all of them, and are therefore subject to management organised on the basis of decisions taken by a certain majority of the co-owners.⁴² Such a system is essential in order to enable effective management of those common parts: a rule of unanimity would render it unworkable.

62. The internal heating and hot water installation is, specifically, a common part in co-ownership.⁴³ The supply of heating and hot water in the building, since it involves the use of that internal installation, is a service offered to the owners collectively and, accordingly, is a matter for the co-ownership in its entirety. The ‘application’ for district heating is based, logically, on a decision of that co-ownership.⁴⁴

63. Moreover, once that decision has been taken, it is also logical that each co-owner is required to contribute to the costs corresponding to the losses of the internal installation and to the heat consumption of the other communal parts of the building: in his capacity as joint owner of those parts, he is also a ‘consumer’ of that heat.⁴⁵ It matters little, in that regard, that he intends to heat his apartment by his own means without recourse to collective heating, that he does not occupy the premises or that he has removed his radiators.⁴⁶

64. The same applies to owners who enter the co-ownership after the decision to connect the building to district heating has been taken. The principle that new co-owners are bound by the decisions taken by the co-ownership, including the connection to urban heating, is designed to ensure the stability of the co-ownership — otherwise, any decision taken by it would be called in question at every transfer of ownership in the building. Moreover, persons who purchase an apartment are informed of the fact that the building in question is supplied by a heat network and that certain costs are associated with the common parts which they acquire with that apartment.⁴⁷ Furthermore, the general conditions applicable to district heating are known to the public.⁴⁸

65. In that context, it cannot be inferred from Article 27 of Directive 2011/83, as Ms Dimitrova and Mr Dimitrov seem to do, that a consumer must always *consent individually* to the delivery of any goods or the supply of any service, and must be able *individually* to terminate the contract providing for that delivery or supply. I consider that Directive 2011/83 does not preclude, in certain complex situations, involving a form of community of consumers and a good or service provided to them collectively, *the consent given by some of them binding the others*,⁴⁹ *including the new members of that community*, under the conditions laid down by the national law of the Member States. That directive, or EU law in general, simply does not address those particular issues.

42 Legal relationships arising from commonhold property are governed in Bulgaria by the Zakon za sobstvenostta (Law on ownership). The Zakon za upravlenie na etazhnata sobstvenost (Law on the management of commonhold property) lays down the respective rights and obligations of owners, users and occupants in connection with the management of commonhold property. Article 10 defines the general meeting and the management board as management bodies.

43 Article 140(1) of the Law on energy. The same rule is contained in the Law on ownership and in the Law on the management of commonhold property.

44 The same applies to all suppliers of services in common parts. These might include the provider in charge of the repair or maintenance of the internal installation, or the gardener responsible for the maintenance of a common area, etc. In these matters, it is normal for each co-owner to be required to use providers designated by the co-ownership and to pay a proportion of the collective costs relating to such services. See the Opinion of Advocate General Kokott in *Kerr* (C-25/18, EU:C:2019:86, point 43).

45 I note that both the Konstitutsionen sad (Constitutional Court, Bulgaria), by judgment No 5 of 22 April 2010 in constitutional case No 15 of 2009, and the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) in its interpretive judgment No 2/2016 of 25 May 2017, held, on similar grounds, that there is no conflict between Article 153(1) and (6) of the Law on energy and Article 62 of the Law on consumer protection prohibiting unsolicited supplies.

46 In addition, part of that heat enters his apartment. See point 85 of the present Opinion.

47 See, to that effect, judgment No 5 of 22 April 2010 of the Konstitutsionen sad (Constitutional Court).

48 See footnote 24 of this Opinion. Moreover, as the Commission pointed out at the hearing, it is possible for a co-owner, in certain circumstances, to ask the general meeting to reconsider the question of the connection of the building to the district heating network and to challenge before the courts any decision of that meeting.

49 On that point, it therefore does not matter whether it is the group as a whole (in the present case, the co-ownership) or each of the persons of whom it is constituted (each co-owner) who is the consumer of the service or of the product solicited, within the meaning of Directive 2011/83.

66. In the light of all the foregoing considerations, I suggest that the Court should reply to the second and third questions in Case C-708/17 and all the questions in Case C-725/17, that Directive 2011/83 is to be interpreted as not precluding national legislation, which provides that, in buildings in co-ownership supplied by a heat network, the co-owners are required to contribute to the heating costs of the building, even though they have not individually solicited the district heating supply and even if they do not use it in their apartments.

3. Energy efficiency directives (first question in Case C-708/17)

67. The first question referred by the Rayonen sad Asenovgrad (District Court, Asenovgrad) in Case C-708/17 concerns the method of allocating, between the co-owners of a building supplied by a heat network, the costs corresponding to the thermal energy consumed in that building. The wording of that question refers to Directive 2006/32. However, since the claim disputed by Ms Dimitrova relates to the thermal energy supplied between 1 November 2012 and 30 April 2015⁵⁰ and that directive was replaced by Directive 2012/27 as from 5 June 2014, the question must be answered in the light of both directives.⁵¹

68. As stated in point 40 of this Opinion, the Bulgarian legislation provides that the costs corresponding to the heat released by the internal installation (or, I note, the losses from the internal distribution network) are allocated between the co-owners in proportion to the heatable volume of their apartments.

69. Ms Dimitrova submits that that allocation rule does not comply with the requirements of Article 13(2) of Directive 2006/32, replaced by Article 10(1) and point 1.1 of Annex VII to Directive 2012/27.

70. In that regard, Article 13(2) of Directive 2006/32 required the Member States to ensure that, where appropriate, the bills sent to the final energy customers were based on ‘actual consumption’. Article 10(1) and point 1.1 of Annex VII to Directive 2012/27 reiterate that obligation, stating that it was to be implemented by the Member States by 31 December 2014 for all the sectors covered by that directive where this is technically possible and economically justified.⁵²

71. However, according to Ms Dimitrova, the consequence of the rule for allocating the costs relating to the heat released by the internal installation, provided by the District Heating Order, is that the amount billed to the co-owners in respect of that heat does not depend on the quantity of thermal energy potentially or actually released (or rather lost) by the internal installation in their apartments — and, therefore, ‘actually consumed’ by each co-owner.⁵³ The Rayonen sad Asenovgrad (District Court, tribunal Asenovgrad) is inclined to share that view.

⁵⁰ Similarly, the claim disputed in Case C-725/17 relates to the heat supplied between 1 May 2014 and 30 April 2016. Although the Sofiyski rayonen sad (District Court, Sofia) has not asked the Court about the interpretation of the energy efficiency directives, a reply from it on that issue may be useful for resolving that case also.

⁵¹ See point 9 of this Opinion. According to the Court’s settled case-law, new rules of EU law apply, unless otherwise specifically provided, immediately to the future effects of a situation which arose under the old rule [see, inter alia, judgment of 10 June 2010, *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329, paragraph 53 and the case-law cited)]. Directives 2006/32 and 2012/27 are therefore both applicable *ratione temporis* to the cases in the main proceedings: the former for the thermal energy consumed up to 5 June 2014; the latter for that consumed from that date.

⁵² Article 10(1) of Directive 2012/27 states that that provision does not apply to final customers who have smart meters as referred to in Directives 2009/72 and 2009/73 concerning, respectively, electricity and natural gas. That clarification therefore does not concern the supply of heat.

⁵³ Ms Dimitrova maintains that it is possible to give an accurate estimate of the heat released by the internal installation in each apartment by determining, on a case-by-case basis, whether the risers of that installation actually pass through the apartment in question and, as the case may be, focusing on the technical characteristics of the pipes going through that apartment, in particular their insulation (that prevents any transference of heat) and their heating surface area (the greater the surface area of the pipe, in light inter alia, of its diameter, the greater the quantity of heat released).

72. That court is therefore asking the Court of Justice, in essence, whether Article 13(2) of Directive 2006/32 and Article 10(1) and point 1.1 of Annex VII to Directive 2012/27 preclude such an allocation rule. It also asks whether the answer to that question depends on whether it is technically possible to determine the quantity of heat actually released by the internal installation in each apartment.

73. In my view, that question must be answered in the negative. In that regard, I consider it expedient to re-examine the circumstances in which billing based on actual consumption must be implemented and the techniques on which it is based as regards the supply of heat in buildings in co-ownership supplied by a heat network (in the first place) and then, in the situations in which that method of billing is imposed, the extent of that obligation (in the second place).

74. *In the first place*, as I have pointed out, Article 13(2) of Directive 2006/32 required the Member States to ensure that ‘where appropriate’ billing of energy to final customers was based on actual consumption. Article 10(1) and point 1.1 of Annex VII to Directive 2012/27 state that such billing was to be implemented ‘where this is technically possible and economically justified’. In my view, those conditions must be read in the light of the provisions relating to the metering of energy consumption in Article 13(1) of Directive 2006/32 and Article 9 of Directive 2012/27.

75. In that regard, Article 13(1) of Directive 2006/32 and Article 9(1) of Directive 2012/27 provide, in almost identical terms, for individual meters for measuring the actual consumption of final energy consumers to be installed by them. The level of requirement in that respect varies according to the type of building in question: their installation is imposed for new buildings or those undergoing significant renovation work, while, for existing buildings, that installation is subject to its being technically possible, financially reasonable and proportionate in the light of the potential savings.⁵⁴

76. The EU legislature clarified,⁵⁵ in Article 9(3) of Directive 2012/27, the way of implementing that measure with regard to the consumption of heating, cooling and hot water inter alia in buildings in co-ownership supplied by a heat network.

77. That provision states, accordingly, that, in such buildings, a heat or hot water meter must be installed at the heating exchanger or point of delivery.⁵⁶ Also, the Member States must ensure that, by 31 December 2016 at the latest, individual consumption meters are installed to measure the consumption of heat or cooling or hot water for each unit ‘where technically feasible and cost-efficient’. Failing that, heat cost allocators⁵⁷ must be used for measuring heat consumption at each radiator, ‘unless it is shown by the Member State in question that the installation of such heat cost allocators would not be cost efficient’.⁵⁸ In the latter case, alternative cost-efficient methods of heat consumption measurement may be considered.

⁵⁴ The idea is to take into account the configuration of existing buildings and to introduce a cost-effectiveness ratio. It is a question of assessing whether the cost of the modifications it would be necessary to make to the installations of existing buildings, and particularly old buildings, in order to implement the individual consumption measure is proportionate to the energy savings likely to be made as a result of that measure. See recital 30 of Directive 2012/27 and also Robinson, S. and Vogt, G., *Guidelines on good practice in cost-effective cost allocation and billing of individual consumption of heating, cooling and domestic hot water in multi-apartment and multi-purpose buildings, Support for the implementation of Articles 9-11 of Directive 2012/27/EU on energy efficiency with respect to thermal energy supplied from collective systems*, Empirica GmbH, Bonn, December 2016.

⁵⁵ See recitals 32 and 33 of Directive 2012/27.

⁵⁶ That is to say at sub-station level (see footnote 17 of the present Opinion).

⁵⁷ Unlike a thermal energy meter, a heat cost allocator does not measure the quantity of heat actually supplied to an apartment, but merely gives a figure which is representative of that heat, by integrating over time the difference in temperature between a point on the surface of the radiator to which it is attached and the ambient room temperature.

⁵⁸ As I have stated, these conditions of feasibility and profitability are designed to take into account existing installations and the cost which any modification to them would involve. Thus, the installation of individual meters would require in certain cases the replacement of the entire internal installation of a building, since, in particular, such meters cannot be installed in distribution systems with vertical risers. In those buildings, it is permissible to install, instead, allocators on each radiator. Such allocators cannot, however, be installed in buildings in which heating operates without radiators or a thermal exchanger surface on which to put them. In any event, the installation of devices for determining individual consumption is not appropriate in buildings the occupants of which cannot control their radiators. See recitals 28 and 29 of Directive 2012/27 and Robinson, S. and Vogt, G., cited above.

78. It follows that, as regards heating in buildings in co-ownership supplied by a heat network, billing based on actual consumption, as referred to in Article 13(2) of Directive 2006/32 and in Article 10(1) of Directive 2012/27, must be put in place for the occupants with devices enabling that consumption to be determined, under the conditions laid down in Article 13(1) of the Directive 2006/32 and in Article 9(1) and (3) of Directive 2012/27. That method of billing is based on the measurement of individual thermal meters or, failing that, on readings of heat cost allocators located in the private areas.⁵⁹

79. In the present case, it is common ground that such devices were installed in the apartments of Ms Dimitrova and Mr Dimitrov.⁶⁰ They must therefore receive bills based on their actual consumption of thermal energy.⁶¹

80. Nonetheless, *in the second place*, I am of the view that neither Article 13(2) of Directive 2006/32 nor Article 10(1) of Directive 2012/27 requires that where that method of billing is imposed, the thermal energy bill of the final customers depends *solely* on actual consumption.

81. Contrary to what Ms Dimitrova maintains, those provisions do not lay down the principle that each final energy customer should pay only what he has actually consumed. Their wording merely states that billing must be ‘based on’ actual consumption. That requirement must, in my view, be read in the light of the objectives of those directives and of the background to those provisions.

82. In that regard, I would point out that the objective of Directives 2006/32 and 2012/27 is, *inter alia*, to improve energy efficiency in the EU, in particular at the end-use stage.⁶² Those directives follow two Council recommendations⁶³ and a first directive⁶⁴ seeking to promote the use, with regard to the allocation of the costs of heating, cooling and domestic hot water in buildings in co-ownership equipped with collective installations, of rules taking into account the actual consumption of each occupant. The correlation between actual individual consumption and billing encourages each person to adopt energy-efficient behaviour⁶⁵ in order to lower the former and thus reduce the latter.

83. Billing based on actual consumption, as envisaged in Article 13(2) of Directive 2006/32 and Article 10(1) of Directive 2012/27, is therefore not an end in itself: the objective of that method of billing is to encourage occupiers of buildings in co-ownership to adopt energy-efficient behaviour, in order to save energy at the end-use stage. Such an objective means that *part* of the final customers’ thermal energy bill depends on their actual consumption, that corresponding to the use they make of the radiators in their apartments, that is to say, their individual behaviour.⁶⁶

⁵⁹ That is confirmed by the new Directive 2018/2002, which has inserted in Directive 2012/27 an Article 10a, relating specifically to the billing of consumption of heat, cooling and hot water, and stating, in paragraph 1 thereof, that ‘*where meters or heat cost allocators are installed*, Member States shall ensure that the consumption information is ... based on actual consumption *or heat cost allocator readings*’ (emphasis added).

⁶⁰ It is apparent from the orders for reference that a thermal meter is in Ms Dimitrova’s apartment whereas allocators are installed in Mr Dimitrov’s apartment.

⁶¹ It is not necessary, in the present case, to decide the question of the exact date on which billing based on actual consumption became compulsory in their buildings, under EU law.

⁶² See recitals 1 to 3 and 32 of Directive 2006/32 and recitals 2 and 60 of Directive 2012/27.

⁶³ Council Recommendation 76/493/EEC of 4 May 1976 on the rational use of energy in the heating systems of existing buildings (OJ 1976 L 140, p. 12) and Council Recommendation 77/712/EEC of 25 October 1977 on the regulating of space heating, the production of domestic hot water and metering of heat in new buildings (OJ 1977 L 295, p. 1).

⁶⁴ Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (*Save*) (OJ 1993 L 237, p. 28).

⁶⁵ For example, not opening the windows for ventilation while leaving the radiators on, reducing the temperature of rooms, particularly those which are unoccupied or during the night, etc. See recitals 29 of Directive 2006/32 and 30 to 33 of Directive 2012/27.

⁶⁶ Directive 93/76 required billing to be based ‘in an appropriate proportion’ on actual consumption (see recital 11 and Article 3 of that directive).

84. However, to allocate the *entirety* of the thermal energy consumed in a building to its various co-owners according to the data provided by the individual meters or allocators in their apartments would go beyond the objective of energy-saving pursued. Above all, such an allocation rule would be *unfair* and likely to *jeopardise the attainment of that objective* in the long term.

85. *First*, as Toplofikatsia Sofia, EVN, the Lithuanian Government and the Commission pointed out, the various apartments in buildings in co-ownership are not thermally independent. The heat circulates, to a certain extent, between the walls of adjacent apartments, from those in which the temperature is higher to those in which the temperature is lower, so that the consumption of each is affected by the heating behaviour of the others.⁶⁷ Allocation of the heating costs based solely on individual consumption is likely to encourage certain occupants, whose apartments are, for example, situated in the middle of buildings, to turn off their radiators throughout the heating season and to depend exclusively on the heat from their neighbours, which would lead to additional costs for those persons.

86. Furthermore, individual consumption in the apartments depends on their location in the building. In that regard, some apartments are likely to be colder and require more heat to achieve a given temperature than others, of the same size, by reason of their unfavourable location — for example, those which are situated on the top floor, on the first floor above a car park, an entrance hall or other unheated premises, or at the corner of the building, or which are north facing. It would therefore be unfair to allocate the thermal energy consumed in a building in co-ownership only with regard to individual consumption.

87. *Second*, to make the whole of the energy bill depend on individual consumption risks making it more difficult to adopt measures to improve the overall energy efficiency of the building, such as major renovation work, and thus to make significant long-term energy savings. Such measures require, as a general rule, a decision of the general meeting of co-owners. The manner of allocating heating costs among the co-owners has a direct effect on the incentives for each of them to take such a decision and to bear the cost of that work. Allocation based solely, or to too great an extent, on individual consumption will encourage occupants in a favourable energy location — with, for example, an apartment ideally situated in the middle of the building, receiving heat from the adjacent apartments and losing little of it to the outside — not to go down that path, unlike the owners of apartments which are less energy-efficient, who are at risk of being in the minority.⁶⁸

88. As pointed out by the Commission, EVN and Toplofikatsia Sofia, it is therefore normal in the Member States for the heating bill for buildings in co-ownership supplied by a heat network or collective installation to contain a *variable amount*, depending on the actual consumption measured or on the readings of the allocators in the private parts, and a *fixed amount* allocated to each co-owner on the basis of criteria independent of those data. That fixed amount reflects the fact that part of the heating used in the building *does not depend on the individual behaviour of each of its occupants*. That is the case not only for the heat transfers referred to above, but also *for the heat released by the internal installation*, which forms the backdrop to the present cases, (or that used in the common parts).

⁶⁷ According to EVN, the billing information, provided for by the Law on energy, corresponding to the heat released by the internal installation, encompasses not only the losses of the internal installation in the strict sense but also, more generally, heat transfers within the building.

⁶⁸ See Robinson, S. and Vogt, G., *op. cit.*, p. 31. That would also be contrary to the spirit of Article 19(1)(a) of Directive 2012/27, from which it is apparent that the Member States must consider appropriate measures to remove barriers to energy efficiency as regards ‘the split of incentives ... between owners, with a view to ensuring that these parties are not deterred from making efficiency-improving investments that they would otherwise have made by the fact that they will not individually obtain the full benefits or by the absence of rules for dividing the costs and benefits between them, including national rules and measures regulating decision-making processes in multi-owner properties’.

89. In that context, the third subparagraph of Article 9(3) of Directive 2012/27 provides that, for those buildings, the Member States *may* introduce transparent rules on the allocation of the costs of thermal or hot water consumption, to ensure transparency and accuracy of accounting for individual consumption. That provision also states that, *where appropriate*, such rules shall include guidelines on the way to allocate costs for heat and/or hot water that is used as (a) domestic hot water, (b) heat radiated from the building installation and for the purpose of heating the common areas (where staircases and corridors are equipped with radiators) and (c) for the purpose of heating apartments.

90. As is apparent from that provision, the introduction of such rules on allocation is optional.⁶⁹ The Member States are thus free to lay down such rules or to leave the decision as to the level of the fixed amount and the variable amount to the contractual freedom of the co-ownership, or to adopt a general framework allowing such co-ownership leeway.

91. Furthermore, as regards the content of any such rules, as EVN, Toplofikatsia Sofia and the Lithuanian Government have pointed out, Article 9(3) of Directive 2012/27 leaves it to each Member State to decide, provided that the rules adopted are ‘transparent’. The Member States therefore have a large measure of discretion. Accordingly, Bulgaria applied an allocation based on a division between consumption in the private parts, measured with the aid of meters or allocators, and a fixed amount separating the heat in the common parts and that released by the internal installation, allocated according to the heatable volume of each apartment. By contrast, most Member States chose a method consisting of allocating between the co-owners a given percentage of the overall consumption of the building (for example, 30%) on the basis of a criterion such as the volume or surface area of each apartment (without distinction between the heat released in the common parts and that released by the internal installation) while the remaining percentage depends on the readings of the meters or allocators. Those different methods are, in my view, compatible with Directives 2006/32 and 2012/27.⁷⁰

92. Finally, contrary to what Ms Dimitrova seems to think,⁷¹ billing based on actual consumption does not imply that the criteria chosen by the Member States for allocating the fixed amount of the thermal energy bill — in the present case, the costs relating to the heat released by the internal installation — *reflect actual consumption as accurately as possible*. As regards the part of the bill which is not dependent on the readings of the devices located in the private parts, the Member States are, in my view, free to allocate it according to the criterion they deem appropriate, such as the surface area (in m²) of each apartment or its heatable volume (in m³). In other words, the Bulgarian legislature did not have to adopt a criterion reflecting the heat actually released by the internal installation in each apartment — even if that information could technically be measured.⁷²

93. That being so, the attainment of the objective pursued by the rule of allocation on the basis of actual consumption, as provided for in Article 13(2) of Directive 2006/32 and Article 10(1) of Directive 2012/27, means, in my view, that the variable amount may be significant. In fact, that is essential in order to encourage the development of energy-efficient behaviour patterns.

⁶⁹ I note, however, that the recent Directive 2018/2002 makes it compulsory for the Member States to adopt allocation rules (see the new Article 9b(3) of that directive inserted in Directive 2012/27 by that directive).

⁷⁰ The Court has already held that Directive 2012/27 establishes, in general terms, a framework for the reduction of energy consumption, while leaving to the Member States the choice of the means of implementation, and that they have a broad margin of discretion in that regard. See judgment of 7 August 2018, *Saras Energía* (C-561/16, EU:C:2018:633, paragraph 24 and the case-law cited). In my view, the same applies, a fortiori, as regards Directive 2006/32. Different methods of allocating the cost of thermal energy were thus chosen by the Member States according to their own preferences and characteristics. See Castellazzi, L., *Analysis of Member States’ rules for allocating heating, cooling and hot water costs in multi-apartment/purpose buildings supplied from collective systems — Implementation of EED Article 9(3)*, EUR 28630 EN, Luxembourg: Publications Office of the European Union, 2017.

⁷¹ See footnote 53 of this Opinion.

⁷² Furthermore, as Toplofikatsia Sofia submits, the criterion of the heatable volume, used by the Bulgarian legislature, reflects the diffusion of heat.

94. In short, I am of the opinion that those provisions require the Member States to ensure that *one part* of the bill depends on actual consumption, and that that part is sufficient to bring about the behavioural changes sought by those provisions.⁷³

95. It follows from the foregoing considerations that, in my view, the rules laid down by the Law on energy and the District Heating Order comply with the energy metering and billing requirements laid down by Directives 2006/32 and 2012/27. First, as EVN and Toplofikatsia Sofia maintain, the Law on energy provides for the installation of thermal energy meters at the substation of each building and of individual meters or heat cost allocators in each apartment for heating and meters for domestic hot water.⁷⁴ The bills include a variable amount (corresponding to consumption in the private parts) on the basis of the actual consumption of each co-owner, measured by those individual meters or estimated by means of the allocators, and that variable amount is, on average, significant.⁷⁵ Secondly, the Bulgarian legislature has laid down allocation rules which satisfy the requirement of transparency in Article 9(3) of Directive 2012/27: they clearly define the manner in which the energy consumed in the building is determined and the criteria according to which the corresponding costs are allocated among the co-owners.

96. Therefore, I propose that the Court reply to the first question in Case C-708/17 that Article 13(2) of Directive 2006/32 and Article 10(1) and point 1.1 of Annex VII to Directive 2012/27 are to be interpreted as not precluding national legislation which provides that, in buildings in co-ownership supplied by a heat network, one part of the costs of the heating used in the building, corresponding to the heat released by the internal installation for heating and hot water, is allocated between the co-owners according to the heatable volume of their apartments, irrespective of the quantity of that heat actually released in each apartment.

VI. Conclusion

97. In the light of all the foregoing conclusions, I propose that the Court reply as follows to questions referred for a preliminary ruling by the Rayonen sad Asenovgrad (District Court, Asenovgrad, Bulgaria) in Case C-708/17 and by the Sofijski rayonen sad (District Court, Sofia, Bulgaria) in Case C-725/17:

- (1) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council must be interpreted as not precluding national legislation which provides that, in buildings in co-ownership supplied by a heat network, the co-owners are required to contribute to the heating costs of the building, even though they have not individually solicited the district heating supply and even if they do not use it in their apartments.
- (2) Article 13(2) Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, and Article 10(1) and point 1.1 of Annex VII to Directive 2012/27/EU of the European Parliament and Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, must be interpreted as not

⁷³ I would point out that the fact that Directive 2006/32 did not expressly mention the possibility of adopting rules on allocation, contrary to Article 9(3) of Directive 2012/27, does not mean that the interpretation of the first directive must be different from that of the second directive. The objective of the rules relating to billing on the basis of actual consumption is the same in both directives, and the addition by the legislature of the aforementioned Article 9(3) was designed only to clarify the application of those rules.

⁷⁴ See Article 140 of the Law on energy.

⁷⁵ See Article 145(1) of the Law on energy. Toplofikatsia Sofia stated at the hearing that it is apparent from the application of those rules that the fixed amount of the bill varies, in Bulgaria, between 30% and 70%, depending on the characteristics of each building and, in particular, its insulation.

precluding national legislation which provides that, in buildings in co-ownership supplied by a heat network, one part of the costs of the heating used in the building, corresponding to the heat released by the internal installation for heating and hot water, is allocated between the co-owners according to the heatable volume of their apartments, irrespective of the quantity of that heat actually released in each apartment.