



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

21 December 2021 *

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms – Article 1(2) – Contractual terms reflecting mandatory statutory or regulatory provisions – Exclusion from the scope of the directive – Loan repayable in foreign currency – Term reflecting a national provision of a supplementary nature – Effect of non-transposition of Article 1(2) of the directive – Article 3(1) and Article 4(1) – Assessment of the unfairness of a term – Article 8 – Adoption or retention of national provisions ensuring a maximum degree of protection for the consumer – Interaction between these various provisions of Directive 93/13)

In Case C-243/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Polymeles Protodikeio Athinon (Court of First Instance, Athens, Greece), made by decision of 5 May 2020, received at the Court on 5 June 2020, in the proceedings

DP,

SG

v

Trapeza Peiraios AE,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the Sixth Chamber, N. Jääskinen (Rapporteur) and M. Safjan, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DP and SG, by V. Kontogiannis, dikigoros,
- Trapeza Peiraios AE, by S. Spyropoulos, dikigoros,

* Language of the case: Greek.

- the Greek Government, by V. Karra, S. Charitaki and A. Magrippi, acting as Agents,
- the Czech Government, by M. Smolek, J. Vlácil and by S. Šindelková, acting as Agents,
- the European Commission, by N. Ruiz García and A. Katsimerou, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(2), Article 3(1), Article 4(1) and Article 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).
- 2 The request has been made in proceedings between DP and SG, on the one hand, and Trapeza Peiraios AE, on the other, concerning the alleged unfairness of terms contained in riders to a loan agreement denominated in euros, by which the Swiss franc was substituted for the euro.

Legal context

European Union law

- 3 The twelfth and thirteenth recitals of Directive 93/13 state:

‘Whereas, however, as they now stand, national laws allow only partial harmonisation to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive;

Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording “mandatory statutory or regulatory provisions” in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established.’

- 4 Article 1(2) of the directive provides:

‘The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.’

- 5 The Greek language version of Article 1(2) of the directive has a second subparagraph, which reads as follows:

‘The wording “mandatory statutory or regulatory provisions” in Article 1(2) also covers rules which, according to the law, apply between the contracting parties provided that no other arrangements have been established.’

- 6 Article 3(1) of Directive 93/13 provides:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’

- 7 Article 4 of that directive states:

‘1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.’

- 8 Article 8 of the directive provides:

‘Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.’

Greek law

- 9 Article 291 of the Astikos Kodikas (Civil Code) provides:

‘Where a monetary debt owed in a foreign currency is payable in Greece, the debtor shall be entitled, unless agreed otherwise, to repay the debt in local currency on the basis of the current value of the foreign currency at the time and place of payment.’

- 10 Article 2(6) of Law 2251/1994 of 16 November 1994 on consumer protection (FEK A’ 191), which transposed Directive 93/13 into Greek law, provides, in the version of that law which is applicable to the dispute in the main proceedings (‘Law 2251/1994’):

‘General terms of business that cause a significant imbalance in the parties’ rights and obligations to the detriment of the consumer shall be prohibited and shall be invalid. The unfairness of a general term incorporated in a contract shall be assessed taking into account the nature of the goods or services to which the contract relates, the purpose of the contract, all the specific circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 11 The applicants in the main proceedings are two consumers residing in Greece, where they receive income in euros. On 3 September 2004, they entered into a residential property loan agreement with Trapeza Peiraios, a bank established in that Member State, for a term of 30 years. The loan agreement was denominated in euros and subject to a variable interest rate based on the 360-day EURIBOR.
- 12 On 26 March 2007 and 25 June 2007, the parties signed two riders converting the loan agreement, initially denominated in euros, into Swiss francs. Those riders provided, first, that the amount outstanding would be repaid in Swiss francs and, second, that interest would be calculated at a fixed rate for the first three years, and then at a variable rate based on the 360-day Swiss franc LIBOR.
- 13 It is clear from the file available to the Court that clause 4.5 of the later rider provided: ‘The debtor shall repay the loan either in the same currency or with a sum in euros equivalent to the sum in Swiss francs, calculated on the payment date of the instalment on the basis of the exchange rate for the currency concerned quoted on the interbank currency market. That price shall be higher than the current price at which the Bank sells Swiss francs, as quoted in the Bank’s Daily Currency Price Bulletin.’
- 14 Clause 8.1(3) of that rider provided that ‘if notice of termination of the mortgage agreement is given, and aside from any other consequences noted herein, the Bank shall also be entitled (but not obliged) to convert the full outstanding balance into euros on the basis of the Bank’s current selling price for the Swiss franc, as quoted in the Bank’s Daily Currency Price Bulletin, on the date on which the full debt is converted into euros, and to charge on it a default rate calculated at the Bank’s current base rate for mortgages, plus a margin and the contribution payable under Law 128/1975, enhanced by 2.5 percentage points. If a higher default rate is in force, that rate shall apply.’
- 15 On 17 September 2018, the applicants in the main proceedings brought an action against Trapeza Peiraios before the referring court, the Polymeles Protodikeio Athinon (Court of First Instance, Athens, Greece) by which they asked that court, principally, to annul the riders and restore the status quo ante. In support of their claims, they submit, inter alia, that clause 4.5 and clause 8.1(3), referred to above (‘the contested clauses’), were unfair and therefore invalid pursuant to Article 2 of Law 2251/1994. They allege that the bank incited them to amend the loan agreement without informing them of the currency risk, when they did not have the requisite knowledge to appreciate that such a risk existed.
- 16 The referring court observes that the contested clauses essentially restate Article 291 of the Civil Code, which, in the absence of any agreement to the contrary, permits the borrower to repay a debt denominated in a foreign currency, in Greece, either in that currency or in the national currency at the exchange rate as it stands on the date of payment.
- 17 Accordingly, that court wishes to know whether it can review the contested clauses for unfairness, given that Article 1(2) of Directive 93/13 excludes ‘contractual terms which reflect mandatory statutory or regulatory provisions’ from the scope of that directive.

- 18 In addition, the referring court states that Article 1(2) of Directive 93/13, in the Greek language version, removes supplementary statutory or regulatory provisions from the scope of the review for unfairness, and that it was not expressly reproduced in Law 2251/1994, which transposed Directive 93/13 into Greek law.
- 19 In that regard, the referring court states that there have been differences of opinion in the Greek case-law as to whether, in the absence of any provision of national law expressly reflecting the exclusion set out in Article 1(2) of Directive 93/13, the national legislation can be interpreted as transposing that provision, such that a contractual term which merely reproduces a supplementary statutory provision, such as Article 291 of the Civil Code, cannot be reviewed for unfairness.
- 20 It is apparent from the order for reference that, in judgment No 4/2019, the Areios Pagos (Court of Cassation, Greece), sitting in plenary session, held that, although not transposed into Greek law by a specific and express provision, the exclusion provided for in Article 1(2) of Directive 93/13 is nonetheless inherent in Article 2(6) of Law 2251/1994, as that provision must be interpreted in a manner which is consistent with EU law and with the objective of the directive. It was held in that judgment that ‘where the contested clause reflects a mandatory or supplementary provision of national law it is inconceivable, by definition, that the balance between the contracting parties is disturbed or that the term is unfair. Accordingly, there is no question of such a clause falling within the scope of Law 2251/1994.’ The judgment states that this applies to a clause in a real property loan agreement which reflects the content of Article 291 of the Civil Code.
- 21 The order for reference states that that interpretation has not been universally accepted. According to the minority opinion expressed in the Areios Pagos (Court of Cassation), the exclusion provided for in Article 1(2) of Directive 93/13 cannot be regarded as being contained in Article 2(6) of Law 2251/1994, as exclusions from the scope of the review of a term for unfairness must be interpreted strictly. That minority opinion is based on the fact that the directive, as stated in its twelfth recital and in Article 8, effects only partial, minimal harmonisation, leaving it open to Member States to provide for a higher level of consumer protection. On this view, that was the objective pursued by the Greek legislature in choosing, deliberately, not to transpose the exclusion in Article 1(2) of that directive. A contrary interpretation of Article 2(6) of Law 2251/1994 would run counter to the desire of the Greek legislature to provide for a higher level of consumer protection and would constitute an unacceptable *contra legem* interpretation.
- 22 The referring court states that a majority of its own members take that view and consider that the Greek courts can review clauses falling within Article 1(2) of Directive 93/13 for unfairness, given that the Greek legislature did not incorporate the derogation set out in that provision into national law.
- 23 In those circumstances, the Polymeles Protodikeio Athinon (Court of First Instance, Athens) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 8 of [Directive 93/13] which provides that the Member States may adopt more stringent provisions to ensure a greater degree of protection for the consumer, to be interpreted as meaning that a Member State need not transpose Article 1(2) of [Directive 93/13] into national law and may allow judicial review also of terms which reflect statutory or regulatory provisions of mandatory or non-mandatory law?’

- (2) Can the first and second subparagraphs of Article 1(2) of [Directive 93/13], even though not expressly transposed into Greek law, be regarded as having been transposed indirectly together with the content of Article 3(1) and Article 4(1) of that directive, as transposed in Article [2(6)] of Law 225[1]/1994?
- (3) Is the exclusion in the first and second subparagraphs of Article 1(2) of [Directive 93/13] contained in the concept and the scope of unfair terms as defined in Article 3(1) and Article 4(1) of [Directive 93/13]?
- (4) Does review of the unfairness of a general term of business in accordance with the provisions of [Directive 93/13] extend to a term – contained in a credit agreement entered into by a consumer with a credit institution – which reflects the content of a rule of non-mandatory law of the Member State, where the term was not individually negotiated?

Consideration of the questions referred

Admissibility of the request for a preliminary ruling

- 24 Trapeza Peiraios raises a number of grounds on which it argues that the entire request for a preliminary ruling is inadmissible, along with all of the questions referred. In essence, it submits, first, that the request bears no relation to the subject matter of the dispute in the main proceedings and invites the Court to deliver a consultative opinion. Second, it submits that the Areios Pagos (Court of Cassation) has settled the internal difference of judicial opinion mentioned in that request, that the Court has no jurisdiction to rule on the interpretation of provisions of national law, and that the applicants in the main proceedings rely only on provisions of national law. Third, it submits that some of the referring court's questions are imprecise or even incomprehensible.
- 25 In that regard, it follows from settled case-law of the Court that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, which enjoy a presumption of relevance. Therefore, in so far as a question referred concerns the interpretation or validity of a rule of Union law, the Court is, in principle, required to give a ruling, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action, it is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it (judgment of 2 September 2021, *OTP Jelzálogbank and Others*, C-932/19, EU:C:2021:673, paragraph 26 and the case-law cited).
- 26 It is also common ground that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to interpret and apply national law, while the Court is empowered only to give rulings on the interpretation or the validity of an EU provision on the basis of the facts which the national court or tribunal puts before it (see, to that effect, judgments of 29 April 2021, *Bank BPH*, C-19/20, EU:C:2021:341, paragraph 37 and the case-law cited, and of 10 June 2021, *Ultimo Portfolio Investment (Luxembourg)*, C-303/20, EU:C:2021:479, paragraph 25 and the case-law cited).

- 27 In the present case, the referring court is unsure as to the meaning and scope of a number of provisions of EU law, so that it can review the contested clauses for unfairness in accordance with Directive 93/13. It asks the Court to interpret Article 1(2), Article 3(1), Article 4(1) and Article 8 of that directive, while indicating that Law 2251/1994, which is more specifically relied on by the applicants in the main proceedings, is intended to transpose that directive into the Greek legal system. Furthermore, the referring court has explained, with sufficient clarity and precision, the factual background to the dispute in the main proceedings and the relevant legal framework, and it is apparent from its explanation that it is not the case either that the questions referred bear no relation to the facts of the main action, or that they are hypothetical.
- 28 It follows that the request for a preliminary ruling is admissible.

Substance

The fourth question referred

- 29 By its fourth question, which should be examined first, the referring court asks, in essence, whether Article 1(2) of Directive 93/13 is to be interpreted as excluding, from the scope of that directive, a term in a contract between a seller or supplier and a consumer which reflects a legislative or regulatory provision of a supplementary nature – in other words one which applies by default, in the absence of any other arrangement between the parties – even if that clause has not been individually negotiated.
- 30 In that connection, it should be observed that Article 1(2) of Directive 93/13 excludes from the scope of that directive contractual terms which reflect ‘mandatory statutory or regulatory provisions’, an expression which, in the light of the thirteenth recital of that directive, encompasses both provisions of national law which apply between contracting parties irrespective of their choice and those which are supplementary in nature, that is to say, which apply by default, in the absence of other arrangements established by the parties (judgment of 2 September 2021, *OTP Jelzálogbank and Others*, C-932/19, EU:C:2021:673, paragraph 28 and the case-law cited).
- 31 It should be stated, in that regard, that the Greek language version of Directive 93/13 is the only one in which Article 1(2) contains a second subparagraph, in terms corresponding to the end of the thirteenth recital, according to which the wording ‘mandatory statutory or regulatory provisions’ in Article 1(2) ‘also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established’.
- 32 However, according to the settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 33 and the case-law cited).

- 33 As regards the general scheme of Directive 93/13, the Court has held that Article 1(2) of that directive must be interpreted as meaning that a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect falls outside the scope of that directive (judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 37).
- 34 In that regard, the Court has stated that the fact that a contractual term reflecting one of the provisions referred to in Article 1(2) of Directive 93/13 has not been individually negotiated has no bearing on whether it is excluded from the scope of the directive. In accordance with Article 3(1) of Directive 93/13, the fact that a term has not been individually negotiated is a condition for reviewing whether the term is unfair, and that review cannot be carried out if the contractual term falls outside the scope of the directive (judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 36).
- 35 As regards the purpose of Directive 93/13, the Court has repeatedly held that the exclusion from the scope of that directive in Article 1(2) of that directive is justified by the fact that it is legitimate, in principle, to presume that the national legislature has struck a balance between all of the rights and obligations of the parties to certain contracts, a balance which the EU legislature has expressly intended to preserve (judgment of 10 June 2021, *Prima banka Slovensko*, C-192/20, EU:C:2021:480, paragraph 32 and the case-law cited). Moreover, the Court has stated that the fact that the national legislature has struck such a balance does not constitute a condition for the application of the exclusion in Article 1(2) of Directive 93/13, but the justification for such an exclusion (see, to that effect, judgment of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 27, and Order of 14 October 2021, *NSV and NM*, C-87/21, not published, EU:C:2021:860, paragraph 31).
- 36 It follows from the considerations set out in paragraphs 33 to 35 that it is not open to the national courts to review for unfairness, pursuant to Directive 93/13, a term in a contract between a seller or supplier and a consumer, even if that clause has not been individually negotiated, if it reflects a legislative or regulatory provision which is ‘mandatory’ within the meaning of Article 1(2) thereof, that concept not being limited to provisions which apply between the contracting parties regardless of their intentions, but extending to provisions which are supplementary in nature, or in other words, which apply by default, in the absence of any other arrangement between the parties, in accordance with the case-law referred to in paragraph 30 of the present judgment.
- 37 It is for the national court, before which the case has been brought, to determine whether the clause in question falls within Article 1(2) of Directive 93/13 in the light of the criteria which have been identified by the Court, or in other words having regard to the nature, general scheme and stipulations of the of loan agreements in question, as well as their legal and factual background, while bearing in mind that, given the objective of consumer protection pursued by that directive, the exception provided for in Article 1(2) is to be interpreted strictly (see, to that effect, judgment of 20 September 2017, *Andriiciuc and Others*, C-186/16, EU:C:2017:703, paragraphs 30 and 31).
- 38 In the present case, the referring court considers that the contested clauses, which do not appear to have been negotiated between the parties to the loan agreement in question, reproduce the content of Article 291 of the Civil Code, which the referring court describes as a supplementary statutory provision.

- 39 However, it must be observed that it is incumbent on that court to examine, applying the criteria set out in paragraph 37 of the present judgment, whether all of the contested clauses before it genuinely reflect provisions of national law which are mandatory, within the meaning of Article 1(2) of Directive 93/13, bearing in mind that those contested clauses which do not fall within that category may not be excluded from the application of the directive on that basis. The fact that some terms which reflect statutory provisions fall outside the scope of Directive 93/13 does not mean that the validity of other terms, which are included in the same contract and are not covered by statutory provisions, may not be assessed by the national court in the light of that directive (judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 66).
- 40 In the light of the foregoing, the answer to the fourth question is that Article 1(2) of Directive 93/13 must be interpreted as excluding from the scope of that directive a clause inserted into a contract between a seller or supplier and a consumer which reflects a national legislative or regulatory provision of a supplementary nature – in other words one which applies by default, in the absence of any other arrangement between the parties – even if that clause has not been individually negotiated.

The second and third questions referred

- 41 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(2) of Directive 93/13 is to be interpreted as meaning that the courts of a Member State are required to exclude the clauses referred to in that provision from the scope of the directive, even if Article 1(2) of the directive has not been formally transposed into that State's legal system, and, in such circumstances, whether it is open to those courts to hold that Article 1(2) of the directive has been indirectly incorporated into national law through the transposition of Article 3(1) and Article 4(1) thereof.
- 42 That question is based on the premiss that, Article 1(2) of Directive 93/13 not having been expressly reproduced in the transposing Greek legislation, the Areios Pagos (Court of Cassation) has held, interpreting national law in a manner consistent with the directive, that the exclusion from its scope provided for in Article 1(2) is present by implication in that legislation, as that exclusion is inherent in Article 2(6) of Law 2251/1994, which transposes Article 3(1) and Article 4(1) of the directive.
- 43 First, regarding the consequences of the non-transposition of Article 1(2) of Directive 93/13 into domestic law, it should be observed that the provisions of that directive are only applicable to situations which are not excluded from its scope, by virtue in particular of the exclusion instituted by Article 1(2), where the conditions set out in that provision are met (see, to that effect, judgments of 26 March 2020, *Mikrokasa and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty*, C-779/18, EU:C:2020:236, paragraph 50, and of 9 July 2020, *Banca Transilvania*, C-81/19, EU:C:2020:532, paragraph 23 and the case-law cited).
- 44 Second, it must be observed that Article 1(2) of Directive 93/13 excludes the terms it covers from the scope of that directive, in particular terms reflecting mandatory statutory or regulatory provisions. Consequently, notwithstanding that Article 1(2) thereof may not have been transposed into the legal system of a Member State, EU law does not provide for the conformity of such contractual terms, and indirectly that of the mandatory national provisions they reflect, to be reviewed in the light of the requirements of that directive.

- 45 Such non-transposition cannot alter the scope of Directive 93/13, which must, in principle, be the same in all the Member States, subject to the adjustments permitted by EU law. In that regard, it must be recalled that it remains open to the Member States, in particular, to apply the provisions of that directive, as rules of national law, to situations which do not fall within the scope of the directive, provided that this is compatible with the objectives pursued by the directive and with the Treaties (see, to that effect, judgment of 2 April 2020, *Condominio di Milano, via Meda*, C-329/19, EU:C:2020:263, paragraphs 32 to 38).
- 46 Finally, bearing in mind the background to the main proceedings, as described in paragraphs 18 to 22 and 42 of the present judgment, it is necessary to consider whether, where Article 1(2) of Directive 93/13 has not been expressly transposed into the legal system of a Member State through the adoption of an express and specific legal provision to that effect, the courts of that State may – or must – hold that that provision has been impliedly transposed through the adoption of the national provisions transposing Article 3(1) and Article 4(1) of that directive.
- 47 In that regard, it must be observed that Article 1(2) of Directive 93/13 limits the scope of the system of protection against unfair terms instituted by that directive, while Articles 3 and 4 relate respectively to the concept of unfair terms and the scope of the assessment of whether such a clause is unfair, within the framework of the directive.
- 48 Furthermore, as the Court has held, any instrument of EU law is applicable to a given situation only to the extent that it falls within the scope of that instrument (Orders of 14 April 2021, *Credit Europe Ipotecar IFN and Credit Europe Bank*, C-364/19, EU:C:2021:306, paragraph 32 and the case-law cited, and of 14 October 2021, *NSV and NM*, C-87/21, not published, EU:C:2021:860, paragraph 37). In addition, it is clear from the very structure of Directive 93/13 that any assessment of whether of a term is unfair in the light of the provisions of that directive, and in particular of Articles 3 and 4 thereof, requires establishing, at the outset, whether the term concerned falls within the scope of that directive, especially in the light of the exclusion set out in Article 1(2) of that directive (see, to that effect, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-609/19, EU:C:2021:469, paragraphs 23 and 26, and Orders of 14 April 2021, *Credit Europe Ipotecar IFN and Credit Europe Bank*, C-364/19, EU:C:2021:306, paragraph 33, and of 14 October 2021, *NSV and NM*, C-87/21, not published, EU:C:2021:860, paragraph 38).
- 49 Accordingly, where Article 1(2) of Directive 93/13, the purpose of which is to define the scope of that directive, has not been formally transposed, by means of an express and specific legal provision, into the legal system of a Member State, it is not open to the courts of that Member State to hold that that provision has been indirectly incorporated through the transposition of Article 3(1) and Article 4(1) of that directive, the purpose of which is different.
- 50 In the light of the foregoing considerations, the answer to the second and third questions is that Article 1(2) of Directive 93/13 must be interpreted as meaning that the terms referred to in that provision are excluded from the scope of that directive, even if the provision has not been formally transposed into the legal system of a Member State, and, in such circumstances, the courts of that Member State may not hold that Article 1(2) of the directive has been indirectly incorporated into national law through the transposition of Article 3(1) and Article 4(1) thereof.

The first question referred

- 51 By its first question, the referring court asks, in essence, whether Article 8 of Directive 93/13 is to be interpreted as not precluding the adoption or retention of provisions of domestic law which have the effect of applying the system of consumer protection provided for by that directive to the terms referred to in Article 1(2) thereof.
- 52 As a preliminary remark, it must be observed that the referring court and the applicants in the main proceedings appear to agree that the non-transposition into Greek law, by Law 2251/1994, of the exclusion provided for by Article 1(2) of Directive 93/13 impliedly pursues, on the basis of Article 8 of that directive, the objective of increasing the level of consumer protection by comparison with that guaranteed by the directive. However, in their written observations, Trapeza Peiraios and the Greek government deny that that was the intention of the national legislature.
- 53 In that regard, it must be held that, in accordance with settled case-law, the Court must take into account, under the division of jurisdiction between the Courts of the European Union and national courts, the factual and legal context, as set out in the order for reference, of the questions referred for a preliminary ruling, which means that a reference for a preliminary ruling cannot be examined in the light of the interpretation of national law relied on by the government of a Member State or a party to the main proceedings (see, to that effect, judgment of 15 April 2021, *État belge (Circumstances subsequent to a transfer decision)*, C-194/19, EU:C:2021:270, paragraph 26 and the case-law cited).
- 54 That having been said, it must be reiterated that, according to the twelfth recital of Directive 93/13, that directive provides for only partial minimum harmonisation of national laws on unfair terms, leaving Member States the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of that directive. In addition, under Article 8 of the directive, Member States may adopt or retain the most stringent provisions compatible with the FEU Treaty in the area covered by that directive, to ensure a maximum degree of protection for the consumer (see, to that effect, judgments of 2 April 2020, *Condominio di Milano, via Meda*, C-329/19, EU:C:2020:263, paragraph 33, and of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 84).
- 55 It is clear from the wording of Article 8 of Directive 93/13 that the option left open to the Member States under that provision, of increasing the level of consumer protection, is available ‘in the area covered by [that] Directive’, which covers potentially unfair terms in contracts between sellers or suppliers and consumers.
- 56 As to Article 1(2) of Directive 93/13, read in the light of the thirteenth recital of that directive, it excludes certain terms in consumer contracts from the scope of the directive, particularly terms reflecting mandatory legislative or regulatory provisions.
- 57 Article 1(2) of Directive 93/13 does not interfere with the option available to the Member States, as set out in the twelfth recital and in Article 8 of the directive, to afford consumers a higher level of protection through national provisions that are more stringent than those of the directive, having due regard for the FEU Treaty.

- 58 Furthermore, in the judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C-484/08, EU:C:2010:309, paragraphs 30 to 35, 40 and 43), which concerned the relationship between the option provided for by Article 8 and the exception from the mechanism for substantive review of unfair terms established by Article 4(2) of Directive 93/13, the Court, after observing that the terms referred to in Article 4(2) come within the area covered by Directive 93/13 and that, consequently, Article 8 of that directive applies equally to Article 4(2), held that those provisions did not preclude national legislation which authorises a judicial review as to the unfairness of such terms and affords consumers a higher level of protection than is provided for by the directive.
- 59 Subsequently, the Court has reiterated that the terms referred to in Article 4(2) of Directive 93/13 are not subject to review for unfairness, but do come within the area covered by that directive, for the purposes of Article 8 thereof (see, to that effect, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282, paragraph 41), and that a provision of national law, which confers a stricter scope on the exception laid down in Article 4(2) of Directive 93/13, contributes to the objective of consumer protection pursued by that directive (judgment of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19, EU:C:2020:631, paragraph 85).
- 60 However, there is a difference between Article 1(2) of Directive 93/13, which excludes one category of contractual terms from the scope *ratione materiae* of that directive, and Article 4(2) thereof, which does not fix its scope *ratione materiae*, but excludes a second category of contractual terms – which do come within the scope of the directive – from review for unfairness (see, to that effect, judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 32).
- 61 It must therefore be held that the clauses referred to in Article 1(2) of Directive 93/13 do not come within the area covered by that directive and that, consequently Article 8 of the directive does not apply to Article 1(2) thereof.
- 62 That having been stated, it is important nonetheless to observe that, as indicated in paragraph 45 above, the Member States may apply provisions of the directive to situations which do not fall within its scope, provided that this is compatible with the objectives pursued by the directive and with the Treaties (see, to that effect, judgment of 2 April 2020, *Condominio di Milano, via Meda*, C-329/19, EU:C:2020:263, paragraph 37).
- 63 Consequently, the answer to the first question is that Article 8 of Directive 93/13 is to be interpreted as not precluding the adoption or retention of provisions of domestic law which have the effect of applying the system of consumer protection provided for by that directive to the terms referred to in Article 1(2) thereof.

Costs

- 64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

- 1. Article 1(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as excluding from the scope of that directive a term in a contract between a seller or supplier and a consumer which reflects a national legislative or regulatory provision of a supplementary nature – in other words one which applies by default, in the absence of any other arrangement between the parties – even if that clause has not been individually negotiated.**
- 2. Article 1(2) of Directive 93/13 must be interpreted as meaning that the terms referred to in that provision are excluded from the scope of that directive, even if the provision has not been formally transposed into the legal system of a Member State, and, in such circumstances, the courts of that Member State may not hold that Article 1(2) of the directive has been indirectly incorporated into national law through the transposition of Article 3(1) and Article 4(1) thereof.**
- 3. Article 8 of Directive 93/13 must be interpreted as not precluding the adoption or retention of provisions of domestic law which have the effect of applying the system of consumer protection provided for by that directive to the terms referred to in Article 1(2) thereof.**

[Signatures]