Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 15 November 2018 [1]

Case C-590/17

Henri Pouvin
Marie Dijoux
v
Electricité de France (EDF)

(Request for a preliminary ruling from the Cour de cassation (France))

(Reference for a preliminary ruling — Directive 93/13/EEC — Unfair terms in consumer contracts concluded between a seller or supplier and a consumer — Notion of 'seller or supplier' — Notion of 'consumer' — Loan agreement concluded between an employer and an employee and his spouse for the purchase of their home)

I. Introduction

1. Mr Pouvin and Ms Dijoux entered into a mortgage loan agreement with Electricité de France (EDF), Mr Pouvin's employer. The loan agreement contained an automatic termination clause: if the borrower ceased to be an employee of that company, the loan became immediately repayable.

2. After Mr Pouvin left the company, EDF sued to obtain repayment of the loan. Mr Pouvin and Ms Dijoux counter-argued that in view of the national rules transposing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [2] the automatic termination clause was unfair. EDF, however, considers that Directive 93/13 does not apply since it cannot be considered as a 'seller or supplier' within the meaning of that directive.

3. Who is a 'seller or supplier'? Although the notions of 'seller or supplier', as well as that of 'consumer', have been interpreted by this Court on a number of occasions, the present case raises another unexplored dimension relating to those notions: whether a company, when providing loans to its employees (or, for that matter, other services) which are not connected to its main sphere of professional competence, is acting as a 'seller or supplier', and whether its employees can be considered to be 'consumers' in such a situation.

1 Original language: English.

2 OJ 1993 L 95, p. 29.

II. Legal framework

4. The 10th recital of Directive 93/13 states: 'Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements must be excluded from this Directive.'

5. According to Article 1(1) of Directive 93/13: 'The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.'

6. Article 2 of Directive 93/13 contains the following definitions:

'…

(b) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(c) "seller or supplier" means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.'

7. According to Article 3(1) of the directive, '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'.

III. Facts, proceedings and questions referred

8. In April 1995, EDF granted a loan to Mr Pouvin and to his wife, Ms Dijoux ('the Appellants'). At the time, Mr Pouvin was an employee of the company. The loan, granted in order to finance the purchase of their home, was for EUR 57 625.73, to be repaid in 240 monthly instalments over two 10-year amortisation periods, at the respective interest rates of 4.75% and 8.75%. It was granted under a scheme providing assistance for the purchase of a home governed at national level by Loi No 79-596 du 13 juillet 1979 relative à l'information et à la protection des emprunteurs dans le domaine immobilier (Law No 79-596 of 13 July 1979 on the provision of information and protection for borrowers in the housing sector).

9. Article 7 of the loan agreement provided for the automatic termination of the agreement on the date on which the borrower, for whatever reason, ceased to be a member of EDF's workforce (the automatic termination clause). As a result, in the event of termination of the employment contract, the capital that has been lent becomes immediately repayable, even if the borrower has complied with all the obligations that are incumbent on him.

10. On 1 January 2002, Mr Pouvin resigned from the company. The Appellants then stopped paying the loan instalments.

11. On 5 April 2012, EDF brought a claim against the Appellants before the tribunal de grande instance de Saint-Pierre de la Réunion (Regional Court, Saint-Pierre, Réunion, France) for payment of the sum of EUR 50 238.37 corresponding to the outstanding capital, the interest as from 1 January 2002, and the sum of EUR 3 517 pursuant to the contractual penalty clause.

12. In its judgment of 29 March 2013, that court declared that the automatic termination clause was an unfair clause. It rejected EDF's application for a declaration that the contract had terminated automatically. It did however declare that the loan agreement was to be terminated because the Appellants had defaulted on the repayment of instalments.

13. In a judgment of 12 September 2014, the cour d'appel de Saint-Denis de la Réunion (Court of Appeal, Saint-Denis, Réunion, France) set aside the judgment of 29 March 2013. That court found that the loan had been granted by EDF in its capacity as an employer only, and not as a 'seller or supplier'. The fact that EDF has a department which administers the granting of loans to employees is, according to that judgment, irrelevant. Notwithstanding that finding, that court also found that the automatic termination clause was neither invalid nor unfair, as it forms part of an agreement which entails advantages for the employee which counterbalance the automatic termination clause. Thus, that court ruled that the automatic termination of the agreement had taken effect on 1 January 2002. It ordered the Appellants to pay EDF the sum of EUR 50 238.37, with accrued interest at the rate of 6% per annum from 1 January 2002, after deduction of the sums previously paid, plus the sum of EUR 3 517 pursuant to the penalty clause, together with statutory interest from that same date.

14. The Appellants appealed against that judgment before the Cour de cassation (Court of Cassation, France), the referring court. Considering that the solution of the dispute depends on the interpretation of Directive 93/13, that court stayed the proceedings and referred the following questions to the Court of Justice:

'(1) Is Article 2 of [Directive 93/13] to be interpreted as meaning that a company such as EDF, where it grants an employee a mortgage loan covered by the scheme providing assistance for the purchase of a home, for which only members of the staff of that company are eligible, is acting as a seller or supplier?

(2) Is Article 2 of [Directive 93/13] to be interpreted as meaning that a company such as EDF, where it grants such a mortgage loan to the spouse of an employee who is not a member of the staff of that company but is jointly and severally liable as co-borrower, is acting as a seller or supplier?

(3) Is Article 2 of [Directive 93/13] to be interpreted as meaning that an employee of a company such as EDF who enters into an agreement with the company for such a loan is acting as a consumer?

(4) Is Article 2 of [Directive 93/13] to be interpreted as meaning that the spouse of such an employee who enters into the same loan, not as an employee of the company but as a jointly and severally liable co-borrower, is acting as a consumer?'

15. Written submissions were lodged by the Appellants, EDF, the Greek and French Governments and the European Commission. Those interested parties, with the exception of the Appellants, also presented oral argument at the hearing held on 12 September 2018.

IV. Assessment

16. By its four questions, the Cour de cassation (Court of Cassation) wishes to know whether, where an employer such as EDF grants an employee, together with his spouse (who is not an employee), a mortgage loan for the purchase of a property which is their main dwelling, the company may be categorised as a 'seller or supplier' and the Appellants as 'consumers' within the meaning of Article 2(b) and (c) of Directive 93/13.

17. In answering that question, I will first examine in general the notions of 'seller or supplier' and 'consumer', and thus also the scope of application of Directive 93/13 (A). I will then address Questions 1 and 2 together: can EDF be considered as a 'seller or supplier' in the circumstances of the present case (B)? Finally, I will turn to Questions 3 and 4: can the Appellants be regarded as 'consumers' in the sense of the directive (C)?

A. The notions of 'consumer' and 'seller or supplier'

18. It should be stressed at the outset that Directive 93/13 does not define its scope of application by a list of the *types of contract* or *subject matter* to be covered by such contracts. Instead, the scope of that directive can be inferred from Article 1(1) thereof: it applies to 'contracts concluded between a seller or supplier and a consumer'. The concepts of 'seller or supplier' and of 'consumer' are, in turn, defined in Article 2(b) and (c), by reference to whether a person is acting for purposes relating to, or outside, their trade, business or profession. [3] Thus, Directive 93/13 defines the contracts to which it applies by reference to the *capacity in which the contracting parties are acting*.

19. It should also be highlighted that the present case is concerned with that first stage: the referring court has asked whether the parties to the loan agreement at issue can be regarded, respectively, as 'consumers' and as a 'seller or supplier' in the sense of Directive 93/13, thus rendering the directive applicable. The questions therefore exclusively concern the assessment of the capacities in which the Appellants and EDF have acted, according to the definition laid down in Article 2(b) and (c) of the directive. Conversely, the case before this Court does not concern the assessment of the (un)fairness of the individual contract term in the context of the loan agreement. That is a matter for a substantive assessment on the merits under Article 3 of the directive.

20. With that initial clarification in mind, a number of guidelines to that assessment can be inferred from the extant case-law of the Court.

21. First, the assessment of the scope of application of Directive 93/13, through the concepts of 'consumer' and 'seller or supplier', relies on a *functional* criterion. This means that the concepts of 'seller or supplier' and of 'consumer' must be assessed on the basis of whether a contractual relationship has arisen in the course of activities 'relating to' or 'outside' a trade, business or profession. [4]

22. Second, the assessment must be carried out *in concreto*, bearing in mind the capacity in which the parties have acted in a given contract. That is to say, the status of 'consumer' and 'seller or supplier' is not fixed: the same person can be qualified as one of the former, the other, or neither, depending on the specific contractual context. [5] As the Court has already confirmed, this implies that the analysis must necessarily be undertaken on a case-by-case basis. [6]

3 Judgments of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 30), and of 15 January 2015, *Šiba* (C-537/13, EU:C:2015:14, paragraph 21).

4 See, to that effect, judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraph 55). See also orders of 19 November 2015, *Tarcău*, (C-74/15, EU:C:2015:772, paragraph 27); of 14 September 2016, *Dumitraș* (C-534/15, EU:C:2016:700, paragraph 32); and of 27 April 2017, *Bachman* (C-535/16, not published, EU:C:2017:321, paragraph 36).

5 Judgment of 3 September 2015, *Costea* (C-110/14, EU:C:2015:538, paragraph 20).

6 See, by analogy, judgment of 4 October 2018, *Kamenova* (C-105/17, EU:C:2018:808, paragraph 37). See also judgment of 3 September 2015, *Costea* (C-110/14, EU:C:2015:538, paragraphs 22 and 23).

23. Third, the notions of 'consumer' and 'seller or supplier' must be assessed in an *objective* manner. Whether a person can be classified as a 'consumer' or as a 'seller or supplier' in a given contractual relationship must be considered by means of an objective, generalised assessment of the functional criterion previously stated.[7] In other words, whether or not a person is actually uninformed or has in fact a greater level of knowledge, economic power, specialisation or is better prepared should not influence the analysis of whether a contracting party is acting for purposes relating to, or outside, his business, trade or profession in the sense of Article 2(b) and (c) of Directive 93/13.[8]

24. With those general points in mind, what then is the criterion exactly? In the course of the proceedings before this Court, the parties that have made submissions raised a number of considerations which, to my mind, are not entirely relevant for the decision as to the capacity in which each party entered into a contract. For instance, the Appellants argued that EDF has a *specialised department*. This would demonstrate that EDF acts as a seller or supplier, because it has specialised knowledge and an organisational structure. Moreover, EDF *regularly* engages in negotiations on this kind of contract. The Greek and French Governments have also submitted that the existence of a specialised service within the structure of EDF demonstrates that the Appellants are in a *situation of inferiority* in terms of information and bargaining power. Both governments, as well as the Commission, have recalled the case-law of the Court according to which the consequences of the *inequality between the parties* are aggravated when the contract at issue relates to an essential need of the consumer. In this case, that concerns the acquisition of a place of residence (namely to obtain lodging), and involves sums which represent one of the most significant items in the consumer's budget, while, from a legal perspective, the contract, as a general rule, is covered by complex national rules, about which individuals are often poorly informed.[9]

25. In my view, it might be useful to recall the difference between three distinct sets of considerations: (i) the criteria for delimiting the scope of the directive (in what capacity did the parties enter into a contract?); (ii) the criteria appertaining to the substantive assessment of fairness of contract terms (is a given contractual term in that contract unfair?); and (iii) the underlying reasons for which the protection of the directive was put in place (what were the problems that needed to be addressed?).

26. Starting with point (iii), the underlying rationale for the protection provided for by Directive 93/13 presupposes that, in relation to the 'seller or supplier', the consumer 'is in a weaker position, in that *he must be deemed* to be less informed, economically weaker and legally less experienced than the other party to the contract'.[10] This reflects the idea on which the entire system of the directive is based: it aims at implementing a protective system based on the assumption that 'the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge'.[11] In general terms, this 'leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms'.[12]

27. The submissions in this case, which relate to the inequality between the parties and the inferiority of the Appellants in terms of information and bargaining power, demonstrate that the results obtained from applying the criteria mentioned above fit with the protective aim of Directive 93/13. Similarly, considerations regarding the existence of a specialised department and the regularity with which contracts are concluded confirm the situation of superiority that the directive presupposes of those persons fulfilling the functional and objective criterion of the definition of Article 2(c) of the directive.

7 See, with regard to the notion of 'consumer', judgment of 3 September 2015, *Costea* (C-110/14, EU:C:2015:538, paragraph 21). See also orders of 19 November 2015, *Tarcău* (C-74/15, EU:C:2015:772, paragraph 27); of 14 September 2016, *Dumitraș* (C-534/15, EU:C:2016:700, paragraph 36); and of 27 April 2017, *Bachman* (C-535/16, not published, EU:C:2017:321, paragraph 36).

8 If that were the case, then consumer protection law could be turned into a shield for the protection of incompetent legal departments of large companies, as well as into a sword, chopping away legal protection from consumers who happen to be more informed or sharp than others.

9 Those considerations emanate from a judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 32).

10 Judgmentof 4 October 2018, *Kamenova* (C-105/17, EU:C:2018:808, paragraph 34). Emphasis added.

11 Judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 31).

12 Judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 31).

28. However, that broader underlying rationale is not a criterion that would have to be fulfilled in each individual case. Such considerations are therefore not decisive, per se, in order to assess whether EDF has acted a 'seller or supplier', that is, for purposes relating to, or outside, his business, trade or profession.

29. Indeed, the determination of the applicability of Directive 93/13 does not depend on a relative balancing exercise of the positions of the parties in terms of knowledge, specialisation or economic power. The EU legislature has already embedded that balancing exercise in the legislation. It has done so by including *a generalisation*: those who act outside their business, trade, or profession usually possess a lower level of knowledge and, more importantly, their bargaining power is weaker where contractual terms are drawn up in advance by the seller or supplier, as they are unable to influence their content. The broad definition of both the notions of 'seller or supplier' and of 'consumer', based on functional and objective criteria, is indeed connected with this protective aim. It is not, however, a condition for defining who is a seller or supplier on the one hand and a consumer on the other.

30. Turning to the considerations pertaining to point (ii): whether there is a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer, as well as, for that matter, the presence of any of the terms listed in the Annex to Directive 93/13, are issues relating to the substantive assessment of the fairness of a contract. Again, they do not, certainly not directly, relate to the capacity of the parties entering a contract.

31. Thus, the only determining criterion for deciding whether or not there is a consumer contract, a point outlined above under (i), consists, quite simply, of two cumulative conditions.[13] These are (a) whether there is a contract, and (b) whether it has been entered into by one party for purposes which are *outside* his business, trade, or profession (the consumer), and by another party that is acting *for purposes relating to* his trade, business, or profession (seller or supplier).

32. The assessment of whether someone is acting for purposes relating to, or outside, his business, trade, or profession requires verification of all the relevant facts and circumstances.[14] It is in this connection that the Court has recently listed, in its judgment in *Kamenova*, a number of indicative criteria that may prove relevant to discern whether a *physical* person selling goods on the internet may be regarded as a 'seller or supplier' in the context of Directive 2005/29/EC and of Directive 2011/83/EU.[15] The Court has listed no less than nine considerations. Factors such as organisation, intention to make a profit, expertise or regularity of the activity may be included amongst some of the indicative (but not exclusive or exhaustive) criteria to determine whether a person can be regarded as a 'trader', which is defined in those directives in similar terms to the notion of 'seller or supplier' in Directive 93/13.[16]

13 If viewed from the perspective of (the assessment of) individual contract terms, it could be said that 'Directive 93/13 applies, as is clear from Article 1(1) and Article 3(1), to the terms of "contracts concluded between a seller or supplier and a consumer which have not been individually negotiated"' (as the Court has stated for example in the judgment of 15 January 2015, *Šiba* (C-537/13, EU:C:2015:14, paragraph 19) or of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraph 45)). However, whether the condition that a contractual term has not been individually negotiated constitutes a third condition for the applicability of the *entire* directive and all of its provisions, or whether it is rather a *specific* condition of applicability and (substantive) assessment under its Article 3, could also be open to debate.

14 See, by analogy, judgment of 4 October 2018, *Kamenova* (C-105/17, EU:C:2018:808, paragraph 37).

15 Article 2(b) of 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); Article 2(2) of Directive 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 (OJ 2011 L 304, p. 64).

16 See judgment of 4 October 2018, *Kamenova* (C-105/17, EU:C:2018:808, paragraphs 38 and 39). See also, Opinion of Advocate General Szpunar in *Kamenova* (C-105/17, EU:C:2018:378, points 50 to 52).

33. It should perhaps be underlined, as the Court did in the paragraph preceding that list, that those elements might be useful for assessing the capacity or status of 'seller or supplier' of a natural person acting in the (still relatively novel) world of the online marketplace. That list should nonetheless not be understood as a type of a checklist that would indeed need to be verified.

34. The present case is however somewhat different since it concerns a *legal* person who is, as I will explain in Section B of the present Opinion, in effect acting for purposes relating to its business. In such a situation, the elements mentioned above could, if anything, have confirmatory value, but are certainly not decisive. Lack of expertise, specialisation or organisation does not necessarily rule out the status of 'seller or supplier'.[17] The same is true with regard to the recurrence or regularity of the activity in which the contract ascribes itself. Equally, how much profit (if any) is gained by a contract may also be of limited relevance: there are transactions that may not seek, on the one hand, the achievement of immediate profit, but that does not mean, on the other, that they do not follow a business purpose in the longer run.

35. It is these considerations, assessed in the specific context of the present case, to which I now turn.

B. Whether EDF is a 'seller or supplier'

36. All the parties that submitted observations, with the exception of EDF, agree that EDF has acted, for the purposes of the contract at issue, as a 'seller or supplier' in the sense of Directive 93/13.

37. EDF maintains that it does not have the status of 'seller or supplier' with regard to the loan agreement concerned. It did not enter that particular contract in a professional capacity. Granting loans does not come within the sphere of its professional competence. EDF is not a bank. It only grants loans for the benefit of its employees, as part of its social policy.

38. This argument relies on three elements: (1) the loan agreement does not come within the scope of professional competence of EDF; (2) the contract is linked to an employment contract; and (3) the contract is part of a policy EDF has to assist its employees. In this part, I shall address those three elements in turn.

1. The realm of professional competence of a 'seller or supplier'

39. In EDF's view, a person can be considered to be a 'seller or supplier' only within the specific field of activity that corresponds to its realm of professional competence. EDF's business is the production and provision of energy. It cannot therefore be considered to be a professional in the field of credit services. Similarly, EDF suggested that the fact that a company has a canteen for its employees does not render it a 'seller or supplier' in the restaurant industry.

40. Such an approach to the interpretation of the notion of 'seller or supplier' appears to be quite restrictive. It would effectively mean replacing the present wording of Article 2(c) of Directive 93/13, namely 'acting *for purposes* relating to [someone's] business, trade or profession', with something along the lines of 'acting exclusively within someone's professional competence'. I find little support for such a reading in the text, context and purpose of the directive, as well as the extant case-law of this Court.

17 See already above, point 23 and footnote 8.

41. Starting with that case-law, it might be recalled that this Court has already held that ancillary services or activities carried out on the side that facilitate or are conducive to the main or principal activity may also be covered under the notion of acts performed for purposes relating to a business, trade or profession. The judgment in *Karel de Grote* has confirmed that complementary or ancillary activities carried out in connection with a main activity can themselves also be considered as included in the concept of 'business, trade or profession' which defines the status of a 'seller or supplier'. In that decision, the Court held that an educational establishment acts as a 'seller or supplier' within the meaning of Directive 93/13 when it provides credit services to students, even if those services are clearly not its main (educational) activity. [18]

42. Thus, similar to the present case, despite the fact that the educational establishment was not a bank or a financial entity, its activities relating to payment facilities gave rise to the protection of the directive. Granted, it could be suggested that in *Karel de Grote* the payment facilities at issue were provided to fund the main activity of the educational establishment directly (they were granted for the funding of a study trip). Thus, a proximity argument could be made: whereas in *Karel de Grote*, the educational institution was actually lending the money to a student so that she could pay it back to that institution directly, in the present case, EDF is not in fact 'self-funding' its main activity indirectly. Instead, it just lends the money so that an employee (and his spouse) can purchase a home from a third party.

43. I do not think, however, that that argument would make such a mortgage loan 'too incidental' or 'too remote', so as to push it outside the scope of application of the directive. When compared with the situation in *Karel de Grote*, the credit agreement in the present case is still ancillary to the main business activities of EDF, but in a different manner. The loan agreement at issue undeniably forms part of its social policy as an employer, as confirmed by EDF. However, noble and praiseworthy as such a policy certainly is, it is perhaps also safe to assume that for any rationally operating undertaking, putting in place such a policy is not entirely a matter of charity. It serves the aim of attracting and maintaining, together with other potential employee benefits, a qualified and skilled workforce. It is in this sense that such loan agreements are indeed ancillary and conducive to the successful running of a business.

44. Moreover, apart from that logic, which is already present in the case-law, it might be added that Article 2(c) of Directive 93/13 indicates that the EU legislature intended a broad definition to be given to the notion of 'seller or supplier'. [19]

45. First, that provision itself defines 'seller or supplier' as '*any* natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'. [20] On a purely literal reading, it is difficult to argue that EDF has not acted, in this particular contract, for purposes *relating* to his trade, business or profession, in the sense outlined above. The terminology used by other linguistic versions (sometimes using the expression of 'in the framework of' rather than 'relating to') is equally broad. [21] Moreover, there is nothing in that text to indicate that the concepts of 'trade, business or profession' cover only those activities conducted in a sphere where a person or entity possesses a specific professional competence.

18 Judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraphs 57 to 58).

19 Judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraph 48).

20 Emphasis added.

21 In French 'dans le cadre de son activité professionnelle'; in German 'im Rahmen ihrer gewerblichen oder beruflichen Tätigkeit'; in Italian 'nel quadro della sua attività professionale'; in Portuguese 'no âmbito da sua actividade profissional'; in Spanish 'dentro del marco de su actividad profesional'; in Dutch, 'in het kader van zijn … beroepsactiviteit'; in Czech, 'jedná pro účely související s její obchodní nebo výrobní činnosti'.

46. Second, it is not unintentional that the wording of Article 2(c) provides for a broad definition of the concept of 'seller or supplier'.[22] The broad definition deliberately sought by the EU legislature connects with the overarching scheme of Directive 93/13 to protect consumers as weaker parties. The need for a particular contract to fall within the 'sphere of professional competence' would add an unwritten requirement to Article 2(c) and would restrict the scope of protection of the directive.

47. Third, even if such a requirement (that a contract must fall within the sphere of professional competence of an economic actor for it to be considered a 'seller or supplier') were to be pencilled into the wording of Article 2(c) of the directive judicially, *quid non*, the result would be rather questionable in terms of predictability for the consumer.

48. On the one hand, the (rather intuitive) approach that EDF seems to be advocating would mean that 'professional competence' is linked to the core or natural sphere of activity undertaken by a professional. Such an approach would nonetheless render the scope of Directive 93/13 dependent on the self-declaration (or even self-perception) of the corporate or professional purpose of one of the parties to a contract. That would eventually risk making the protection of the Directive a function of what sellers or suppliers say they do rather than of what they actually do.[23]

49. On the other hand, a more objective approach to the delineation of the sphere of professional competence, relying, for example, on the registered business activities of a company, does not sit well with the purposes of Directive 93/13 either. If the scope of the directive were to be tied to the scope of authorisation or registration of business activities under national law, that would effectively oblige consumers to check, each time they wish to purchase a good, whether the other party is in fact signing the contract within the scope of its activity under national law or not.[24] It would entail a divergent approach with regard to regulated and unregulated professions. It would also potentially lead to rather divergent results in the different Member States, since there appears to be quite some difference in terms of the obligation at the national level to state explicitly and to what degree of precision, what exactly is the business activity of a registered company. Moreover, and perhaps above all, I fail to see good reason why the fact that an economic operator has (whether irregularly or not) concluded contracts outside the scope of its registered activity should deprive consumers of protection under the directive.

50. In sum, the fact that a contract has been concluded in a field which does not fall within the sphere of professional competences of a legal person shall not preclude its status as a 'seller or supplier' if, when concluding such contract, someone has acted for purposes *relating to* his trade, business or profession.

51. I readily acknowledge that for legal persons, such an approach is indeed broad, certainly if it also includes matters that are ancillary or incidental to, preparatory to, or enhancing the main business activity. Nonetheless, I do not find such a result problematic, for essentially two reasons. First, in practical terms, under the logic and the purpose of the protection under Directive 93/13, a legal person, and in particular a company, is simply different from a physical person. Most of the activities

22 See, to that effect, judgment of 17 May 2018, *Karel de Grote Hogeschool Katholieke Hogeschool Antwerpen* — (C-147/16, EU:C:2018:320, paragraphs 48 to 50).

23 It might be added that the issue of legal persons acting outside their usual field of activity is not new in the field of consumer law. Indeed, a number of Member States have adopted a more protective standard extending the definition of consumer to legal persons when they are acting outside their usual field of activity (see Ebers, M., 'The notion of "consumer"' in Schulte-Nölke, H., Twigg-Flesner, C., Ebers, M. (Eds), *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States*, Sellier European Law Publishers, 2008, pp. 454 to 464). The definition of consumer in Directive 93/13 only covers natural persons (judgment of 22 November 2001, *Cape and Idealservice MN RE* (C-541/99 and C-542/99, EU:C:2001:625, paragraph 17)). Member States can, however, adopt more protective standards and extend the protection in areas not covered by the directive, such as the protection of professionals (see, by analogy, judgment of 14 March 1991, *Di Pinto* (C-361/89, EU:C:1991:118, paragraphs 21 to 23)). However, the fact that minimum harmonisation, according to Article 8 of the directive, could allow a more expansive definition of consumer in the Member States does not mean that this could possibly have the impact of narrowing down the definition of 'seller or supplier'. That would run counter the purpose of the directive as it would amount to lowering the protection granted by the minimum standard offered by the directive.

24 Similarly to what I have argued in my Opinion in *Nemec*, (C-256/15, EU:C:2016:619, point 90).

the former carry out relate, in one way or another, to their business. Second, it might again be recalled that the present case is only about the status of either party to a consumer contract and thus the applicability of the directive. However, even if entering within the scope of that directive, an individual term or the contract may of course, once assessed as to its substance, be considered as fair.

2. Contracts relating to employment

52. Apart from the issue that providing loan agreements is not the main activity of EDF, or that it is an activity falling outside its sphere of professional competence, the fact remains that the loan agreement was concluded with an *employee* of EDF. Can a natural or legal person still be regarded as a 'seller or supplier' in the sense of Directive 93/13 when it supplies services or goods to its employees?

53. It was in this connection that the participants at the hearing debated the meaning of recital 10 of the directive.[25] That recital states, first, that the rules of law in the matter of unfair terms adopted to achieve more effective consumer protection 'should apply to *all* contracts concluded between sellers or suppliers and consumers'.[26] It further states that, 'as a result inter alia contracts relating to employment … must be excluded from this Directive'. That recital therefore gives the impression that there is an (subject matter-related) exception from the scope of the directive.[27]

54. However, I do not think that that is the case.

55. First, as a matter of principle, a recital to a legal act of the European Union has no binding legal force. It thus cannot establish an exception to the actual (valid and binding) provisions of the act at issue.[28] Recital 10, like any other recital, may assist the interpretation of a 'matching' valid provision of the directive, but cannot be used to establish, in and of itself, an exception or restriction to the scope of the directive.

56. Second, as to the actual meaning of that recital, I am in agreement with the Commission: the purpose of recital 10 is not to exclude from the scope of Directive 93/13 contracts that would otherwise be covered by it. It does not introduce a 'subject matter' list of exclusions from the scope of the directive. It merely illustrates the kind of contracts that already fall outside the scope of consumer relationships, because the parties to them are not acting as 'consumers' or 'sellers or suppliers' in the sense of the directive. In this way, recital 10 indeed provides illustrative examples of types of legal transactions that will fall short of Article 1(1) read in conjunction with Article 2(b) and (c) of the directive.[29]

57. That is also the case for employment contracts, whereby a person, the employee, places his services under the direction of another, the employer, for a period of time and in exchange for remuneration. Such an employment contract (or even series of employment contracts) establishes or amends the rights and duties pertaining to such a principal-agent relationship.

25 Reproduced in full above at point 4.

26 Emphasis added.

27 This may have led the Court to refer to the examples in recital 10 as 'exceptions' in the order of 14 September 2016, *Dumitraș* (C-534/15, EU:C:2016:700, paragraph 27): 'The purpose of the contract is thus, subject to the exceptions listed in the 10th recital of Directive 93/13, irrelevant in determining the scope of the directive.' However, that case did not concern the interpretation of any of the examples contained in recital 10.

28 See, to that effect, judgment of 19 November 1998, *Nilsson and Others* (C-162/97, EU:C:1998:554, paragraph 54).

29 In this way also logically explaining the introductory wording before the list: 'where as a result, inter alia'. Otherwise, having an open list of (subject matter) exceptions that would be illustrative only and could be expanded at will (without there however being any criterion for establishing other exceptions) would be indeed a rather surprising legislative technique.

58. As all the parties that have made submissions in the present case have agreed, the loan agreement in the present case is not such an employment contract.[30] The loan agreement does not regulate either an employment relationship or concern employment conditions. Nor does it form part of elements that normally relate to or must by necessity be linked to employment relationships.

59. Conceding that the contract at issue is not an employment contract, EDF has nevertheless insisted that Directive 93/13 should not apply in the present case, because the loan agreement at issue is a contract concluded *in connection with* an employment contract providing advantageous conditions for employees.

60. To my mind, the fact that access to the loan agreement at issue is reserved for employees does not detract from the fact that when concluding that contract, EDF is acting as a 'seller or supplier' within the meaning of the directive. Again, the determining criterion is the capacity in which either party entered into a contract, not the reason or motivation for doing so. Equally, the fact that certain types of consumer contracts are reserved for certain groups of consumers does not deprive the latter of consumer status.

61. Embracing the argument advanced by EDF would mean that any contract concluded between an employer and an employee comprising a benefit or a privilege would be excluded from the scope of Directive 93/13. Would the directive then not cover an employee in a car factory when purchasing a vehicle from his employer, based only on the fact that he gets a rebate on the purchase price, like all the other employees of that factory? Even EDF conceded at the hearing that this cannot be the case. The difference with the present case would be, according to EDF, that in that example, the contract comes within the domain of 'professional competence' of the car manufacturer. But, if the notion of 'seller or supplier' does not depend on whether a given contract falls outside the sphere of professional competence of a person, as was suggested in the previous section of this Opinion, I do not see why that should matter when the contracting parties happen to be an employee and an employer.

62. It might be added, in my view, that the (potentially differentiated) fiscal treatment of the 'advantage' that the worker receives does not impact the nature of the contractual relationship for the purposes of the directive. The fact that, under certain national systems, the monetary advantage that accrues from the beneficial conditions offered by certain employee schemes may be considered as income for the purposes of taxation (forming part of the employee package for the purposes of taxation), does not turn a mortgage loan agreement into a contract related to employment which ought to be considered as falling outside the scope of the directive.

63. Finally, if the mere fact that the service provider is the employer of a consumer were to exclude a given contract from the scope of the directive, consumer-employees would be put in a rather precarious position. They would be attracted, through advantageous conditions, to contract services or buy goods provided by their employers in areas in which they would normally turn to other service providers in the market. But the 'hidden cost' would in reality be the renouncing of any consumer protection. The scope of consumer protection would then depend on whether or not the employer offers those services in-house or through other service providers.

64. As a result, the fact that a contract, which is *not an employment contract*, has been concluded between an employer and an employee does not have any impact on the categorisation of the contracting parties as 'consumers' or 'sellers or suppliers'.

30 Or, as used in the English wording, a 'contract relating to employment'. However, for the reasons outlined in this section of the Opinion, the linguistic argument that a 'contract relating to employment' should mean any contract entered into *because* of an employment relationship simply cannot be maintained. It might also be added that linguistic versions other than the English contain a much narrower notion than 'contracts relating to employment': Arbeitsverträge, contrats de travail, contratti di lavoro, contratos de trabajo, arbeidsovereenkomsten, contratos de trabalho, pracovní smlouvy, umów o pracę, etc.

3. Contracts concluded in the framework of an employer's social policy

65. Finally, EDF has also argued that the loan agreement at issue is part of the social policy of the company. By granting such loans, EDF does not seek a profit for itself, but only to provide its employees with beneficial conditions to facilitate access to being the owner of their own home.

66. This element is also, in my view, irrelevant for the purposes of classifying a contracting party as a 'seller or supplier' in the sense of the directive.

67. As the Appellants have rightly argued, the public or private character of the activity, the fact that it pursues a public interest objective, or that it is not carried out on a lucrative basis or for consideration, is not determinant.

68. First, and most importantly, the Court has already stated that Article 2(c) of Directive 93/13 encompasses tasks conducted on a not-for-profit basis: in *Karel de Grote*, interest-free payment facilities were considered by the Court as falling within the scope of the directive.[31]

69. Second, in general terms, 'the public or private nature of the activities of the seller or supplier or his specific task' cannot determine whether or not the directive is applicable.[32] The Court has held, in this connection, that the notion of 'trader' in Directive 2005/29, defined similarly to the notion of 'seller or supplier' in Directive 93/13, includes a public law body charged with a task of public interest, such as the management of a statutory health insurance fund,[33] which is also unlikely to be run for profit.

70. Third and in any case, it should be recalled that the loan agreement at issue in the present case was not interest-free. Interest was clearly payable to EDF under the contract, even if the interest rate for employees may have been more favourable than that available on the market at the time.

71. In conclusion, the fact that the loan agreement at issue is part of the social policy of a company for the benefit of its employees through a scheme providing assistance for the purchase of a home is not relevant in the present case.

72. That being said, it can only be underlined that as already stated above in point 19 of this Opinion, the case before this Court does not concern the assessment of the (un)fairness of the contract term at issue. That assessment is to be conducted by the national court. It should take account of the nature of the services which are the subject matter of the contract, and refer, at the time of conclusion of the contract, to all of the circumstances leading to its conclusion.[34] Thus, although social considerations and/or profit (that may not have been) made are hardly relevant for the assessment of the capacity of the parties to a contract, it is conceivable that they might be of relevance for the assessment of the overall balance in the parties' rights and obligations arising under that contract.

4. Interim conclusion

73. EDF is a legal person, constituted with the corporate aim of producing and supplying electricity. In pursuit of this main economic activity or business, it operates a staff policy whereby it seeks to attract and retain its employees, by offering them certain advantages and employee benefits. One of those is the scheme for access to housing, through which EDF enters into contractual relationships with

31 See to that effect judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraph 51).

32 Judgment of 15 January 2015, *Šiba* (C-537/13, EU:C:2015:14, paragraph 28).

33 Judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12, EU:C:2013:634, paragraph 41).

34 Judgment of 15 January 2015, *Šiba* (C-537/13, EU:C:2015:14, paragraph 33 and the case-law cited).

employees to grant them a loan in order for them to be able to purchase a home. For the reasons set out in the previous sections of this part, when concluding loan agreements with its employees, EDF is acting for purposes relating to its business and shall, therefore, be regarded as a 'seller or supplier' in the sense of Article 2(c) of Directive 93/13.

74. In this case, there are further elements confirming that conclusion:[35] EDF appears to have a specialised organisational structure. It runs a specific department devoted to grant loans to employees. It also seems to engage in loan agreements with its employees regularly. This activity of EDF, in granting such loans, was apparently subject to the national legislation concerning the provision of information and protection,[36] apparently a precursor for consumer protection under national law. Moreover, the loan agreements were not interest-free.

75. The fact that the loan agreement does not come within the usual sphere of professional competence of EDF, that it has been concluded between EDF and one of its employees, and that it forms part of the social policy of the company, to my mind, have no repercussions on the assessment of the quality of 'seller or supplier' in the sense of the directive.

C. Whether the Appellants are consumers

76. In the present case, Mr Pouvin has entered into the loan agreement with EDF with the aim of purchasing a dwelling. As indicated above in Section B.2 of the present Opinion, this is not a contract relating to employment. There is no doubt that the loan agreement has been entered into for purposes outside his trade, business or profession. In fact, none of the parties that have made submissions in the present case have argued that Mr Pouvin may have acted for purposes pertaining to his business, trade, or profession.

77. As a result, Mr Pouvin must be regarded, for the purposes of the loan agreement concluded with EDF, as a consumer in the sense of Article 2(b) of Directive 93/13.

78. A fortiori, the same conclusion must be true for Ms Dijoux, who was never linked to EDF in any capacity other than as a borrower in a loan agreement entered into for the purpose of purchasing a home.

V. Conclusion

79. In the light of the aforementioned considerations, I propose that the Court answer the questions posed by the Cour de cassation (Court of Cassation, France) as follows:

– Article 2(c) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to be interpreted as meaning that a company such as EDF, where it grants an employee and the employee's spouse a mortgage loan covered by a scheme providing assistance for the purchase of a home, which only members of staff of that company are eligible for, is acting as a 'seller or supplier'.

– Article 2(b) of Directive 93/13 is to be interpreted as meaning that an employee of a company, and the spouse of such an employee, who enter into a loan agreement with the employing company for the purchase of a home, are acting as 'consumers'.

35 In the sense outlined above at points 32 to 34.

36 Law No 79-596 of 13 July 1979 on the provision of information and protection for borrowers in the housing sector.