Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 7 March 2019[1]

Case C-2/18

Lietuvos Respublikos Seimo narių grupė
joined parties:
Lietuvos Respublikos Seimas

(Request for a preliminary ruling from the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania))

(Reference for a preliminary ruling — Agriculture — Common organisation of the market — Milk and milk products — Regulation (EU) No 1308/2013 — Article 148(4) — Contractual provisions — Free negotiation of prices — National legislation obliging purchasers of raw milk to offer the same prices to groups of producers and prohibiting the lowering of prices without justification)

I. Introduction

1. The raw milk market in Lithuania is characterised by atomised supply, with thousands of small raw milk producers, and highly concentrated demand, with only a handful of large purchasing companies. The small producers are not organised. The purchasing companies have thus been able to impose purchase prices upon them, resulting in very low raw milk prices.

2. In reaction to that situation, Lithuania has adopted specific legislation in order to prevent unfair commercial practices in the raw milk sector. That legislation establishes the classification of producers depending on the volume of raw milk sold per day, and obliges purchasers of raw milk to offer the same price to all producers belonging to the same group. It also prohibits purchasers of raw milk from lowering prices without providing justification. A price reduction of 3% or more of the purchase price is only allowed following authorisation from the competent administrative authority.

3. In the main proceedings, a group of members of the Lithuanian Parliament has brought an action before the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania) ('the Lithuanian Constitutional Court'), disputing whether those national law provisions were compatible with the Lithuanian Constitution. In the context of those proceedings, doubts have also been expressed as to the compatibility of those provisions with Article 148(4) of Regulation (EU) No 1308/2013,[2] in particular with the requirement that all the elements of the contracts are to be freely negotiated between the parties, including the purchase price.

1 Original language: English.

2 Regulation of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

4. Against that background, the key issue raised by the present case is how to assess whether or not there is 'exhaustive harmonisation' or 'EU legislative pre-emption' in a certain area or with regard to a certain issue. What are the criteria and considerations that must be taken into account? While of course the issue of the scope of the Member States' competences in areas covered by EU law is certainly not a new one, the recent changes in legislative technique and approach in the common agricultural policy and the common organisation of the market in agricultural products have also had an impact on the traditional case-law on the matter in this field, as recently shown by the decision in *Scotch Whisky Association*.[3]

II. Legal framework

A. EU law

5. Article 148 of Regulation No 1308/2013, is worded as follows:

'1. Where a Member State decides that every delivery of raw milk in its territory by a farmer to a processor of raw milk must be covered by a written contract between the parties and/or decides that first purchasers must make a written offer for a contract for the delivery of raw milk by the farmers, such contract and/or such offer for a contract shall fulfil the conditions laid down in paragraph 2.

…

2. The contract and/or the offer for a contract referred to in paragraph 1 shall:

(a) be made in advance of the delivery,

(b) be made in writing, and

(c) include, in particular, the following elements:

(i) the price payable for the delivery, which shall:

– be static and be set out in the contract, and/or

– be calculated by combining various factors set out in the contract, which may include market indicators reflecting changes in market conditions, the volume delivered and the quality or composition of the raw milk delivered,

(ii) the volume of raw milk which may and/or must be delivered and the timing of such deliveries,

(iii) the duration of the contract, which may include either a definite or an indefinite duration with termination clauses,

(iv) details regarding payment periods and procedures,

(v) arrangements for collecting or delivering raw milk, and

(vi) rules applicable in the event of *force majeure*.

3 Judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845).

…

4. All elements of contracts for the delivery of raw milk concluded by farmers, collectors or processors of raw milk, including the elements referred to in point (c) of paragraph 2, shall be freely negotiated between the parties.

Notwithstanding the first subparagraph, one or both of the following shall apply:

(a) where a Member State decides to make a written contract for the delivery of raw milk compulsory in accordance with paragraph 1, it may establish a minimum duration, applicable only to written contracts between a farmer and the first purchaser of raw milk; such a minimum duration shall be at least six months, and shall not impair the proper functioning of the internal market;

(b) where a Member State decides that the first purchaser of raw milk must make a written offer for a contract to the farmer in accordance with paragraph 1, it may provide that the offer must include a minimum duration for the contract, set by national law for this purpose; such a minimum duration shall be at least six months, and shall not impair the proper functioning of the internal market.

The second subparagraph shall be without prejudice to the farmer's right to refuse such a minimum duration provided that he does so in writing. In such a case, the parties shall be free to negotiate all elements of the contract, including the elements referred to in point (c) of paragraph 2.'

6. Regulation (EU) 2017/2393,[4] which amended Regulation No 1308/2013, modified Article 148(4)(a) as follows:

'(a) where a Member State decides to make a written contract for the delivery of raw milk compulsory in accordance with paragraph 1, it may establish:

(i) an obligation for the parties to agree on a relationship between a given quantity delivered and the price payable for that delivery;

(ii) a minimum duration, applicable only to written contracts between a farmer and the first purchaser of raw milk; such a minimum duration shall be at least six months, and shall not impair the proper functioning of the internal market;

…'

B. Lithuanian law

7. According to Article 46, first paragraph, of the Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania): 'The economy of Lithuania shall be based on the right of private ownership, freedom of individual economic activity, and economic initiative.'

8. According to Article 2(5) of the Lietuvos Respublikos Ūkio subjektų, perkančių-parduodančių žalią pieną ir prekiaujančių pieno gaminiais, nesąžiningų veiksmų draudimo įstatymas (Law prohibiting unfair actions on the part of economic operators when buying and selling raw milk and marketing milk products),[5] as amended by Law n°XII-2230 ('the Law on the prohibition of unfair practices'),[6] raw milk sellers are classified into 10 groups according to the volume (in kilograms) of raw milk of natural fat

4 Regulation of the European Parliament and of the Council of 13 December 2017 (OJ 2017 L 350, p. 15).

5 Legislative Register (TAR), 2015-07-09, No 11209.

6 Legislative Register (TAR), 2015-12-29, No 20903.

content sold per day. Article 2(7) of the Law on the prohibition of unfair practices establishes that the raw milk purchase price is the amount agreed upon by the raw milk buyer and the seller that is paid for raw milk having the base milk composition indicators, not including surcharges, premiums or deductions. Those indicators have been set out in Decree No 146 of the Minister for Agriculture of 9 May 2001, entitled 'Approval of the Milk Purchase Rules'.

9. Article 3 of the Law on the prohibition of unfair practices is entitled 'Prohibiting unfair actions on the part of economic operators'. According to Article 3(3)(1) of that law: 'A raw milk buyer is prohibited from performing the following unfair acts: (1) setting different raw milk purchase prices in contracts for the sale of raw milk, when buying raw milk that meets the quality requirements, set by decree of the Lithuanian Minister for Agriculture, from the same raw milk sellers' group and when it is delivered to the raw milk buyer via the same method (raw milk delivered to a raw milk purchase spot, raw milk acquired directly from a farm, raw milk delivered directly to a raw milk processing company), except when raw milk is purchased from raw milk sellers who are selling milk that they themselves produced and who belong to an organisation of milk producers recognised according to the rules set by decree of the Lithuanian Minister for Agriculture. In the latter case, however, the raw milk purchase price applied cannot be lower than the price that would be set according to the group of raw milk sellers.'

10. Article 3(3)(3) of the Law on the prohibition of unfair practices provides as follows: 'Raw milk buyers are prohibited from performing the following unfair actions: …(3) unjustifiably reducing the purchase price of raw milk ...'

11. Article 5 of the Law on the prohibition of unfair practices provides that:

'1. If the raw milk buyer reduces the raw milk purchase price set in the contract for the purchase and sale of raw milk by more than 3%, he must provide grounds for reducing the price and must submit such grounds to the Market Regulation Agency.

2. The Market Regulation Agency, pursuant to the guidelines approved by decree of the Lithuanian Minister for Agriculture, after examining, within five working days, the grounds for the reduction of the raw milk purchase price by the raw milk buyer referred to in paragraph 1 of this article, shall decide, within three working days, whether the reduction of the raw milk purchase price by more than 3% percent was justified.

3. If the Market Regulation Agency, in accordance with the guidelines set out in paragraph 2 of this article, decides that the reduction of the raw milk purchase price by more than 3% percent was unjustified, the raw milk buyer shall be prohibited from reducing the raw milk purchase price set in the raw milk purchase and sale contract.'

III. Facts, proceedings and the questions referred

12. The Lietuvos Respublikos Seimo narių grupė (a group of members of the Lithuanian Parliament, 'the Applicants') have requested that the Lietuvos Respublikos Konstitucinis Teismas (Lithuanian Constitutional Court) examine the compatibility of the Law on the prohibition of unfair practices, in particular of Articles 3 and 5, with the Lithuanian Constitution, in particular with the first paragraph of Article 46. They claim that the Law on the prohibition of unfair practices is unconstitutional because it restricts the right of the parties to a contract to agree on the essential elements relating to the purchase and sale of raw milk in that contract. That runs counter to the constitutional freedom of contract, guaranteed by the first paragraph of Article 46 of the Lithuanian Constitution.

13. The referring court explains that the raw milk market in Lithuania (the dairy sector being one of the biggest food production sectors, amounting to approximately 2% of the country's gross domestic product) is characterised by the existence of a multitude of small producers (around 25 000 producers, with 74% owning between 1 and 5 cows), and only a few processors (six milk-processing companies process 97% of the milk). Various methods that have been employed to encourage cooperation between raw milk producers have been unsuccessful. There are no organisations of raw milk producers as defined and recognised in accordance with Articles 152 to 154 of Regulation No 1308/2013. Raw milk is purchased via milk purchase spots from small raw milk producers. Before the Law on the prohibition of unfair practices was passed, the buyers simply presented information on the price at which they would buy the raw milk, without negotiating with the raw milk producers. As a result, according to data produced by the European Commission, the average purchase price for raw milk in Lithuania was among the lowest in the European Union.

14. The referring court further notes that the objective of the Law on the prohibition of unfair practices is to prohibit unfair actions on the part of raw milk sellers and raw milk buyers. The explanatory note to the draft version of that law stated that the purpose of the Law on the prohibition of unfair practices was to ensure that there is a balance between the lawful interests of raw milk buyers and sellers, to restrict large milk-processing companies from using their extensive market power, and to restrict the unfair advantage that economic operators selling milk products obtain from a reduction in wholesale prices of milk products.

15. According to the views expressed in the course of the proceedings before the Lietuvos Respublikos Konstitucinis Teismas (Lithuanian Constitutional Court), Article 3(3)(1) and (3) and Article 5 of the Law on the prohibition of unfair practices pose problems of compatibility with Article 148(4) of Regulation No 1308/2013. The Lietuvos Respublikos Konstitucinis Teismas (Lithuanian Constitutional Court) notes that the interpretation of Article 148(4) of Regulation No 1308/2013 is indeed important for the purpose of determining whether the contested provisions are compliant with the first paragraph of Article 46 of the Lithuanian Constitution. EU law is a source for interpreting Lithuanian law, including the Constitution, in those areas in which Lithuania shares with, or confers upon, the European Union, the powers of its State institutions, as is the case with the agriculture and internal market sectors.

16. In those circumstances, the Lietuvos Respublikos Konstitucinis Teismas (Lithuanian Constitutional Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can Article 148(4) of Regulation No 1308/2013 be interpreted as meaning that, for the purpose of strengthening the negotiating powers of raw milk producers and preventing unfair commercial practices, and taking into account certain particular structural features of the milk and milk products sector of the Member State and changes in the market for milk, it does not prohibit the establishment of a national legal regulatory framework which restricts the freedom of contracting parties to negotiate the purchase price of raw milk in the sense that a raw milk buyer is prohibited from paying different raw milk prices to raw milk sellers from the same group, grouped according to the volume of milk sold, who do not belong to a recognised milk producers' organisation, for raw milk of the same quality and composition as that delivered to the buyer via the same method, and, thus, the parties are unable to agree on a different raw milk purchase price by taking into account any other factors?

(2) Can Article 148(4) of Regulation No 1308/2013 be interpreted as meaning that, for the purpose of strengthening the negotiating powers of raw milk producers and preventing unfair commercial practices, and taking into account certain particular structural features of the milk and milk products sector of the Member State and changes in the market for milk, it does not prohibit the establishment of a national legal regulatory framework which restricts the freedom of contracting parties to negotiate the purchase price of raw milk in the sense that a raw milk buyer is

prohibited from unjustifiably reducing the purchase price of the raw milk, and a reduction of the price by more than 3% is possible only if a State-empowered institution recognises such a reduction as being justified?'

17. Written submissions were lodged by the German, French and Lithuanian Governments, as well as by the Commission. Those interested parties, as well as the Applicants and the Netherlands Government, presented oral argument at the hearing held on 5 December 2018.

IV. Assessment

18. This Opinion is structured as follows. First, I will start by suggesting the considerations that should guide the assessment of whether EU law prevents certain measures from being taken by the Member States (A). Second, in the light of those considerations, I will analyse the questions of the referring court, concluding that national measures, such as those in the main proceedings in the present case, are indeed precluded (B). Third, I will also make several concluding remarks, which are warranted when looking at the broader context of this case (C).

A. EU harmonisation (or rather federal pre-emption)

1. The evolving legislative context

19. The present case raises a fundamental issue, which is as old as the project of European integration itself: to what extent can Member States (still) adopt national measures in a field that is 'covered' by EU law? The evolving nature of the regulation of the common agricultural policy gives that question (and the older case-law of this Court dealing with that question) a rather new twist.

20. Historically, the question of the scope of EU harmonisation has often arisen in the field of common agricultural policy, considering the extensive and detailed action of EU law in that field. Without it being possible to retrace all the intricacies of the voluminous case-law of the Court relating to this field at this point,[7] it may be stated, in a nutshell, that this question has received a nuanced answer from the Court, depending on: (1) the occupation of the regulatory space by EU rules; (2) the specific interaction between the national rule and the EU law framework in terms of the specificity of the normative conflict, as well as (3) the objectives pursued by the different rules.

21. Thus, in situations where EU law has regulated a matter extensively (sometimes referred to as 'exhaustive' harmonisation), Member States can no longer take action through national provisions adopted unilaterally, which may affect the system established at EU level. The EU law regulatory framework which creates a system or a complete legislative set-up may not entail a complete 'area' or 'field' pre-emption, but its effects come close: any national rule which may affect it is precluded.[8] Accordingly, no national rules touching upon that field would have been allowed.

7 See, regarding the subsequent stages of evolution of the common agricultural policy (CAP), for example: Barents, R., *The Agricultural Law of the EC*, Kluwer, 1994; Usher, J.A., *EC Agricultural Law*, Oxford University Press, 2001; McMahon, J.A., *EU Agricultural Law*, Oxford University Press, 2007; and Schütze, R., 'Reforming the 'CAP': From Vertical to Horizontal Harmonisation', *Yearbook of European Law*, Volume 28, Issue 1, 2009, pp. 337 to 361.

8 Some judgments of the Court seemed to point at pre-emption, by stating that 'once [the] rules on the common organisation of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless [EU] law expressly provides otherwise', judgment of 13 March 1984, *Prantl* (16/83, EU:C:1984:101, paragraph 13). On this debate, see Schütze, R., 'Reforming the 'CAP': From Vertical to Horizontal Harmonisation', *Yearbook of European Law*, Volume 28, Issue 1, 2009, pp. 337 to 361.

22. In the past, this seems to have been the case of the common pricing system, which was at the core of the 'old' legislative framework of the common organisations of the market in different sectors. Despite the fact that it is open to debate whether there actually was an absolute pre-emption of the entire area,[9] the Court stated that, 'in a sector covered by a common organisation, a fortiori where that organisation is based on a common pricing system, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation at the production and marketing stages established under the common organisation'.[10]

23. However, the successive reforms of the common agricultural policy have led to a more market-oriented approach, seeking to strengthen the competitiveness of the sector and its sustainability in the context of globalised trade.[11] This change of approach has in turn led to a 'recalibration' of the level of pre-emption with regard to the national legislative space. Indeed, the single common market organisation is no longer based on a common pricing system.[12]

24. Thus, these elements can be said to have (fully) returned to the general regime of shared competence. In accordance with Article 4(2)(d) TFEU, the common agricultural policy is a competence shared between the European Union and the Member States. Therefore, in line with Article 2(2) TFEU, Member States can exercise their legislative competence as long as the European Union has not regulated an issue.[13]

25. Against this background, a national rule cannot be pre-empted automatically because it relates to milk, a product covered by the single common market organisation. Nor can it be precluded because it touches on the formation of prices. In other words, the approach is not (or no longer, if it ever in fact was) one of 'field harmonisation' or 'block pre-emption', where no rules in an abstractly defined area could ever be adopted at national level.

2. Elements to be considered

26. In order to carry out the correct assessment of the (non-)existence of the EU legislative pre-emption in the individual case, three considerations are important to take into account: the correct level of analysis or abstraction at which the EU rules and the national rules are to be compared and contrasted (a); the type and scope of conflict that may emerge (b); followed by identifying the objectives that the different rules pursue (c).

(a) Level of analysis

27. Carrying out the examination of pre-emption in terms of 'exhaustiveness' of harmonisation outside clearly defined situations does not, in my view, constitute a suitable framework of analysis. That is because the analysis of whether EU law has exhaustively regulated a *specific issue* will of course depend on how narrowly or broadly the framework of reference is imagined to be.

9 See, for example, Berardis, G., 'The Common organisation of agricultural markets and national price regulations', CML Rev, 1980, pp. 539 to 551; Usher, J.A., 'The Effects of Common Organisations and Policies on the Powers of a Member State', *European Law Review*, Volume 2, 1977, pp. 428 to 443.

10 See, for example, judgment of 26 May 2005, *Kuipers* (C-283/03, EU:C:2005:314, paragraph 42 and the case-law cited).

11 See recital 1 of Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector (OJ 2012 L 94, p. 38).

12 Opinion of Advocate General Bot in *The Scotch Whisky Association and Others* (C-333/14, EU:C:2015:527, point 31 et seq.).

13 See, to that effect, judgment of 19 September 2013, *Panellinios Sindesmos Viomikhanion Metapoiisis Kapnou* (C-373/11, EU:C:2013:567, paragraph 26).

28. For example, consider the fact that an EU law measure might have provided for an (imaginary) rule in a directive dealing with consumer protection. That imaginary rule states that 'if the trader, while negotiating a contract with a consumer is not on the former's business premises, and suspiciously blinks at least twice when discussing the quality of the product he sells, that is a sufficient reason for the contract to be declared null and void'. That can hardly be construed as meaning that such a rule (or several rules on that matter in the given measure) seeks to (exhaustively) harmonise 'all elements of the formation of consumer contracts', or, moving to a higher level of abstraction, the 'formation of (consumer) contracts' or even 'contract law' as a whole.

29. Thus, logically, when the question at issue concerns the compatibility of a national rule with a provision of EU law, the starting point to assess compatibility must be the scope of the rule as stated by the EU law. As suggested elsewhere, the appropriate way to address the issue of whether a specific national rule is pre-empted by EU law is at the level of *microanalysis*, looking at a specific rule or a specific and well-defined aspect of EU law.[14] It is therefore necessary to undertake the analysis of pre-emption through the examination of a *specific* normative conflict.

(b) Type of conflict

30. Taking the EU law rule at its proper level of abstraction, the next step is to assess whether it conflicts, at the level of the nature and scope of the legal rule, with any provision of national law. Two types of conflict can potentially emerge.

31. First, the obvious normative conflict arises when there is a *direct textual 'clash'* between the provisions of EU law and one or more rules of national law. At the level of normative statement, the EU proposition and the national proposition cannot be maintained at the same time: the EU rule states 'be A', whereas the national rule states 'be (fully or partially) non-A'.

32. Second, however, normative conflicts may also be of a *functional nature*: this covers situations where national and EU law rules are incompatible because, even in the absence of an express and clashing provision, certain rules of the Member State conflict with the EU legislative framework at the level of application or operation.[15] It is in this sense that I would understand the Court's statement that, even if a matter has not been exhaustively regulated by a common organisation of the market, rules which interfere with its proper functioning are precluded by EU law.[16]

33. It is, however, clear that these two categories are very far from being two clearly separated boxes. They are more like two points on the spectrum. It is also clear that direct clashes of wording are (only) rarely likely to occur.[17] Conflicts are likely to arise more frequently in cases in which a national provision establishes an incidentally different rule, or introduces exceptions, derogations or additional conditions that are not expressly provided for in the EU law provision. This therefore also makes it particularly necessary to examine the broader context of a provision, including the general scheme of which it forms a part, and its objectives.

14 See my Opinion in *Dzivev* (C-310/16, EU:C:2018:623, points 72 to 80).

15 See, again, my Opinion in *Dzivev* (C-310/16, EU:C:2018:623, point 76), quoting as an example, in the context of the European arrest warrant, the judgment of 30 May 2013, *F.* (C-168/13 PPU, EU:C:2013:358, paragraphs 37 to 38 and 56).

16 See, for example, judgment of 19 March 1998, *Compassion in World Farming* (C-1/96, EU:C:1998:113, paragraph 41 and the case-law cited).

17 See, for this discussion, Arena, A., 'The Twin Doctrines of Primacy and Pre-emption' in Schütze, R., and Tridimas, T., *Oxford Principles of European Union Law: The European Union Legal Order*, Vol. 1, Oxford University Press, 2018, pp. 300 to 349, at p. 329.

(c) Objectives

34. When it comes to determining whether a national rule is pre-empted by a conflicting EU law provision, the Court has acknowledged that the objectives pursued at the national level at issue play an important role, leaving room for justification of the national measure under the requirements of proportionality. [18]

35. However, such a possibility for national differentiation is naturally tied to the scope and exhaustiveness of the EU's pre-emption (also referred to as the 'exhaustiveness of harmonisation' [19]). That explains the finding that any national measure having an effect on the machinery of price formation at the production and marketing stages in a common market organisation of the *ancien régime* would be precluded 'whatever its alleged or stated objective may be', [20] or 'even if that measure is likely to support the common policy of the [EU]'. [21]

36. Conversely, in regulatory spheres that have not been completely covered by the EU legislature, or which became 'deregulated' at the EU level, the examination of the compatibility of national rules with EU law may take account of the objectives pursued at both levels. As a result, national rules pursuing *objectives of general interest not covered* by the EU law instrument at issue, such as the protection of human health, have been declared to be compatible with EU law, subject to the requirements of the principle of proportionality, even if they have an impact on common market organisation. [22] The Court has also stated that 'the mere establishment of a common organisation of the market does not have the effect of exempting agricultural producers from any national provisions intended to attain objectives other than those covered by the common organisation, even though such provisions may have an impact on the operation of the market in the sector concerned'. [23]

37. However, in a situation where the rules at issue pursue *the same objectives* as the conflicting EU law rule, the national provisions are precluded. [24] The differentiated approach is due to the fact that, where conflicting rules pursue the same objectives, national conflicting rules collide with rules of EU law because they simply wish to establish a different legislative balance on the basis of the same type of considerations. In other words, after having taken into account all the relevant factors, the EU legislature has opted for a particular normative solution that requires a balance to be struck between the different interests and considerations at issue. A national rule pursuing the same aims but doing so through a different normative set-up entails a re-evaluation of the same issue.

38. The existence of *different objectives* means, on the contrary, that the considerations that both legislatures had in mind were different *in kind*. For example, they may concern different areas of law that have only an incidental connection with an EU law act, or even in a field covered by EU law, they may concern a different stage in the production/distribution chain or different actors. The national legislature is awarded a certain degree of freedom to pursue other public interest aims, which the European legislature did not (or could not) take into account when the EU rule at issue was drafted.

18 See judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 26 and the case-law cited).

19 Above, points 21 and 22.

20 See judgment of 26 May 2005, *Kuipers* (C-283/03, EU:C:2005:314, paragraph 53).

21 See, for example judgment of 14 October 2004, *Spain* v *Commission* (C-173/02, EU:C:2004:617, paragraph 19 and the case-law cited).

22 Judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraphs 26 to 29).

23 See, for example, judgment of 6 October 1987, *Nertsvoederfabriek Nederland* (118/86, EU:C:1987:424, paragraph 12). See also judgment of 1 April 1982, *Holdijk and Others* (141/81 to 143/81, EU:C:1982:122, paragraphs 12 and 13).

24 See, for example, judgment of 16 January 2003, *Hammarsten* (C-462/01, EU:C:2003:33, paragraph 34 et seq.), and order of 11 July 2008, *Babanov* (C-207/08, not published, EU:C:2008:407, paragraph 28 et seq.).

39. I wish to underline one important clarification: the difference in objectives pursued must be one *in kind*, not just *in degree*. Thus, for example, when adopting an EU measure pursuing the protection of consumers, in which a balance was struck in particular between the protection of consumers, on the one hand, and competition and freedom of contract, on the other, it is entirely plausible that the objective of protection of public health or environment was not considered. That is different from a situation in which both EU measures and national measures aim at accommodating the same type of objectives, but with different weights attached to those objectives. That would be the case if the national legislation referred to in my previous example were to put more emphasis on the protection of consumers than EU law in that particular case, by adopting, for example, more precise and detailed prohibitions. That would entail a difference *in degree* or precision, but the rules at issue would still be ascribed to the *same kind* of objectives.

40. Finally, even if a genuine difference in the kind of objective is present, it has already been pointed out that there is no unwarranted leeway to adopt national rules pursuing different objectives, whatever their 'impact' on the common rules might be. The limitations that arise from the application of the *proportionality principle* necessarily mean there is a need to balance such objectives with those of the common agricultural policy and of the common market organisation, as well as that the measure be appropriate and not go beyond what is strictly necessary. [25]

41. It is within this analytical framework that I would understand the recent statements of the Court in the *Scotch Whisky Association* case. [26] That case concerned national rules imposing minimum prices at the retail level for alcoholic drinks in order to protect human health. The Court found that the national legislation was liable to undermine competition by preventing some producers or importers from taking advantage of lower prices. It found that the national legislation was incompatible with the principle of free formation of prices of agricultural products on the basis of fair competition, which is the foundation of Regulation No 1308/2013. However, since the national rule pursued an objective relating to a general interest other than those covered by Regulation No 1308/2013, the Court stated that the rule would not be precluded if it satisfied the principle of proportionality.

42. It would appear that the objective of the protection of public health was not specifically part of the equation in the balance struck by the EU legislature at EU level when setting the rules for the operation of the common market concerning wine products. [27] That objective was part of a different national regulatory regime, guided by different considerations, which only incidentally overlapped with the EU one. The national rule at stake was a measure applicable only at the retail stage. Thus, although retail is naturally also a stage (the last stage) of the marketing chain, the overlap and thus ensuing conflict between EU rules and the national rules was indeed marginal.

B. The present case

43. With those general clarifications in mind, I shall now turn to the examination of the present case.

44. By its questions, the national court enquires about the compatibility of Articles 3(3)(1) and (3) and Article 5 of the Law on the prohibition of unfair practices with Article 148(4) of Regulation No 1308/2013. The content and the scope of the latter provision thus logically forms the point of departure in terms of reference at the EU level for the assessment of any potential conflict, while defining the appropriate level of abstraction at which the pre-emption analysis is to be carried out.

25 See, to that effect, judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 29).

26 Judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845).

27 Opinion of Advocate General Bot in *The Scotch Whisky Association and Others* (C-333/14, EU:C:2015:527, point 41).

45. Therefore, the argument of the French Government, pointing at the general field of 'contractual relationships' or commercial law as the framework of reference in order to assess the exhaustiveness of harmonisation, while suggesting that the rules applicable to the entire field of contractual relationships cannot be precluded because no such harmonisation arises from Regulation No 1308/2013, is unconvincing. Outside the instances of 'area' or 'field' pre-emption, to which this element of the common organisation of the milk market does not (or no longer) belong(s), it is necessary to focus on the actual normative conflict. Adopting this framework of reference, the German Government and the Commission have zoomed in, correctly in my view, on the specific rule, regarding the free negotiation of all contractual elements for the delivery of raw milk (including its price), in Article 148(4) of Regulation No 1308/2013.

46. In order to provide an answer to the questions posed by the referring court, it is necessary to ascertain, first, the exact scope and interpretation of that rule contained in Article 148(4) of Regulation No 1308/2013 (1). Second, it must be examined whether the national provisions at issue are in conflict with that provision (2). If that is the case, it would only be possible for a conflicting national rule to be compatible with EU law — subject to the requirements of the proportionality principle — if it were to pursue different kinds of objectives (3).

47. Having carried out that analysis, I am bound to conclude that, since Article 3(3)(1) and (3) and Article 5 of the Law on the prohibition of unfair practices do appear to pursue the same type of objectives that are already inherent in Article 148(4) of Regulation No 1308/2013 and were already taken into consideration by the EU legislature when enacting that provision, the national rules at issue are precluded by EU law (4).

1. Article 148(4) of Regulation No 1308/2013 and the 'free negotiation of all contractual elements' rule

48. Article 148 of Regulation No 1308/2013 must be analysed in the context of the evolution of the regulation of the common organisation of the market in the milk and milk products sector.[28] The successive reforms of the common agricultural policy have entailed a change of approach, driven by a stronger emphasis on market orientation and competitiveness.[29]

49. However, in order to respond to the difficult market situation in this sector, additional measures were deemed necessary, according to the recommendations of the High Level Expert Group on Milk. Those (support) measures included a recommendation for the adoption of provisions concerning contractual relations. As a result, a provision corresponding to the current Article 148 was introduced in 2012 in Regulation (EC) No 1234/2007.[30]

50. The adoption of a provision on formalised written contracts was considered to be such a support measure in the milk sector, bearing in mind the fact that the system of common pricing no longer applied, and that the system of quotas was close to reaching its expiration date. The EU legislature considered that the use of formalised written contracts would 'help to reinforce the responsibility of operators in the dairy chain and increase awareness of the need to better take into account the signals

28 Section 3, devoted to milk and milk products, of Chapter II (on specific provisions for individual sectors) of Title II of Part II of Regulation No 1308/2013.

29 Above, point 23.

30 Article 185f was inserted into Council Regulation No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1) by Regulation No 261/2012.

of the market, to improve price transmission and to adapt supply to demand, as well as to help to avoid certain unfair commercial practices'.[31] The provision on contractual relationships, which was initially of a temporary nature, later became a permanent measure[32] and has been extended to sectors other than that of milk and milk products.[33]

51. According to Article 148 of Regulation No 1308/2013, when Member States decide that deliveries of raw milk by a farmer to a processor must be covered by a written contract (as is the case in Lithuania, according to the referring court), those contracts must, according to paragraph 1 of that provision, fulfil certain conditions. As explained in recital 127, the regulation lays down some basic conditions for the use of such contracts in order to ensure appropriate *minimum standards* for such contracts and the proper functioning of the internal market and the common market organisation. In order to fulfil that function, Article 148(2) of Regulation No 1308/2013 establishes the minimum content that those contracts ought to contain, including price.[34]

52. Article 148(2) further states that the contract shall be made in advance of the delivery and be made in writing; it must include, inter alia, elements such as the price, the volume of milk delivered and timing of deliveries, the duration of the contract, details regarding payments, arrangements for collection or delivery and the rules applicable in the event of *force majeure*. Article 148(2)(c)(i) specifies that the element 'price', which it is compulsory to include in the written contract, may be expressed in different ways: the price shall be static and be set out in the contract and/or the price shall be calculated by combining various factors set out in the contract (which may include market indicators reflecting changes in market conditions, the volume delivered and the quality or composition of the raw milk delivered).

53. However, even if the Member States make use of the possibility provided by Regulation No 1308/2013 of rendering written contracts compulsory, all the elements of such contracts between sellers and buyers — including price — must still be negotiated freely. In so providing, and as it appears from its recital 127, Article 148(4) of Regulation No 1308/2013 sets out the limits to the powers of the Member States to intervene in the sector by rendering the conclusion of written contracts compulsory. That provision itself allows only for two specific derogations from the principle of free negotiation. First, Member States may establish an obligation for the parties to agree on a relationship between a given quantity delivered and the price payable for that delivery. Second, Member States may set out a minimum duration for contracts between farmers and first purchasers.

54. To sum up the indeed rather complex structure of that provision, the *default rule* that is said to permeate the new common market organisation is the free formation of selling prices on the basis of fair competition, which also 'constitutes the expression of the principle of free movement of goods in conditions of effective competition'.[35] As an *exception* to that, Member States may insist on a number of listed contractual formalities, essentially as a support measure to correct imbalances in that specific sector. However, even if the Member States provide for such derogations, there is an *outer limit to the exception*: Member States cannot go so far as to undermine the principle of free negotiation of all elements of contracts, including price, with minor exceptions in Article 148(4).

31 Recital 8 of Regulation No 261/2012.

32 According to Article 232(2) of Regulation No 1308/2013, Article 148 was supposed to apply only until 30 June 2020. However, since it was considered appropriate to continue to help the milk and milk products sector as a result of the end of the quota system and to encourage it to respond more effectively to market and price fluctuations, that end date was removed by Regulation 2017/2393, see recital 60 and Article 4(22).

33 See recital 138 and Article 168 of Regulation No 1308/2013.

34 The 'minimum' character of that rule is also apparent from the *travaux préparatoires*, in particular, from the Commission's Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector, COM(2010) 0728 final (proposal leading to Regulation No 261/2012, introducing the predecessor of Article 148).

35 See judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 20).

55. It is in this context, having in mind the nature and scope of the applicable EU rule, that the national provisions at issue must be assessed.

2. A conflict between Article 148(4) and the national provisions?

(a) Question 1: Article 3(3)(1) of the Law on the prohibition of unfair practices

56. By its first question, the referring court wishes to know whether Article 148(4) of Regulation No 1308/2013 precludes a national provision such as Article 3(3)(1) of the Law on the prohibition of unfair practices. According to the latter provision, a raw milk buyer is prohibited from applying different raw milk prices to raw milk sellers from the same group. The groups are constituted according to the volume of milk sold and include only producers who do not belong to a recognised milk producers' organisation. The same price must be applied per group for raw milk of the same quality and composition as that delivered to the buyer via the same method.

57. The referring court further notes that the parties to a contract are unable to agree on a purchase price for raw milk by taking into account relevant factors other than the ones prescribed by the legislation. According to the information given by that court, pursuant to the Milk Purchase Rules, milk is purchased if the initial quality indicators (milk colour, smell, consistency, temperature, taste, acidity, purity, density, neutralising and inhibiting substances) comply with those set out in the rules. If the milk does not comply with other milk quality indicators (such as the overall number of bacteria, number of somatic cells, inhibiting substances, milk-freezing temperature), deductions of the amount set out in the rules are to be applied. Accordingly, raw milk producers may be paid surcharges or premiums pursuant to the conditions set out in the contract, and thus also for milk of better quality.

58. As a result, a raw milk buyer is not prohibited from applying differing raw milk purchase prices to raw milk sellers from the same group, but may do so only if the composition and quality of the milk supplied varies. The list setting out the factors that influence the purchase price of raw milk is nevertheless exhaustive. Therefore, the parties to the contract cannot freely choose the relevant factors for the determination of the price.

59. In view of this dual limitation, I am bound to agree with the Commission and the German Government that the national provisions are not compatible with the freedom to negotiate all the elements of written contracts, provided for by Article 148(4) of Regulation No 1308/2013. Moreover, as the German Government has also pointed out, Article 148(4) provides explicitly for exceptions to the principle of free negotiation of the elements of the contract. The limitations provided for in Article 3(3)(1) of the Law on the prohibition of unfair practices do not fall under any of those derogations.

60. The Lithuanian Government has nevertheless submitted that the contracting parties freely negotiate the 'base price', by reference to indicators based on the composition of the milk. The effect of Article 3(3)(1) is to apply that base price to all the members of a group. In that case, the price can vary depending on the methods used for delivery. The final price will moreover be influenced by surcharges, discounts or premiums, based on quality criteria. As a result, the Lithuanian Government submits that this mechanism respects the freedom to negotiate prices while preventing unfair practices.

61. The arguments of the Lithuanian Government fail to convince.

62. First, the Lithuanian Government insists that the base price is freely negotiated between the parties. However, even if that were true with regard to one producer, presumably the one with whom the purchaser concluded the first contract within a given group,[36] the effect of Article 3(3)(1) of the Law on the prohibition of unfair practices is to apply the same base price compulsorily to all other producers in the same group. I do not see how imposing the same base price to all members of a group of producers would respect, with regard to all the other contracts concluded, the principle of freedom of negotiation. For all the other producers in that group, the base price effectively becomes fixed.

63. Second, the submissions of the Lithuanian Government according to which the price can also vary depending on other factors that are laid down in the legislation does not lead to a different conclusion. It rather only underlines the fact that once the base price is fixed, so are all the factors that may be taken into account when calculating the exact price for each individual delivery, so there is in fact no free negotiation of price.

64. Article 148(2)(c)(i) of Regulation No 1308/2013 refers to the minimum content regarding the indication of the price payable for delivery that must be indicated in contracts. The contract must either refer to a static price, and/or to a price to be calculated by combining various factors, which must be laid out in the contract. By way of illustration, that provision states that those factors 'may include market indicators reflecting changes in market conditions, the volume delivered and the quality or composition of the raw milk delivered'.

65. From the use of the conjunctions 'and/or' in Article 148(2)(c)(i) it appears that Regulation No 1308/2013 is neutral as to the pricing mechanism chosen by the parties to the contract. Moreover, the words 'which may include' indicate that the factors listed in the second indent of Article 148(2)(c)(i) are purely indicative, and that other or fewer elements could be included.

66. In any case, however, the bottom line of Article 148(4) remains the same: it must be possible *for the parties* to negotiate freely all the elements of a contract. Setting an unchangeable list of factors that may only be taken into account when calculating the exact price for each delivery *by a Member State's decree*, that it is obligatory for all parties to apply, is again hardly reconcilable with such a proposition.

67. As a result, it must be concluded that the provision at issue in the present case restricts the freedom of contracting parties to negotiate the purchase price of raw milk on two accounts: it ties the base price to the group and it entails that the parties to a contract are unable to agree on a different raw milk purchase price by taking into account any factors other than those specified in the national legislation.

(b) Question 2: the prohibition of unjustified reductions of price

68. By its second question, the national court wishes to know whether Article 148(4) of Regulation No 1308/2013 precludes national rules according to which raw milk buyers are prohibited from unjustifiably reducing the purchase price of raw milk. Where the reduction of the price is more than 3%, it becomes possible only if the competent authority (the Market Regulation Agency) finds such a reduction to be justified.

36 'Presumably' since in a market with characteristics such as that of the Lithuanian raw milk market, in which there appears to be a significant imbalance in bargaining power, it would be fair to assume that it would also translate into a considerable information asymmetry.

69. According to the Lithuanian Government, Article 3(3)(3) and Article 5 of the Law on the prohibition of unfair practices aim at providing guarantees to avoid unjustified price modifications *after the conclusion* of the contract. Those provisions do not establish a limitation on the free negotiation of prices, but a guarantee that the price will not be modified unless objective reasons have been provided.

70. The German Government has argued that Article 3(3)(3) of the Law on the prohibition of unfair practices is not in contravention of Article 148(4) of Regulation No 1308/2013. That government submits that that rule concerns the unilateral behaviour of one of the parties to the contract after that contract has been concluded and, as such, is not covered by the scope of Article 148(4), as it covers an aspect which is not regulated therein: the prevention of unfair practices.

71. The Commission submits that this provision, similar to Article 3(3)(1) of the Law on the prohibition of unfair practices, constitutes a restriction of the freedom to negotiate the price, as laid down in Article 148(4) of Regulation No 1308/2013, and that is therefore precluded by it.

72. I agree with the Commission on this point.

73. At the outset, I must admit that I am a little puzzled by Article 3(3)(3) and Article 5 of the Law on the prohibition of unfair practices. Their mere existence seems to imply that, despite the fact that it is compulsory to have written contracts, (and even after the setting of common prices within the group according to Article 3(3)(1) of that law), there can still be a rather high volatility in price after the conclusion of such a written contract, the very stated aim of which was to introduce stability into contractual relationships.

74. At the hearing, the Lithuanian Government explained that the reason for that provision are the particular circumstances of the Lithuanian market. Due to unequal bargaining power between them, raw milk purchasers may impose a lower price on producers, with the threat of withdrawing future custom. According to that government, the operation of contractual terms does not work in the way that it should regarding raw milk purchasers.

75. In view of such a reality, I find the argument of the German Government — which relies on the distinction between the exact time of the conclusion of the contract, to which the principle of free negotiation applies, and the subsequent performance of the contract, which is not subject to any such rules— to be somewhat formalistic and unconvincing. The explanations offered by the Lithuanian Government rather underline the fact that the bargaining asymmetry that exists at the stage of negotiation of the contract can easily be translated into the later stage of contract performance. That can happen formally (by incorporating contractual clauses that would allow for such price volatility, which, needless to say, is apparently to the detriment of just one party), or on a factual level (as a number of successive contracts are likely to be concluded between the same parties in which — in the way indicated by the Lithuanian Government — 'non-cooperation' in 'non-performance' of one contract might result in 'less favourable conditions' in the next contract between the same parties).

76. However, considering both of those views, it is also rather apparent to me that the relevant provisions do indeed seek to restrict the freedom to negotiate elements of the contract, which undermines the operation of Article 148(4) of the regulation. They limit the possibility to negotiate price reductions freely. Article 3(3)(3) of the Law on the prohibition of unfair practices imposes an absolute prohibition on unjustified reductions, thus clearly limiting the contractual freedom of the parties. Article 5 thereof further expands and institutionally frames this logic by making price reductions of more than 3% contingent on obtaining authorisation from the relevant administrative body.

77. In conclusion, even though I am aware of the economic reality underlining the operation of the raw milk market in Lithuania, I cannot find a way to reconcile such national rules with the clearly stated rule for parties to a contract to be able to freely negotiate all elements of the contract.

3. Different objectives?

78. At the hearing, the Government of the Netherlands submitted, relying on the judgment in *Scotch Whisky Association and Others*,[37] that despite the rules at issue entailing restrictions to the freedom of negotiation prescribed by Article 148(4) of Regulation No 1308/2013, they should nonetheless be examined by reference to the requirements of the proportionality principle because they pursue different objectives to those covered by that regulation. In that connection, the Government of the Netherlands considers that the objective pursued by the Law on the prohibition of unfair practices — that of preventing unfair trade practices — is not an autonomous objective of that regulation, but plays the role of a mere ancillary consideration.

79. Similarly, the French Government argued at the hearing that the solution in *Scotch Whisky Association* is applicable in this case, as the rule at issue does not entail exhaustive harmonisation. Whether national provisions that have an impact on an explicit EU law provision can be allowed on this basis is only possible to ascertain on a case-by-case approach.

80. The German Government holds the opposite view. According to that government, this case is different to *Scotch Whisky Association*. Contrary to that case, where the matter at issue was not regulated by Regulation No 1308/2013, the present case concerns an explicit rule governing the limits that a Member State can impose on the freedom to negotiate all the elements of a contract.

81. Applying the analytical framework outlined above in points 26 to 42 of this Opinion, the key question for this stage of the assessment becomes: what exactly were the objectives pursued by the EU law provision and the national law provision respectively, a conflict between which has just been confirmed?

82. As far as Article 148(4) of Regulation No 1308/2013 is concerned, two objectives stand out. First, there is the objective of *enhancing the bargaining power of milk producers* in the specific milk sector. As the Commission correctly submits, that regulation, as posited by its recital 128, has established measures to strengthen the bargaining power of dairy farmers vis-à-vis processors, with the aim of ensuring a fair standard of living for those farmers. Article 149 of Regulation No 1308/2013 allows organisations of producers which are made up of dairy farmers or their associations to negotiate collectively the clauses in contracts for the delivery of raw milk, as an exception to the application of competition rules. Moreover, the regulation relies generally (not only in the milk sector) on the capacity of such producer organisations to concentrate the supply, and therefore contribute to the bargaining position of producers, in turn fostering the creation and recognition of such organisations.[38]

83. Second, as laid out by recital 138 of Regulation No 1308/2013, the use of written contracts, as provided for by Article 148 and Article 168 of Regulation No 1308/2013, is generally considered to be a tool that can help to prevent certain *unfair commercial practices*. The equivalent provision to Article 148 was inserted into Regulation No 1234/2007 by Regulation No 261/2012, with the explicit purpose that the use of formalised written contracts would contribute to the prevention of certain unfair commercial practices.[39] In particular, the recitals of Regulation No 261/2012 make clear that

37 Judgment of 23 December 2015 (C-333/14, EU:C:2015:845, paragraphs 26 to 29).

38 See recitals 131 to 134 and Chapter III of Title II of part II of the regulation, on 'producer organisations and associations and interbranch organisations'.

39 Recital 8 of Regulation No 261/2012, quoted in point 50 of this Opinion.

the considerations that led to the adoption of the provision corresponding to the current Article 148 Regulation No 1308/2013 was that, despite the highly differentiated situations in Member States as regards the dairy producing and processing sectors, in many cases, the concentration of supply is low, resulting in imbalances in the bargaining power in the supply chain between farmers and dairies, such imbalance being prone to lead to unfair commercial practices. [40]

84. Concerning the objectives pursued by the Law on the prohibition of unfair practices, the Lithuanian Government stated that the rules at issue aim at prohibiting unfair commercial practices, therefore stimulating competition and reinforcing the bargaining power of farmers. Article 3(3)(1) of that law ensures a certain degree of cooperation amongst producers concerning the fixing of prices of raw milk as a means to reinforce their bargaining position. Thus, the Law on the prohibition of unfair practices aims to enhance the *bargaining power of milk producers* and to prevent *unfair trading practices* in the milk sector.

85. It is thus evident that the objectives pursued by the national provisions at issue are the same as those present in the regulation. At the hearing, the Lithuanian Government itself admitted as much. The EU legislature devised Article 148 of Regulation No 1308/2013 precisely after having taken into account considerations of the *same nature* as the ones motivating the adoption by the Lithuanian legislature of the contested provisions of the Law on the prohibition of unfair practices. What was reached is perhaps a different balance between the same values: when seeking to reconcile the objectives of free competition with the specific objectives of the common agricultural policy, including the aim to ensure a fair standard of living for farmers in the milk sector reinforcing their bargaining power and protecting them against unfair commercial practices, the EU legislature chose, instead of the perhaps more robust measures adopted by the Lithuanian legislature, to allow merely for the possibility to render it compulsory for Member States to require a written contract.

86. Now whether and how far that measure is in fact appropriate and effective in order to achieve those aims is a rather different question, to which I shall return in the closing section of this Opinion. There is, however, little doubt that the EU legislature made a clear value choice: taking into account the *same objectives* and arriving at regulating the *same situation* at the exact *same stage* of the production chain. For these reasons, the conflict between EU law rules and the national ones in this case is simply not a mere marginal instance of two partially overlapping regimes, in which any further examination of proportionality could even be discussed. Instead, it is a fundamental functional clash between two ways of regulating exactly the same issue, reflecting different value choices between the same objectives.

87. The fact that, as the referring court notes, there are still no further specific EU law measures on unfair trade practices between companies in the food supply chain, but only preparatory measures, [41] changes little in that outcome.

88. A proposal for a directive on unfair trading practices in business-to-business relationships in the food supply chain was published in April 2018. [42] It is indeed true that as long as that legislative space remains vacant, until an EU law instrument is adopted in that field, Member States could adopt national provisions.

40 See recital 5 of Regulation No 261/2012.

41 On 7 June 2016, the European Parliament passed a Resolution on unfair trading practices in the food supply chain (2015/2065(INI)). On 14 November 2016, the Agricultural Markets Task Force, set up by EU Commission Member Mr Phil Hogan, released the Report on strengthening the position of farmers in the supply chain, while on 12 December 2016, the Council of the European Union approved the findings of the Report on strengthening farmers' position in the food supply chain and tackling unfair trading practices (Conclusions No 15508/16).

42 COM(2018) 173 final, of 12 April 2018.

89. However, it is equally true that the measures Member States could adopt in the interim cannot conflict with those EU law rules that are already in place under Regulation No 1308/2013, or any other instruments of EU law in force.

90. At the hearing, the Government of the Netherlands nevertheless suggested that the abovementioned proposal means that EU law, in Article 148 of Regulation No 1308/2013, could not have already exclusively covered the matter of (protection against) unfair trade practices in the raw milk sector. If it did, how could the Commission now be proposing new legislation in that field? Thus, by proposing new legislation on exactly that matter, the Commission in fact implicitly recognised that a specific legislative lacuna exists.

91. As elegant as that argument may appear to be at first sight, on a closer inspection, it crumbles. First, the actual EU pre-emption, as described above,[43] occurred at the level of the rule stating that all elements of the contract must be freely negotiated between the parties. That does not preclude other potential measures that aim at redressing the imbalance, and which do not impede the operation of that specific rule. But those in the main proceedings clearly do. Second, even if it were to be considered that there would be an exact match between the scope of the new EU rules that are about to be proposed and the current scope of Article 148 and other provisions of Regulation No 1308/2013, *quod non*, then the fact that new rules are being proposed in the same area could also simply mean that what already exists in that area is being amended. Subsequent provisions of EU law would then constitute *lex posterior* at the same legislative level as Regulation No 1308/2013.

4. Interim conclusion

92. As a result of the foregoing, it is my view that Article 148(4) of Regulation No 1308/2013 must be interpreted as precluding legislation such as that at issue, which for the purpose of strengthening the negotiating powers of raw milk producers and preventing unfair commercial practices:

– restricts the freedom of contracting parties to negotiate the purchase price of raw milk in the sense that a raw milk buyer is prohibited from paying different raw milk prices to raw milk sellers from the same group, grouped according to the volume of milk sold, who do not belong to a recognised milk producers' organisation, for raw milk of the same quality and composition as that delivered to the buyer via the same method, and, thus, where the parties are unable to agree on a different raw milk purchase price by taking into account any other factors, and which;

– restricts the freedom of contracting parties to negotiate the purchase price of raw milk in the sense that a raw milk buyer is prohibited from unjustifiably reducing the purchase price of the raw milk, and where a reduction of the price by more than 3% is possible only if authorised by the competent authority.

C. A Postscript

93. With the change in the regulatory framework in the common agricultural policy and the common market organisation in agricultural products, as well as the Court's ruling in *Scotch Whisky Association*, doubts might have arisen as to what room there is exactly for national rules when pursuing legitimate objectives that are not covered by the common agricultural policy instruments.

43 Point 29, and points 59 to 67, of this Opinion.

94. In view of the changed regulatory approach and logic that I have discussed in this Opinion, there is some space for national diversity, in particular at the edges of the market, where the forces of the market have to be reconciled with other objective and values. However, I do not think that 'licence to diverge', even if driven by quite legitimate objectives, can be pushed so far as to start disassembling the regulatory core of the single common market organisation.

95. Those statements in no way deny the legitimacy and soundness of what the Lithuanian legislature wished to attain with the contested provisions of the Law on the prohibition of unfair practices. In fact, I have a great degree of personal sympathy for those objectives. The national provisions at issue seek to respond to a national specific context where it seems that the approach of the regulation, relying on the potential of producer organisations and associations, does not seem to have operated properly. The Commission's latest report on the implementation of the relevant provisions of Regulation No 1308/2013 echoes that reality on the ground at national level, reporting resistance in some Member States to the 'associative approach' as one of the reasons for it being an incomplete success. [44]

96. However, if the market organisation of agricultural products is not to become like Emmental, even these considerations do not allow a Member State to deviate unilaterally from clear requirements of EU law. First, Regulation No 1308/2013 provides for specific measures to be taken regarding specific problems. [45] Second, it also seeks to ensure the responsiveness of the EU legislature by adding communication and reporting obligations. [46]

97. Third and above all, in general terms, Member States are bound, through the duty of sincere cooperation, to abide by EU law. In the case of difficulties and problems in application, they must, if they deem it necessary to tackle those problems, have recourse to the appropriate institutional avenues at EU level in order to foster legislative change and progressive adaptation to evolving circumstances. [47]

98. The duty of sincere cooperation however cuts both ways. It imposes an obligation not just on the Member States, but also on the institutions to 'work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty and other [EU] provisions, in particular those regulating the common organisation of the market in the sector concerned'. [48]

99. Within such a framework, it is the duty of the EU legislature to react in good time to such developments. [49] As I have already insisted elsewhere, the fact that the EU legislature enjoys a wide margin of discretion, in particular in the field of common agricultural policy, does not amount to a 'blank cheque', whereby past regulatory choices concerning market organisation ought to be perceived as a permanent and sufficient justification for their ongoing application to considerably changed social

44 Report from the Commission to the European Parliament and the Council. Development of the dairy market situation and the operation of the 'Milk Package' provision (COM(2016) 724 final). A sceptical observer from the more eastern parts of the European Union might find such conclusions hardly surprising, noting that this is likely to happen when one single, culturally rather clearly biased, 'solution', is being suggested to the rest. In Member States with a rather fresh historical sensitivity as regards 'compulsory' association and collectivisation of agricultural production, such a model is quite likely to meet with a 'lack of success'.

45 See, in particular, Article 221(1) of Regulation No 1308/2013.

46 Articles 223 and 225 of the regulation, respectively.

47 See, to that effect, judgment of 7 February 1973, *Commission* v *Italy* (39/72, EU:C:1973:13, paragraph 20 et seq.).

48 Judgment of 8 January 2002, *van den Bor* (C-428/99, EU:C:2002:3, paragraph 47).

49 See, to that effect, on the 'duty to amend existing legislation', judgment of 12 December 1985, *Vonk's Kaas Inkoop en Produktie Holland* (208/84, EU:C:1985:508, paragraph 22).

and market environments.[50] Indeed, the proportionality principle also requires that EU law measures are appropriate in the light of the objectives they seek to pursue, failing which their *validity* may eventually be contested.[51] Any such challenge would, however, be a different case, requiring different arguments and evidence to be presented to this Court.

V. Conclusion

100. In the light of the foregoing considerations, I propose to the Court that it answer the questions referred to it by the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania) as follows:

Article 148(4) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 is to be interpreted as precluding national legislation such as that at issue in the present case, which for the purpose of strengthening the negotiating powers of raw milk producers and preventing unfair commercial practices:

– restricts the freedom of contracting parties to negotiate the purchase price of raw milk in the sense that a raw milk buyer is prohibited from paying different raw milk prices to raw milk sellers from the same group, grouped according to the volume of milk sold, who do not belong to a recognised milk producers' organisation, for raw milk of the same quality and composition as that delivered to the buyer via the same method, and, thus, where the parties are unable to agree on a different raw milk purchase price by taking into account any other factors, and which;

– restricts the freedom of contracting parties to negotiate the purchase price of raw milk in the sense that a raw milk buyer is prohibited from unjustifiably reducing the purchase price of the raw milk, and where a reduction of the price by more than 3% is possible only if authorised by the competent authority.

50 See my Opinions in *Lidl* (C-134/15, EU:C:2016:169, point 90) and in *Confédération paysanne and Others* (C-528/16, EU:C:2018:20, point 139).

51 See, for example, judgment of 12 July 2012, *Association Kokopelli* (C-59/11, EU:C:2012:447, paragraph 38 and the case-law cited). See also judgment of 6 December 1984, *Biovilac* v *EEC* (59/83, EU:C:1984:380, paragraph 17), according to which '… the legality of a measure can be adversely affected only if the measure is manifestly unsuitable for achieving the aim pursued by the competent Community institution'.