



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

11 March 2021*

(Failure of a Member State to fulfil obligations – Common organisation of the markets in agricultural products – Regulation (EU) No 1308/2013 – Article 34 TFEU – Selling prices of agri-food products – Minimal profit margins to be applied in the retail trade of those products)

In Case C-400/19,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 23 May 2019,

European Commission, represented by A. Sipos, X. Lewis and E. Manhaeve, acting as Agents,

applicant,

v

Hungary, represented initially by M.Z. Fehér, G. Koós and Zs. Wagner, and subsequently by M.Z. Fehér and G. Koós, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin (Rapporteur) and K. Jürimäe, Judges,

Advocate General: G. Hogan,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 3 September 2020,

after hearing the Opinion of the Advocate General at the sitting on 12 November 2020,

gives the following

* Language of the case: Hungarian.

Judgment

- 1 By its application, the European Commission asks the Court to declare that, by adopting Paragraph 3(2)(u) of the mezőgazdasági és élelmiszeripari termékek vonatkozásában a beszállítókkal szemben alkalmazott tisztességtelen forgalmazói magatartás tilalmáról szóló 2009. évi XCV. törvény (Law No XCV of 2009 prohibiting unfair trading practices applied against suppliers of agricultural and food products; ‘Law No XCV of 2009’) and by thus restricting the way in which the selling prices of agricultural and food products are formed, Hungary has failed to fulfil its obligations under Article 34 TFEU and 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 (OJ 2013 L 347, p. 671).

Legal context

European Union law

- 2 Recital 172 of Regulation No 1308/2013 states:

‘In view of the specific characteristics of the agricultural sector and its reliance on the good functioning of the entire food supply chain, including the effective application of competition rules in all related sectors throughout the whole food chain, which can be highly concentrated, special attention should be paid to the application of the competition rules laid down in Article 42 TFEU ...’

- 3 Article 83(5) of that regulation provides:

‘Member States may only adopt or maintain additional national provisions on products covered by a Union marketing standard if those provisions comply with Union law, in particular the principle of free movement of goods, and subject to Directive 98/34/EC of the European Parliament and of the Council [of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37)].’

Hungarian law

- 4 Paragraph 1 of Law No XCV of 2009 specifies that that law is intended to ensure that there is fair commercial behaviour between bodies trading in agricultural and food products and their suppliers.
- 5 Pursuant to its Paragraph 2(1), that law relates to (i) undertakings producing, processing or selling without processing agricultural and food products and (ii) undertakings selling those products to final consumers. The latter category includes all retailers, irrespective of their size, and therefore applies to both hypermarkets and small shops selling agricultural and food products.

6 Paragraph 3(2)(u) of that law provides:

‘The following shall be deemed to be an unfair commercial practice:

...

(u) any discriminatory fixing, on the basis of the country of origin of the products, of the price at which products identical in composition and organoleptic properties are sold to the final consumer.’

Pre-litigation procedure

7 On 12 January 2015, the Commission sent a letter to the Hungarian authorities in order to obtain information on Paragraph 3(2)(u) of Law No XCV of 2009 (‘the measure in question’). Hungary replied to that letter on 23 March 2015.

8 Taking the view that it needed additional information, the Commission sent Hungary a request for information on 7 July 2015, to which Hungary replied on 22 July 2015.

9 On 16 February 2017, the Commission sent a letter of formal notice to Hungary, in which it expressed doubts as to the compatibility of certain provisions of Law No XCV of 2009 with Regulation No 1308/2013 and Article 34 TFEU.

10 On 7 June 2017, Hungary replied to that letter of formal notice, disputing the alleged failure to fulfil obligations.

11 On 9 March 2018, the Commission issued a reasoned opinion in which it maintained the position which it had set out in its letter of formal notice. The Commission called on that Member State to take the measures necessary to comply with that reasoned opinion within two months of its receipt. Hungary replied to that opinion on 11 May 2018, reiterating its position that its legislation complies with EU law.

12 As it was not satisfied with that reply, the Commission brought the present action for failure to fulfil obligations.

The action

13 In support of its action, the Commission submits that the measure in question is incompatible with Regulation No 1308/2013 and Article 34 TFEU. It is first necessary to address the complaint alleging infringement of that regulation and, subsequently, the complaint alleging infringement of Article 34 TFEU.

The first complaint, alleging infringement of Regulation No 1308/2013

Arguments of the parties

- 14 The Commission observes that the measure in question provides, in essence, that retail prices for agricultural and food products from a given country must include the same profit margin as that applied to identical products from another country, with the result that it prohibits the setting of different margins for identical products from different countries, the concept of 'identical products' being defined by reference to the composition and organoleptic properties of the product ('the identical products').
- 15 The Commission observes that, although the Member States remain, in principle, competent to adopt certain measures which are not provided for in Regulation No 1308/2013, the fact remains that such measures must not be such as to derogate from or undermine that regulation, or impede its proper functioning.
- 16 In that regard, the Commission observes that, in the absence of a pricing mechanism, the free formation of selling prices on the basis of fair competition is a component of Regulation No 1308/2013 and constitutes the expression of the principle of free movement of goods in conditions of effective competition. Moreover, it maintains that any common organisation of the market ('the CMO') is based on the concept of an open market to which every producer has free access in conditions of effective competition.
- 17 In this case, the Commission takes the view (i) that the measure in question undermines the implementation of Regulation No 1308/2013 as it is incompatible with the principle of the free formation of selling prices of agricultural products on the basis of fair competition and (ii) that the profit margin is an integral part of the formation of the retail price. In that regard, it claims that a provision which prohibits, as in this case, the setting of different profit margins on the retail sale of identical products prevents imported products from entering a given national market by means of attractive retail prices.
- 18 While the Commission accepts that the objective of prohibiting unfair commercial practices may constitute an objective relating to the general interest falling outside the scope of the CMO rules, it recalls that the restrictive measures adopted in order to attain that objective must, nevertheless, be proportionate.
- 19 In that regard, the Commission submits that the measure in question is neither appropriate for securing attainment of the objective to be achieved nor proportionate to that objective, which is to ensure respect for fair commercial behaviour and to improve the situation of producers in the food chain.
- 20 In that regard, the Commission submits that the practice of setting different margins does not, in its view, constitute an unfair commercial practice. Moreover, it maintains that the measure in question interferes considerably with the freedom of retailers in setting margins, whereas the exercise of that freedom cannot be deemed to be equivalent to a sale at a price lower than the purchase price, since that latter practice may be limited without any breach of EU law.
- 21 Furthermore, the measure in question is not appropriate for securing attainment of the objective pursued, since the setting of profit margins on retail sales does not in any way guarantee that suppliers will derive an advantage from it.

- 22 According to the Commission, that measure goes, in any event, beyond what is necessary to secure the attainment of the objective pursued and, in practice, has a discriminatory effect, by having a greater adverse effect on imported goods.
- 23 For its part, Hungary submits that the measure in question is intended to ensure equal conditions of competition for national agricultural and food products and those from other Member States. It observes that Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (OJ 2019 L 111, p. 59) expressly authorises Member States to maintain measures relating to market practices which are not covered by that directive, provided that they are compatible with the rules on the functioning of the internal market. Thus, Hungary takes the view that that measure, which, in order to ensure that the products concerned can compete on the national market on the basis of their cost-effectiveness, prohibits retailers from fixing their selling price in a discriminatory manner on the basis of the country of origin of the products, is consistent with Regulation No 1308/2013.
- 24 Hungary states that Law No XCV of 2009 was adopted in a context characterised by suppliers' dependence on, and vulnerability to, large retailers, which resulted in asymmetry in their bargaining positions and led to unfair market practices. That Member State submits that, before the entry into force of that law, retailers could dictate to suppliers the conditions for marketing their products and that, in practice, they asked suppliers to pay additional costs or to meet *ad hoc* requirements which they imposed on them, thus conducting themselves in an abusive manner. According to Hungary, the objective pursued by that law is to protect suppliers against retailers who, by abusing their greater bargaining power, engage in practices which undermine fair competition on the market concerned which are not, however, capable of being penalised under competition law.
- 25 Hungary submits that the concept of 'identical product' includes basic foodstuffs which are homogeneous and cannot be distinguished from one another by composition and taste. The measure in question concerns only products that are identical in all their characteristics, with the result that it generally concerns basic food products in a lower-price category and which are less processed, but does not concern so-called 'branded' products. Hungary submits that, in so far as those products are identical, consumer preferences are of lesser importance and the difference in price of the products may be decisive in the choices made by consumers. Given that, as regards those products, competition is based on their price, that Member State takes the view that the measure in question ensures that that competition is fair.
- 26 In addition, Hungary takes the view that that measure prevents competition on the market of suppliers of agricultural and food products from being influenced by criteria specific to the retailer, including the subjective sympathy that the retailer may feel for a supplier or for the products which the supplier sells.
- 27 Nonetheless, that Member State observes that the supplier and retailer remain entirely free to determine the purchase price of the products, the measure in question preventing distortions of competition by prohibiting the price paid by the consumer of a product purchased by the retailer at a price lower than that of an identical product from being artificially high on account of the retailer's applying a higher profit margin.
- 28 Furthermore, that Member State observes that the measure in question does not restrict the sale of the goods concerned at a special promotional price.

- 29 As regards the compatibility of that measure with Regulation No 1308/2013, Hungary observes that the Commission does not identify the specific provision infringed of that regulation.
- 30 Hungary contends that the measure in question fully preserves the freedom to set prices when agricultural and food products are purchased by retailers, with the result that it does not infringe settled case-law according to which national measures which undermine competitive relationships by preventing some of the producers or importers from taking advantage of lower cost prices in order to offer more attractive retail prices are contrary to EU law. Hungary adds that the principle underlying Regulation No 1308/2013 does not concern the setting of prices, but the guarantee of the free movement of goods, with the result that the measure in question, which seeks to ensure effective competition, does not infringe that regulation.
- 31 In that regard, Hungary observes that the measure in question formally takes place at the end of the distribution chain, at the stage of the relationship between the retailer and the consumer, but that it produces its effect at the stage of the relationship between the supplier and the retailer, with the result that it is based on the same idea as Directive 2019/633. Hungary submits that that measure is appropriate for securing attainment of the objective stated, since it protects producers, by preventing the competitiveness of their products with consumers from being undermined by a discriminatory pricing technique by the retailer.
- 32 Hungary adds that that measure does not eliminate retailers' freedom of choice, since they retain the possibility of applying price reductions when launching a product and of using marketing tools based on a transitional price reduction, on condition that the price margins applied to the products are equalised within a six-month period.
- 33 Lastly, Hungary takes the view that the Commission has not succeeded in demonstrating (i) that the measure in question draws a distinction between the marketing of products imported from other Member States and that of domestic products and (ii) that in the case of basic products, it is the price of the product which plays a decisive role in the choices made by consumers. In that regard, Hungary takes the view that the Commission's line of argument that that measure is indirectly discriminatory since it places imported products at a disadvantage is based on the reasoning that consumers generally favour domestic products to which they are already accustomed, without, however, showing how that reasoning may be applicable to products which are identical as regards their composition and their organoleptic properties.

Findings of the Court

- 34 As a preliminary observation, it must be noted that, under the common agricultural policy, which, in accordance with Article 4(2)(d) TFEU, is a competence shared between the European Union and the Member States, the Member States have legislative powers which allow them, as is apparent from Article 2(2) TFEU, to exercise their competence to the extent that the European Union has not exercised its competence (judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraph 28 and the case-law cited).
- 35 Furthermore, according to the Court's settled case-law, where there is a regulation on the CMO in a given sector, the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it. Rules which interfere with the proper functioning of a CMO are also incompatible with such common organisation, even if the matter in question has not been exhaustively regulated by it (judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraph 29 and the case-law cited).

- 36 In that regard, it should be noted at the outset that, although the Commission does not allege infringement of a specific provision of Regulation No 1308/2013, but infringement of that regulation as a whole, the fact remains that, in the absence of a pricing mechanism, the free formation of selling prices on the basis of fair competition is a component of that regulation and constitutes the expression of the principle of free movement of goods in conditions of effective competition (see, to that effect, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraph 37 and the case-law cited).
- 37 However, the establishment of a CMO does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by that CMO, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned, provided that those rules are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (see, to that effect, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraphs 30 and 56, and the case-law cited).
- 38 In the present case, the measure in question prohibits, as regards agricultural and food products falling within its scope under Paragraph 2(1) of Law No XCV of 2009, any discriminatory fixing, on the basis of the country of origin of the products, of the price at which identical products are sold to the final consumer.
- 39 Since the measure in question prohibits the application of different profit margins for the retail sale of identical products from different Member States, it has an impact on the formation of prices of agricultural and food products sold to consumers by retailers, with the result that it restricts the freedom to set retail prices for those products.
- 40 As the Commission essentially argues, that measure interferes with retailers' freedom to set their profit margins, by preventing them from selling identical products, but which come from different countries, with a higher or lower profit margin, and thus to be able either to take advantage of lower purchase prices on certain agricultural and food products which are identical to other products, or to offset, by applying lower profit margins, the competitive disadvantage resulting from higher purchase prices of such products.
- 41 That finding cannot be called into question by Hungary's argument that the measure in question does not prohibit promotional sales. As the Commission essentially observed, that measure has the effect of depriving retailers of a method of promoting the products which they wish to put forward, including in particular newly marketed products. As the Advocate General observed in point 83 of his Opinion, it may in certain circumstances be necessary for a retailer to employ a pricing strategy in order to stimulate long-term sales of a new product entering the market.
- 42 Accordingly, it must be held that the measure in question runs counter to the principle of the free formation of selling prices on the basis of fair competition, which, as is apparent from paragraph 36 of this judgment, is a component of Regulation No 1308/2013 and is thus liable to undermine that regulation.
- 43 In this case, Hungary contends that that measure is justified by the combating of unfair commercial practices, by preventing retailers, by setting their profit margin at their discretion, from favouring certain products and therefore from interfering with competition between producers. Hungary takes the view that that conduct is deemed to constitute an unfair

commercial practice which prejudices the interests of producers of agricultural and food products, who must be able to offer their products under conditions of fair competition, which means that such competition must not be distorted by retailers.

- 44 However, Hungary has not established that the circumstance, which is lawful under EU law, that a retailer applies different profit margins to identical products from different suppliers established in different Member States, constitutes an unfair commercial practice.
- 45 A retailer's decision to vary the profit margin applied to identical agricultural and food products may be driven by various commercial reasons, such as to promote new products as to their origin or to attract new customers by lower retail prices.
- 46 Accordingly, the justification put forward by Hungary for the measure in question cannot be accepted.
- 47 First of all, as regards the review of proportionality of the measure in question, that review must be carried out by taking into consideration, in particular, the objectives of the common agricultural policy and the proper functioning of the CMO, which necessitates that those objectives be weighed against the objective pursued by the measure, which is to combat unfair commercial practices (see, to that effect, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraph 57 and the case-law cited).
- 48 Next, as regards whether the measure in question is appropriate for securing attainment of the objective which it pursues, it should be noted that, in accordance with the settled case-law of the Court, national legislation is appropriate for securing attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (see, to that effect, judgment of 4 July 2019, *Commission v Germany*, C-377/17, EU:C:2019:562, paragraph 89 and the case-law cited).
- 49 In this case, it should be noted, as the Commission has rightly observed, that that measure, which occurs in the final phase of the supply chain for agricultural and food products, namely sales to consumers, does not strengthen the bargaining power of producers or suppliers, which the Hungarian legislature regards as the weakest parties in the sale of their products to retailers.
- 50 Thus, that measure does not prohibit producers of agricultural and food products from engaging in price competition by employing practices other than that prohibited by the measure in question which are liable to constitute unfair commercial practices, such as, inter alia, the fixing of the selling price of those products to retailers at their cost price or at their marginal production cost, irrespective of the efficiency of the production methods the promotion of which was however sought by the Hungarian legislature.
- 51 Furthermore, given that the measure in question requires only that an identical profit margin be applied to identical products from different countries, it does not prevent retailers from applying a different profit margin to identical products from the same country, thereby undermining the very coherence of that measure, since, in that case, the objective of that measure cannot be attained.
- 52 Accordingly, it cannot be accepted that the measure in question is appropriate for securing attainment of the objective of combating unfair commercial practices in a consistent and systematic manner.

53 It follows from all the foregoing considerations that, by adopting the measure in question and by thus restricting the way in which the selling prices of agricultural and food products are formed, Hungary has failed to fulfil its obligations under Regulation No 1308/2013.

The second complaint, alleging breach of Article 34 TFEU

54 In the light of the foregoing, there is no need to examine the measure in question under Article 34 TFEU.

Costs

55 Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Hungary has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Orders that, by adopting Paragraph 3(2)(u) of the mezőgazdasági és élelmiszeripari termékek vonatkozásában a beszállítókkal szemben alkalmazott tisztességtelen forgalmazói magatartás tilalmáról szóló 2009. évi XCV. törvény (Law No XCV of 2009 prohibiting unfair trading practices applied against suppliers of agricultural and food products) and by thus restricting the way in which the selling prices of agricultural and food products are formed, Hungary has failed to fulfil its obligations under 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.**
- 2. Orders Hungary to bear its own costs and to pay those incurred by the European Commission.**

[Signatures]