



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 November 2019*

(Reference for a preliminary ruling — Common agricultural policy — Common organisation of the markets — Milk and milk products — Regulation (EC) No 1308/2013 — Article 148(4) — Contract for the delivery of raw milk — Free negotiation of price — Combating unfair commercial practices — Prohibition of payment of different prices to producers of raw milk belonging to a group that is formed according to the daily quantity sold, and of a reduction in price without justification)

In Case C-2/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania), made by decision of 20 December 2017, received at the Court on 2 January 2018, in the proceedings

Lietuvos Respublikos Seimo narių grupė,

intervener:

Lietuvos Respublikos Seimas,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb and T. von Danwitz (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 5 December 2018,

after considering the observations submitted on behalf of:

- the Lietuvos Respublikos Seimo narių grupė, by G. Kaminskas, advokatas,
- the Lithuanian Government, by R. Dzikovič, M. Važnevičius and V. Voinilko, acting as Agents,
- the German Government, initially by T. Henze and S. Eisenberg, and subsequently by S. Eisenberg, acting as Agents,
- the French Government, by S. Horrenberger, D. Colas, A.-L. Desjonquères and C. Mosser, acting as Agents,

* Language of the case: Lithuanian.

- the Netherlands Government, by J. Langer, acting as Agent,
- the European Commission, by A. Lewis and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2019,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2013 L 347, p. 671), as amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 (OJ 2017 L 350, p. 15) ('Regulation No 1308/2013').
- 2 The request has been made in proceedings brought by the Lietuvos Respublikos Seimo narių grupė (group of members of the Parliament of the Republic of Lithuania) for a review of the constitutionality of the Lietuvos Respublikos Ūkio subjektų, perkančių-parduodančių žalią pieną ir prekiaujančių pieno gaminiais, nesąžiningų veiksmų draudimo įstatymas Nr. XII-1907 (Law No XII-1907 of the Republic of Lithuania, prohibiting unfair practices by Lithuanian operators when buying and selling raw milk and trading in milk products), of 25 June 2015 (TAR, 2015, No 2015-11209), as amended by the Law of 22 December 2015 (TAR, 2015, No 2015-20903) ('the Law on the Prohibition of Unfair Practices'), in particular Articles 3 and 5 thereof.

Legal context

EU law

- 3 Recitals 127, 128 and 138 of Regulation No 1308/2013 state:
 - '(127) In the absence of Union legislation on formalised, written contracts, Member States may, under national contract law, decide to make the use of such contracts compulsory, provided that, in doing so, Union law is respected, and in particular that the proper functioning of the internal market and the common market organisation is respected. Given the diversity of situations across the Union, and in the interests of subsidiarity, such a decision should remain with Member States. However, in the milk and milk products sector, to ensure appropriate minimum standards for such contracts and the proper functioning of the internal market and the common market organisation, some basic conditions for the use of such contracts should be laid down at the Union level. All such basic conditions should be freely negotiated. Since some dairy co-operatives possibly have rules with similar effect in their statutes, they should, in the interests of simplicity, be exempted from the requirement to enter into a contract. In order to strengthen the effectiveness of such system of contracts, Member States should decide whether they should also apply where intermediate parties collect milk from farmers to deliver to processors.
 - (128) In order to ensure the viable development of production and a resulting fair standard of living for dairy farmers, their bargaining power vis-à-vis processors should be strengthened, which should result in a fairer distribution of added value along the supply chain. In order to attain those [common agricultural policy] objectives, a provision should be adopted pursuant to Article 42 and Article 43(2) TFEU to allow producer organisations constituted by dairy farmers

or their associations to collectively negotiate with a dairy contract terms, including price, for some or all of their members' raw milk production. In order to maintain effective competition on the dairy market, this possibility should be subject to appropriate quantitative limits. In order not to undermine the effective functioning of cooperatives, and for the sake of clarity, it should be specified that, when a farmer's membership of a cooperative entails an obligation, in respect of all or a part of that farmer's milk production, to deliver raw milk, the conditions of which are set out in the cooperative's statutes or in the rules and decisions based thereon, those conditions should not be the subject of negotiations through a producer organisation.

...

(138) Whereas the use of formalised written contracts in the milk sector is covered by separate provisions, the use of such contracts may also help to reinforce the responsibility of operators in other sectors and to increase their awareness of the need to better take into account the signals of the market, to improve price transmission and to adapt supply to demand, as well as to help to avoid certain unfair commercial practices. In the absence of Union legislation concerning such contracts, Member States may, under national contract law, decide to make the use of such contracts compulsory, provided that, in doing so, Union law is complied with, and in particular that the proper functioning of the internal market and the common market organisation is respected.'

4 Article 1 of that regulation, headed 'Scope', provides:

'1. This Regulation establishes a common organisation of the markets for agricultural products, which means all the products listed in Annex I to the Treaties ...

2. Agricultural products as defined in paragraph 1 shall be divided into the following sectors as listed in the respective parts of Annex I:

...

(p) milk and milk products, Part XVI;

...'

5 Article 148 of that regulation, headed 'Contractual relations in the milk and milk products sector', provides:

'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.

Where a Member State decides that deliveries of raw milk by a farmer to a processor of raw milk must be covered by a written contract between the parties, it shall also decide which stage or stages of the delivery shall be covered by such a contract if the delivery of raw milk is made through one or more collectors.

For the purposes of this Article, a "collector" means an undertaking which transports raw milk from a farmer or another collector to a processor of raw milk or another collector, where the ownership of the raw milk is transferred in each case.

...

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.

...

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:
 - (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) 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 Under Article 149 of Regulation No 1308/2013, headed ‘Contractual negotiations in the milk and milk products sector’:

‘1. A producer organisation in the milk and milk products sector which is recognised under Article 161(1) may negotiate on behalf of its farmer members, in respect of part or all of their joint production, contracts for the delivery of raw milk by a farmer to a processor of raw milk, or to a collector within the meaning of the third subparagraph of Article 148(1).

2. The negotiations by the producer organisation may take place:

- (a) whether or not there is a transfer of ownership of the raw milk by the farmers to the producer organisation;
- (b) whether or not the price negotiated is the same as regards the joint production of some or all of the farmer members;

...’

- 7 Article 152 of that regulation, headed ‘Producer organisations’, provides:

‘1. Member States may, on request, recognise producer organisations, which:

- (a) are constituted, and controlled in accordance with point (c) of Article 153(2), by producers in a specific sector listed in Article 1(2);

...’

- 8 Recital 50 of Regulation 2017/2393 states:

‘The use of contracts in the milk and milk products sector may help to reinforce the responsibility of operators and to increase their awareness of the need to better take into account the signals of the market, to improve price transmission and to adapt supply to demand, as well as to help to avoid certain unfair commercial practices. In order to incentivise the use of such contracts in the milk and milk products sector as well as in other sectors, producers, producer organisations or associations of producer organisations should have the right to request a written contract, even if the Member State concerned has not made the use of such contracts compulsory.’

- 9 As set out in recital 8 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), that regulation having been repealed by Regulation No 1308/2013:

‘The use of formalised written contracts concluded in advance of delivery containing basic elements is not widespread. However, such contracts may help to reinforce the responsibility of operators in the dairy chain and increase awareness of the need to better take into account the signals of the market, to improve price transmission and to adapt supply to demand, as well as to help to avoid certain unfair commercial practices.’

- 10 Article 13 of 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), headed ‘Transposition’, provides in paragraph 1:

‘Member States shall adopt and publish, by 1 May 2021, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission.

They shall apply those measures not later than 1 November 2021.

...’

- 11 As set out in Article 14 of that directive:

‘This Directive shall enter into force on the fifth day following that of its publication in the *Official Journal of the European Union*.’

Lithuanian law

- 12 Pursuant to the first paragraph of Article 46 of the Lithuanian Constitution, the Lithuanian economy is to be based on the right of private ownership, freedom of individual economic activity, and economic initiative.

- 13 Under Article 2(5) of the Law on the Prohibition of Unfair Practices, sellers of raw milk are divided into 10 groups, according to the quantity, expressed in kilograms (kg), of raw milk of natural fat content sold per day. That quantity is less than or equal to 100 kg for the 1st group, more than 100 kg and less than or equal to 200 kg for the 2nd group, more than 200 kg and less than or equal to 300 kg for the 3rd group, more than 300 kg and less than or equal to 500 kg for the 4th group, more than 500 kg and less than or equal to 1 000 kg for the 5th group, more than 1 000 kg and less than or equal to 2 000 kg for the 6th group, more than 2 000 kg and less than or equal to 4 000 kg for the 7th group, more than 4 000 kg and less than or equal to 10 000 kg for the 8th group, more than 10 000 kg and less than or equal to 20 000 kg for the 9th group and more than 20 000 kg for the 10th group.

- 14 Article 2(7) of that law defines the purchase price of raw milk as the amount agreed between the buyer and the seller that is paid for raw milk meeting the basic milk composition indicators set by order of the Lithuanian Minister for Agriculture, excluding surcharges, premiums and deductions.

- 15 Article 3 of that law, headed ‘Prohibition of unfair practices by operators’, provides in paragraph 3:

‘The buyer of raw milk is prohibited from engaging in the following unfair practices:

- (1) setting different purchase prices in contracts for the sale of raw milk when buying raw milk that meets the quality requirements set by order of the Lithuanian Minister for Agriculture from the same group of sellers and in circumstances where the arrangements for the delivery of the milk to the buyer are the same (raw milk delivered to a milk point of purchase, raw milk collected directly from a farm, raw milk delivered directly to a processor), except when raw milk is purchased from sellers who are selling milk that they themselves produced and who belong to a milk producer organisation recognised in accordance with the rules set by decree of the Lithuanian Minister for Agriculture, in which event the purchase price of raw milk applied cannot be lower than the price that would be set according to the relevant group of sellers.

...

(3) unjustifiably reducing the purchase price of raw milk.’

16 Article 5 of that law, headed ‘Obligation to justify a reduction in the purchase price of raw milk’, provides:

‘1. Where a buyer reduces by more than 3% the purchase price fixed in the contract for the purchase of raw milk, he must provide grounds to justify that price reduction and submit those grounds to the Market Regulation Agency.

2. In accordance with the procedural guidelines approved by order of the Lithuanian Minister for Agriculture, the Market Regulation Agency shall, within 5 working days, examine the grounds justifying the reduction in the purchase price of raw milk submitted by the buyer pursuant to paragraph 1, and, within 3 further working days, determine whether the reduction in the purchase price of raw milk by more than 3% was justified.

3. If the Market Regulation Agency decides, under paragraph 2, that the reduction in the purchase price of raw milk by more than 3% was not justified, the buyer shall be prohibited from reducing the purchase price fixed in the contract for the purchase of raw milk.’

The main proceedings and the questions referred

17 On 28 June 2016, a group of members of the Parliament of the Republic of Lithuania submitted to the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania) an application for a review of the conformity of, inter alia, Articles 3 and 5 of the Law on the Prohibition of Unfair Practices with the first paragraph of Article 46 of the Lithuanian Constitution.

18 In support of its application, the group submitted that the Law on the Prohibition of Unfair Practices restricts the right of parties to a contract for the sale of raw milk to set the basic elements of the contract, such as the price or quantity, and therefore does not guarantee the freedom of contract laid down by the first paragraph of Article 46 of the Lithuanian Constitution.

19 The Lithuanian Parliament, for its part, maintained that that freedom is not absolute and may be restricted in order to protect the public interest and to ensure equity and justice. It submitted that, in Lithuania, the bargaining power of raw milk producers, on the one hand, and processors or buyers, on the other hand, is unbalanced in favour of the latter and that the mandatory rules laid down in Articles 3 and 5 of the Law on the Prohibition of Unfair Practices are intended to protect the rights and legitimate interests of the party considered to be the weaker contracting party, namely raw milk producers.

20 The Europos teisės departamentas prie Lietuvos Respublikos teisingumo ministerijos (Department of European Law at the Ministry of Justice of the Republic of Lithuania) and the Lietuvos Respublikos Konkurencijos Taryba (Competition Council of the Republic of Lithuania), which also submitted observations to the referring court, maintained, for their part, that Articles 3 and 5 of that law infringe the principle of freedom of negotiation laid down in Article 148(4) of Regulation No 1308/2013, in particular as regards the fixing of the price of raw milk.

21 The referring court states that, since the sectors of agriculture and the internal market are sectors which fall within the areas of competence shared between the European Union and the Member States, the national legislation concerning those sectors, including the Lithuanian Constitution and the first paragraph of Article 46 thereof, must be interpreted in accordance with the EU legislation relating to those sectors. Consequently, the referring court seeks the interpretation of Article 148(4) of

Regulation No 1308/2013 for the purpose of enabling it to determine whether Article 3(3)(1) and (3) and Article 5 of the Law on the Prohibition of Unfair Practices comply with the first paragraph of Article 46 of the Constitution.

- 22 In that context, the referring court points out that the Lithuanian legislation requires the operators concerned to draw up a written contract when purchasing raw milk. That court adds that, according to the explanatory notes accompanying the draft law on the prohibition of unfair practices, the purpose of that law is, first, to ensure a balance between the legitimate interests of buyers and sellers of raw milk and, secondly, to limit the exercise of market power by milk processors that possess extensive market power and the unfair advantage that operators trading in milk products obtain from a reduction in wholesale prices of such products.
- 23 The referring court also states that it is apparent from the file before it that the milk sector is one of the most important branches of agricultural production in Lithuania, generating approximately 2% of the country's total gross domestic product. However, the bargaining power of producers is extremely limited because of their small size, compared with the size of processors. In that respect, it points out that, according to data submitted for 2015, 74% of Lithuanian raw milk producers own between one and five cows, whereas six companies process 97% of the raw milk. In addition, cooperation between those producers has historically been underdeveloped, despite efforts to encourage it, and only 15% of them engage in genuine cooperation, supplying just 18% of the total quantity of raw milk purchased in Lithuania. There are no raw milk producer organisations recognised in accordance with Article 152 et seq. of Regulation No 1308/2013. The average purchase price of raw milk in Lithuania is one of the lowest in all of the European Union.
- 24 In addition, the referring court states that before the Law on the Prohibition of Unfair Practices was adopted, buyers would simply inform milk producers of the price at which they would purchase the raw milk, without the price being subject to prior negotiation.
- 25 The referring court notes that Article 148 of Regulation No 1308/2013 does not explicitly confer on Member States, which have chosen to make written contracts compulsory for every delivery of raw milk in their territory, the power to restrict, under national law, the principle of freedom of negotiation. However, it is unsure whether it might not be possible to restrict that principle in order to strengthen the bargaining power of farmers in the milk sector vis-à-vis purchasers of milk and to prevent unfair commercial practices, in the light of circumstances such as the specific structural characteristics of the milk and milk products sector, the lack of producer organisations or changes in the market for milk.
- 26 In those circumstances, the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania) decided to stay the proceedings and to 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?

Consideration of the questions referred

The first question

- 27 By its first question, the referring court asks, in essence, whether Article 148(4) of Regulation No 1308/2013 must be interpreted as precluding rules of national law, such as those provided for in Article 3(3)(1) of the Law on the Prohibition of Unfair Practices, which prohibit buyers of raw milk from paying a different purchase price to producers who must be regarded as belonging to the same group on the basis of the daily quantity of raw milk sold that is of identical composition and quality and delivered via the same method.
- 28 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 19 September 2013, *Panellinos Sindesmos Viomikhanion Metapoisis Kapnou*, C-373/11, EU:C:2013:567, paragraph 26).
- 29 Furthermore, according to settled case-law, where there is a regulation on the common organisation of the markets 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 common organisation of the markets are also incompatible with such common organisation, even if the matter in question has not been exhaustively regulated by it (judgment of 26 May 2005, *Kuipers*, C-283/03, EU:C:2005:314, paragraph 37 and the case-law cited).
- 30 Nevertheless, the establishment of a common market organisation 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 common market organisation, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned (judgment of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 26 and the case-law cited).
- 31 In the present case, as Article 1(2)(p) of Regulation No 1308/2013 makes clear, that regulation establishes a common organisation of the markets for all agricultural products listed in Annex I to the EU and FEU Treaties, which covers the milk and milk products sector.
- 32 Article 148(1) of Regulation No 1308/2013 provides that, where a Member State decides that deliveries of raw milk by a farmer to a processor of raw milk must be covered by a written contract between the parties, that contract must fulfil the conditions laid down in Article 148(2). According to Article 148(2)(c) of the regulation, that contract is to include, in particular, as indicated in point (i) of that provision, the price payable for the delivery, which must be static and 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, and, as indicated in point (ii) of that provision, the volume of raw milk which may and/or must be delivered.

- 33 The first subparagraph of Article 148(4) of that regulation provides that 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, are to be freely negotiated between the parties.
- 34 Pursuant to the second subparagraph of Article 148(4) of Regulation No 1308/2013, a Member State may establish an obligation for the parties to agree on a relationship between a given quantity delivered and the price payable for that delivery and may determine a minimum duration applicable only to written contracts between a farmer and the first purchaser of raw milk.
- 35 It is apparent from those provisions that the first subparagraph of Article 148(4) of Regulation No 1308/2013 establishes a rule that all elements of contracts for the delivery of raw milk, including the price, are to be freely negotiated, while the second subparagraph of Article 148(4) provides for exceptions to that rule.
- 36 It follows that the parties must have the opportunity to fix the selling price of raw milk following free negotiation between them and, in particular, after having compared supply and demand in the market in question.
- 37 As the Court has pointed out, 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 (see, to that effect, judgment of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 20).
- 38 In the present case, it is apparent from the information contained in the order for reference and from the Lithuanian Government's observations that the conditions for effective competition are not met on the Lithuanian raw milk market because of unfair commercial practices by buyers, which are highly concentrated, since there are 6 companies processing 97% of the raw milk coming from more than 20 000 very small producers. Before the Law on the Prohibition of Unfair Practices entered into force, buyers of raw milk would simply inform producers of the purchase price of the milk, without prior negotiation and leaving those producers with no option but to accept the conditions imposed. That pressure placed on Lithuanian raw milk producers and the limited development of cooperation between them explain, according to those observations, why the average purchase price of raw milk in Lithuania is one of the lowest in the European Union and why the milk production sector has faced the threat of collapse. That situation, characterised by an imbalance in bargaining power between raw milk producers and processors, prompted the national legislature to adopt that law, which seeks to protect the rights and legitimate interests of the weaker contracting party, namely raw milk producers, by prohibiting operators from engaging in unfair practices and by laying down a number of related requirements.
- 39 The Lithuanian Government adds that that law allows the parties freely to negotiate the purchase price of raw milk and permits the restoration of effective competition on the market.
- 40 According to the information provided by the referring court and confirmed by the Lithuanian Government, it is clear, in that regard, that Article 2(7) of the Law on the Prohibition of Unfair Practices defines the purchase price of raw milk as the amount agreed between the buyer and the seller that is paid for raw milk meeting the basic raw milk composition indicators set by order of the Minister for Agriculture.

- 41 Therefore, while that basic price is fixed for all producers in the same group that is formed according to the daily quantity of raw milk sold, in accordance with Article 3(3)(1) and Article 2(5) of the Law on the Prohibition of Unfair Practices, the final price payable will be calculated according to any surcharges, premiums, deductions or delivery arrangements freely and individually negotiated at the relevant stage.
- 42 It is necessary to consider whether, by adopting Regulation No 1308/2013 and, in particular, Article 148 thereof, the European Union has exhaustively exercised its competence in the area of contractual relations between the parties to a contract for the delivery of raw milk and, more specifically, in relation to the process of negotiation of that contract.
- 43 First of all, it follows from the wording of Article 148(1) of Regulation No 1308/2013, in particular the words ‘where a Member State decides’ that every delivery of raw milk must be covered by a written contract between the parties, that a Member State merely has the option whether to lay down the obligation to use a written contract. That interpretation is confirmed by recital 127 of that regulation, which states that Member States ‘may’ decide to make the use of formalised written contracts compulsory and that ‘such a decision should remain with Member States’.
- 44 That recital states that ‘to ensure appropriate minimum standards for such contracts ..., some basic conditions for the use of such contracts should be laid down at the Union level’. Article 148 of that regulation, read in the light of that recital, aims to establish minimum rules applicable to the contracts in question, without prohibiting Member States from prescribing other rules, which is confirmed by the wording of that article, in particular the words that the contract ‘shall ... include, in particular, the following elements’ in point (c) of paragraph 2 of that article.
- 45 It follows that, by adopting Regulation No 1308/2013 and, in particular, Article 148 thereof, the European Union has not exhaustively exercised its competence in the area of contractual relations between the parties to a contract for the delivery of raw milk, and therefore that regulation cannot be interpreted as prohibiting Member States, in principle, from adopting measures in that area.
- 46 As regards the legislation at issue in the main proceedings, it is clear from the request for a preliminary ruling that the main purpose of that legislation is to combat unfair commercial practices by buyers of raw milk vis-à-vis the party considered to be the weaker party, namely milk producers. In particular, the Law on the Prohibition of Unfair Practices seeks to prohibit sellers and buyers of raw milk from engaging in such practices when selling or buying raw milk, to make the trading of milk products in Lithuania subject to specific requirements, to determine the authorities responsible for monitoring compliance with the provisions of that law and to provide for liability in the event of an infringement.
- 47 The explanatory notes accompanying the draft law on the prohibition of unfair practices thus state that that law seeks to ensure a balance between the legitimate interests of buyers and sellers of raw milk, and to restrict the market power of milk processors that possess extensive market power as well as the unfair advantage that operators trading in milk products obtain from a reduction in wholesale prices of such products.
- 48 Admittedly, as stated in recital 138 of Regulation No 1308/2013, whereas the use of formalised written contracts in the milk sector is covered by separate provisions, the use of such contracts may also help to reinforce the responsibility of operators in other sectors as well as to, inter alia, avoid ‘certain unfair commercial practices’. It must also be observed that Regulation No 261/2012, which introduced into EU legislation a provision corresponding to the current Article 148 of Regulation No 1308/2013, similarly stated, in recital 8, that such contracts ‘may ... help to avoid certain unfair commercial practices’. That wording also appears in recital 50 of Regulation 2017/2393 — which amended the previous version of Regulation No 1308/2013 — which states that the use of contracts in the milk and milk products sector may help to, inter alia, avoid ‘certain unfair commercial practices’.

- 49 However, it cannot be established from those references to certain unfair practices that the objective of combating unfair practices pursued by the legislation at issue in the main proceedings is covered by Regulation No 1308/2013, especially since such practices are not referred to as a whole, nor regulated by or even identified in that regulation.
- 50 In addition, as recital 128 of that regulation makes clear, the regulation pursues the objective of ensuring the viable development of production and a resulting fair standard of living for dairy farmers, in accordance with the objectives of the common agricultural policy, as set out in Article 39(1) TFEU. To interpret Article 148 of Regulation No 1308/2013 as prohibiting Member States from adopting measures to combat unfair practices in the milk and milk products sector would run counter to that objective, as well as to the objective of ensuring the maintenance of effective competition in the markets for agricultural products, which is also one of the objectives of the common agricultural policy (see, to that effect, judgment of 19 September 2013, *Panellinos Sindesmos Viomikhanion Metapoisis Kapnou*, C-373/11, EU:C:2013:567, paragraph 37).
- 51 In addition, it must be noted that, in the sector governed by the common organisation of the market in milk and milk products, the national authorities in principle retain jurisdiction to apply their national competition law to a milk producers' cooperative in a powerful position on the national market (see, to that effect, judgment of 9 September 2003, *Milk Marque and National Farmers' Union*, C-137/00, EU:C:2003:429, paragraph 67).
- 52 The recent adoption of Directive 2019/633 which, pursuant to Article 14 thereof, entered into force on 30 April 2019, confirms the absence of exhaustive harmonisation in the sector relating to the combating of unfair commercial practices in the agricultural and food supply chain at the time when the national provisions at issue in the main proceedings were adopted.
- 53 Consequently, in the light of the case-law cited in paragraph 30 of the present judgment, it must be held that Member States have a residual competence to adopt measures to combat unfair commercial practices which have the effect of restricting the process of free negotiation of prices, even if those measures have an effect on the principle of free negotiation of the price payable for the delivery of raw milk laid down in Article 148 of Regulation No 1308/2013 and, accordingly, on the functioning of the internal market in the sector concerned.
- 54 Article 13(1) of Directive 2019/633 requires Member States to adopt and publish, by 1 May 2021, the laws, regulations and administrative provisions necessary to comply with that directive and to apply those measures not later than 1 November 2021. Since the referring court submitted its request for a preliminary ruling before that directive entered into force, no questions have been raised in relation to that directive and the Court is, therefore, not required to adjudicate on it.
- 55 However, it must be recalled that, according to settled case-law, during the period for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the achievement of the result prescribed by that directive (judgments of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45; of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 67; and of 23 April 2009, *VTB-VAB and Galatea*, C-261/07 and C-299/07, EU:C:2009:244, paragraph 38). Although, in the present case, the Law on the Prohibition of Unfair Practices was adopted prior to the entry into force of Directive 2019/633, the authorities and courts in Lithuania must refrain so far as possible from interpreting that law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive (see, to that effect, judgment of 27 October 2016, *Milev*, C-439/16 PPU, EU:C:2016:818, paragraph 32 and the case-law cited).

- 56 In that context, it must be observed that rules of national law, such as those referred to in paragraph 53 of the present judgment, must nevertheless be appropriate for ensuring attainment of the objective pursued and not go beyond what is necessary in order to attain that objective (see, by analogy, judgments of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 64, and of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 28).
- 57 That review of proportionality must be carried out by taking into consideration, in particular, the objectives of the common agricultural policy and the proper functioning of the common market organisation, which necessitates that those objectives be weighed against the objective pursued by the national legislation, which is to combat unfair commercial practices (see, to that effect, judgment of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 28).
- 58 As regards, in the first place, the question of whether the national legislation is appropriate for ensuring attainment of the objective pursued, it should be noted that Article 2(5) of the Law on the Prohibition of Unfair Practices divides producers of raw milk into 10 groups according to the daily quantity of raw milk sold, that quantity being less than 100 kg for the first group and more than 20 000 kg for the last. Article 3(3)(1) of that law prohibits the buyer of raw milk that complies with certain quality requirements from applying a different basic price to producers who belong to the same group, in the case where the delivery arrangements are the same.
- 59 That provision therefore has the effect of ensuring that the buyer offers an identical basic price to all producers who are in a comparable situation based on an objective criterion relating to the daily quantity of milk sold. Moreover, such a criterion is permitted by Article 148(4), second subparagraph, point (a), of Regulation No 1308/2013, which allows Member States to establish an obligation on the contracting parties to agree on a relationship between a given quantity delivered and the price.
- 60 As is apparent from the file before the Court, Article 3(3)(1) of the Law on the Prohibition of Unfair Practices ensures that milk producers who do not belong to a recognised milk producer organisation are not compelled, owing to an inequality in bargaining power, to agree to the conditions of purchase of raw milk imposed on them by processors or to accept very low prices, whereas other producers, even though they may be of the same size, benefit from higher prices resulting from more balanced negotiations. That provision, moreover, allows them not to be placed in a much less favourable position in the market in comparison with those other producers. That provision may also help to strengthen the bargaining power of small producers — who therefore form part of a group — and encourage them to collaborate more and rebalance the opposing bargaining strengths.
- 61 As is evident from recital 128 of Regulation No 1308/2013, it is also with a view to strengthening the bargaining power of dairy farmers that Article 149 of that regulation allows producer organisations and associations collectively to negotiate contract terms, including the price, in respect of part or all of their members' raw milk production.
- 62 In the light of all those factors, the rules at issue in the main proceedings appear appropriate for preventing the risk that the party considered to be the weaker contracting party may be compelled to accept unjustified price reductions and, thus, for combating potential unfair commercial practices, this being a matter for the referring court to determine.
- 63 As regards, in the second place, the question of whether the rules at issue in the main proceedings go beyond what is necessary, account must be taken, first, of the specific characteristics of the milk sector and of the Lithuanian raw milk market, as set out in paragraphs 22 to 24 and 38 of the present judgment. Those characteristics relate to the lack of effective competition on the Lithuanian raw milk market because of unfair commercial practices, and to the nature of raw milk, which is a perishable product that in practice does not allow producers to delay a sale when faced with unfair commercial practices, nor to come into conflict with those buyers at the risk of jeopardising the commercial

relationship, and the lack of adequate cooperation between milk producers in that market. As the referring court pointed out, before the Law on the Prohibition of Unfair Practices was adopted, buyers would inform producers of the price at which they would purchase the raw milk, without any prior negotiation taking place.

- 64 In addition, it appears from the decision to refer that, despite efforts to encourage, by various means, cooperation between milk producers, not enough of them cooperate, with the result that it has not been possible for raw milk producer organisations to be formed, within the meaning of Regulation No 1308/2013.
- 65 Secondly, it is clear from the decision to refer that, in order to be capable of being sold, raw milk must comply with certain quality requirements laid down by ministerial decree as to its fat and protein content, as well as with certain quality indicators, such as colour, smell, consistency, temperature, taste, acidity, purity, density and neutralising and inhibiting substances.
- 66 According to the details provided in that decision, if the milk does not comply with other milk quality indicators, such as bacteria content, somatic cell content, inhibiting substances and freezing point, deductions to the amount prescribed in the rules set by ministerial decree are applied. In addition, surcharges or premiums may be applied in respect of high quality milk, which, according to the Lithuanian Government, may be without limit.
- 67 It follows, as the referring court points out, that the purchase price paid to a given raw milk producer who does not belong to a recognised milk producer organisation may depend on the group of producers into which it is organised on the basis of the quantity of milk sold, the arrangements for the delivery of the milk, and the milk's composition and quality.
- 68 In that regard, as stated in paragraph 32 of the present judgment, it follows from point (i) of Article 148(2)(c) of Regulation No 1308/2013 that the price may be calculated by combining various factors set out in the contract, which may include, *inter alia*, the quality or composition of the raw milk delivered.
- 69 In those circumstances, and taking into account the objectives of the common agricultural policy and the proper functioning of the common market organisation, the rules at issue in the main proceedings do not go beyond what is necessary to achieve the objectives which they pursue. However, it is for the referring court, which is the only court with direct knowledge of the dispute before it, to determine whether the measures adopted to combat unfair commercial practices by strengthening the bargaining power of milk producers who do not belong to a recognised milk producer organisation and, therefore, to contribute to the viable development of production and guarantee a level playing field for milk producers by limiting the principle of freedom to negotiate the price, do not go beyond what is necessary.
- 70 In the light of the foregoing, the answer to the first question is that Article 148(4) of Regulation No 1308/2013 must be interpreted as not precluding rules of national law, such as those provided for in Article 3(3)(1) of the Law on the Prohibition of Unfair Practices, which, in order to combat unfair commercial practices, prohibit buyers of raw milk from paying a different purchase price to producers who must be regarded as belonging to the same group on the basis of the daily quantity of raw milk sold that is of identical composition and quality and delivered via the same method, in so far as those rules are appropriate for ensuring attainment of the objective pursued and do not go beyond what is necessary to achieve that objective, this being a matter for the referring court to determine.

The second question

- 71 By its second question, the referring court asks, in essence, whether Article 148(4) of Regulation No 1308/2013 must be interpreted as precluding rules of national law, such as those provided for in Article 3(3)(3) and Article 5 of the Law on the Prohibition of Unfair Practices, which prohibit a buyer of raw milk from reducing, without justification, the price agreed with the producer and which make all reductions in price of more than 3% subject to authorisation by the competent national authority.
- 72 First, as is clear from paragraphs 43 to 45 and 48 to 54 of the present judgment, Article 148 of Regulation No 1308/2013 does not preclude Member States from adopting measures to combat unfair commercial practices which have the effect of restricting the process of free negotiation of prices, even if such measures have an effect on the principle of free negotiation of the price payable for the delivery of raw milk and, therefore, on the functioning of the internal market in the sector concerned.
- 73 Nevertheless, as noted in paragraph 56 above, such rules must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary to achieve that objective.
- 74 In the present case, the main purpose of the rules at issue in the main proceedings, as noted in paragraph 46 of the present judgment, is to combat unfair commercial practices by buyers of raw milk vis-à-vis the party considered to be the weaker party, namely milk producers.
- 75 In that context, the Lithuanian Government has explained that Article 3(3)(3) and Article 5 of the Law on the Prohibition of Unfair Practices were intended to introduce guarantees that, once the contract between the buyer and seller of raw milk has been concluded and the price agreed between them has been recorded in that contract, it is no longer possible for that price to be reduced without objective justification and in an unfair manner.
- 76 Secondly, as the Lithuanian and German Governments have observed, those provisions do not appear to have any effect on the principle of freedom to negotiate the price laid down in Article 148 of Regulation No 1308/2013. Those provisions do not appear to relate to the actual negotiation of either the price or the other elements of the contract, but rather to the variation of that price by one of the parties after the contract has been concluded and during its performance, unilaterally and without any consultation or any contractual stipulation, this being a matter for the referring court to determine.
- 77 Thirdly, as regards the question of whether those provisions are appropriate for ensuring attainment of the objective pursued without going beyond what is necessary to achieve that objective, Article 3(3)(3) and Article 5 of the Law on the Prohibition of Unfair Practices are such as to ensure that the buyer respects the price negotiated with the producer in the absence of any objective factor capable of justifying a reduction in that price. Furthermore, those provisions help to prevent attempts by buyers to exert pressure on milk producers in order to reduce the price, and to protect milk producers against the arbitrary imposition of price variations. Consequently, those provisions also help to secure the proper performance of the written contract concluded by the parties, in addition to a certain stability in the prices of raw milk.
- 78 In the light of those factors, the rules at issue in the main proceedings appear appropriate for achieving the objective pursued.
- 79 Finally, as regards whether those rules go beyond what is necessary, account should be taken, as stated in paragraph 63 of the present judgment, of the specific characteristics of the milk sector and the Lithuanian raw milk market, in particular the lack of effective competition on that market and the perishable nature of raw milk, which in practice do not allow producers to delay delivery when faced with unfair commercial practices or to come into conflict with those buyers at the risk of jeopardising the commercial relationship.

- 80 It should also be noted that Article 3(3)(3) and Article 5 of the Law on the Prohibition of Unfair Practices do not prohibit all reductions in the agreed price, but merely provide that such reductions must be objectively justified and, in the event of larger reductions, must be authorised by the competent administrative authority. Moreover, those provisions do not appear to be capable of preventing the parties from including terms in the contract which allow them to reduce the agreed price in the event that new objective circumstances, agreed between them, should arise.
- 81 In addition, it should be noted that the second subparagraph of Article 148(4) of Regulation No 1308/2013 allows Member States, by way of exception to the principle of free negotiation of all elements of contracts for the delivery of raw milk, including the price, to determine a minimum duration of at least 6 months applicable to written contracts between a farmer and the first buyer of raw milk.
- 82 In consideration of the foregoing, the answer to the second question is that Article 148(4) of Regulation No 1308/2013 must be interpreted as not precluding rules of national law, such as those provided for in Article 3(3)(3) and Article 5 of the Law on the Prohibition of Unfair Practices, which, in order to combat unfair commercial practices, prohibit a buyer of raw milk from reducing, without justification, the price agreed with the producer and which make all price reductions of more than 3% subject to authorisation by the competent national authority.

Costs

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

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

1. **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, (EEC) No 1037/2001 and (EC) No 1234/2007, as amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017, must be interpreted as not precluding rules of national law, such as those provided for in Article 3(3)(1) of the Lietuvos Respublikos Ūkio subjektų, perkančių-parduodančių žalią pieną ir prekiaujančių pieno gaminiais, nesąžiningų veiksmų draudimo įstatymas Nr. XII-1907 (Law No XII-1907 of the Republic of Lithuania prohibiting unfair practices by Lithuanian operators when buying and selling raw milk and trading in milk products) of 25 June 2015, as amended by the Law of 22 December 2015, which, in order to combat unfair commercial practices, prohibit buyers of raw milk from paying a different purchase price to producers who must be regarded as belonging to the same group on the basis of the daily quantity of raw milk sold that is of identical composition and quality and delivered via the same method, in so far as those rules are appropriate for ensuring attainment of the objective pursued and do not go beyond what is necessary to achieve that objective, this being a matter for the referring court to determine.**
2. **Article 148(4) of Regulation 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, as amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017, must be interpreted as not precluding rules of national law, such as those provided for in Article 3(3)(3) and Article 5 of Law No XII-1907 of the Republic of Lithuania prohibiting unfair practices by Lithuanian operators when buying and selling raw milk and trading in milk products of 25 June 2015, as**

amended by the Law of 22 December 2015, which, in order to combat unfair commercial practices, prohibit a buyer of raw milk from reducing, without justification, the price agreed with the producer and which make all price reductions of more than 3% subject to authorisation by the competent national authority.

[Signatures]