

On the application to the Court of Justice of the European Union

Case no 11/2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA DECISION

ON THE APPLICATION TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING

20 December 2017, noKT21-S11/2017
Vilnius

The Constitutional Court of the Republic of Lithuania, composed of the Justices of the Constitutional Court: Elvyra Baltutytė, Gintaras Goda, Vytautas Greičius, Danutė Jočienė, Gediminas Mesonis, Vytas Milius, Daiva Petrylaitė, Janina Stripeikienė, and Dainius Žalimas

The court reporter – Daiva Pitrenaitė

The Constitutional Court of the Republic of Lithuania, in its procedural sitting, considered a report by Vytautas Greičius, a Justice of the Constitutional Court, on the preparation of constitutional justice case no 11/2016 for judicial proceeding subsequent to the petition (no 1B-16/2016) of a group of members of the Seimas of the Republic of Lithuania, the petitioner, requesting to investigate the compliance of the Republic of Lithuania's Law on the Prohibition against Unfair Acts of Economic Operators That Purchase and Sell Raw Milk and Trade in Milk Products, *inter alia*, Article 3 (wording of 22 December 2015) and Article 5 (with the amendment of 22 December 2015) thereof, with Paragraph 1 of Article 46 of the Constitution of the Republic of Lithuania.

The Constitutional Court

has established:

1. The group of members of the Seimas, the petitioner, represented by Seimas member Petras Gražulis and advocate Gytis Kaminskas, on 28 June 2016, applied to the Constitutional Court requesting an investigation into whether, *inter alia*, Article 3 (wording of 22 December 2015) and Article 5 (with the amendment of 22 May 2015) of the Law on the Prohibition against Unfair Acts of Economic Operators That Purchase and Sell Raw Milk and Trade in Milk Products (hereinafter also referred to as the Law) are in conflict with Paragraph 1 of Article 46 of the Constitution.
2. This petition is based on the fact that the impugned legal regulation, which establishes certain prohibitions against unfair acts of economic operators and related requirements, restricts the right of the contracting parties that purchase and sell raw milk to establish, by mutual agreement, the main elements of the contract – the price, volume, and the period of notice for the termination or amendment of the contract. Such a legal regulation does not ensure the constitutional freedom of contract, thus, it violates Paragraph 1 of Article 46 of the Constitution, which provides that the economy of Lithuania is based on the right of private ownership, freedom of individual economic activity, and economic initiative. The petitioner does not raise the question of compatibility of Articles 3 and 5 of the Law with European Union law.
3. In the written explanations of Gintarė Dešukaitė, an adviser at the Office of the Committee on Rural Affairs of the Office of the Seimas, acting as the representative of the Seimas, the party concerned, it is stated that the principle of freedom of contract is not absolute and it may be limited, among other things, in order to protect public interest and ensure equitability and fairness. Since in Lithuania there is no balance between the raw milk

producers and its processors (purchasers of raw milk), the objective of the imperative norms of Articles 3 and 5 of the Law is to protect the rights and legitimate interests of the raw milk producers, the weaker party to the contract.

4. In the course of the preparation of the case for the Constitutional Court's hearing, written opinions were received from specialists, *inter alia*, Deividas Kriaučiūnas, Director General of the Department of European Law under the Ministry of Justice of the Republic of Lithuania, and Jūratė Šovienė, a member of the Competition Council of the Republic of Lithuania.

4.1. According to Deividas Kriaučiūnas, under 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 (OL 2013 L 347/671) (hereinafter referred to as the Regulation or Regulation (No 1308/2013)), the principle of free negotiations applies to milk delivery contracts; moreover, this principle is also applied for establishing milk prices. Paragraph 2(c)(i) of Article 148 of the Regulation specifies that the price payable for the delivery of raw milk is 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. Meanwhile, Item 1 of Paragraph 3 of Article 3 of the Law prescribes an exhaustive list of conditions that are observed when establishing the same purchase price of raw milk for the sellers of raw milk that are attributed to the same group. Such a legal regulation, under which the purchaser of raw milk is prevented from applying a different purchase price of raw milk when it purchases milk from the sellers of raw milk that are attributed to the same group, disproportionately restricts the principle of free negotiations of contracting parties. Thus, such a legal regulation restricting the negotiating powers of the sellers and purchasers of raw milk is incompatible with Article 148 (4) of the Regulation, under which the parties are allowed to freely negotiate on the purchase price of raw milk, taking into account not only the above-mentioned reference factors important for the calculation of milk price, among other things, the market indicators reflecting the changes in market conditions, but also other factors that may affect the final price of milk, i.e. raw milk transportation costs, the specificity of raw milk production, and the stability of the relationship between the parties selling raw milk.

4.2. Jūratė Šovienė noted that with regard to the principle of free negotiations of contracting parties consolidated in Article 148 (4) of the Regulation, the conditions should be created for the purchasers and sellers of raw milk to establish their own purchase price of raw milk or the criteria for the establishment of this price. The purchase price of raw milk is regulated by the provisions of Item 1 of Paragraph 3 of Article 3 of the Law, as well as Item 3 thereof, under which the purchaser of raw milk is not allowed to unreasonably reduce the purchase price of raw milk, and of Article 5 of the Law, under which the purchasers of raw milk must submit the justification for the reduction of the said price by more than 3 percentage points to the Lithuanian Agricultural and Food Market Regulation Agency (the Market Regulation Agency) and may reduce the price only upon receipt of the permission from this agency; therefore, the purchase price of raw milk is not established by mutual agreement by contracting parties. According to Jūratė Šovienė, this violates the principle free negotiations of contracting parties.

The Constitutional Court

holds that:

I

A legal basis for the application to the Court of Justice of the European Union

5. In the constitutional justice case at issue, the petitioner impugns, *inter alia*, the compliance of the provisions of Articles 3 and 5 of the Law with Paragraph 1 of Article 46 of the Constitution, which, among other things, consolidates freedom of individual economic activity and economic initiative, and Paragraph 3 thereof, which prescribes the duty to regulate economic activity so that it serves the general welfare of the nation. In the course of the preparation of the case for the hearing, a question arose on the compatibility of the provisions of Items 1 and 3 of Paragraph 3 of Article 3 and Article 5 of the Law consolidating certain prohibitions and requirements linked to the establishment of the purchase price of raw milk applicable to the purchasers of raw milk with Article 148 (4) of the Regulation and, accordingly, on the interpretation of the content of this paragraph.

5.1. The Constitutional Court has held that the fully fledged participation of the Republic of Lithuania, as a member of the European Union, in the European Union is a constitutional imperative grounded in the expression of the sovereign will of the Nation and that the fully fledged membership of the Republic of Lithuania in the European Union is a constitutional value (the Constitutional Court's rulings of 24 January 2014 and 19 November 2015 and its decision of 16 May 2016).

5.2. The Constitutional Court has also mentioned that the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" establishes, *inter alia*, the constitutional grounds of the membership of the Republic of Lithuania in the European Union. In case such constitutional grounds were not consolidated in the Constitution, the Republic of Lithuania would not be able to be a full member of the European Union: the Republic of Lithuania, as a Member State of the European Union, shares with or confers on the European Union the competences of its state institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas, as well as enjoy membership rights (Article 1); the norms of European Union law are a constituent part of the legal system of the Republic of Lithuania (Article 2) (the Constitutional Court's rulings of 24 January 2014 and 14 July 2014 and its decision of 20 October 2017). The Constitutional Court has held on more than one occasion that the jurisprudence of the Court of Justice of the European Union, as a source of interpretation of law, is also important for the interpretation and application of Lithuanian law.

5.3. Thus, the constitutional imperative of the full participation of the Republic of Lithuania in the European Union also implies the constitutional obligation of the Republic of Lithuania to implement the requirements of European Union law properly. European Union law is a source of the interpretation of law of the Republic of Lithuania, *inter alia*, the Constitution in the areas where, under Article 1 of the Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union, the Republic of Lithuania shares with or confer on the European Union the competences of its state institutions. As the areas of agriculture and internal market fall under shared competence between the European Union and the Member States, there are no grounds for interpreting the provisions of the Constitution linked to these areas, *inter alia*, Article 46 thereof, in a different manner than the specified areas are regulated by European Union law.

5.4. In view of this fact, the question faced by the Constitutional Court in relation to the interpretation of Article 148 (4) of the Regulation, which was adopted with regard to the provisions of the Treaty on the Functioning of the European Union (TFEU), is important while deciding whether the provisions of Items 1 and 3 of Paragraph 3 of Article 3 and Article 5 of the Law are in conflict, *inter alia*, with Paragraph 1 of Article 46 of the Constitution. Thus, in the constitutional justice case at issue, it is mandatory to receive the preliminary ruling of the Court of Justice of the European Union concerning the interpretation of the content of Article 148 (4) of the Regulation.

5.5. Under Paragraph 2 of Article 107 of the Constitution, the decisions of the Constitutional Court on the issues assigned to its competence by the Constitution are final and not subject to appeal. Therefore, where any question concerning the interpretation of a legal act of the European Union is raised, the Constitutional Court must, under Article 267 of the TFEU, refer to the Court of Justice of the European Union for a preliminary ruling.

II

National legal regulation and significant factual circumstances

6. On 25 June 2015, the Seimas adopted the Law on the Prohibition against Unfair Acts of Economic Operators That Purchase and Sell Raw Milk and Trade in Milk Products (Register of Legal Acts, 09-07-2015, No 11209) which was aimed at establishing the prohibition against unfair acts of the sellers and purchasers of raw milk while purchasing–selling raw milk, the requirements for the milk products produced in Lithuania and placed on the Lithuanian market, the institutions responsible for the supervision of the compliance with the provisions of this law, and the liability for the violations of this law (Paragraph 1 of Article 1).

7. The explanatory note to the draft law, among other things, specifies that this law is aimed at ensuring the balance of legitimate interests between the purchasers and sellers of raw milk, limiting the exercise of market power by milk processing establishments that have significant market power, the benefit obtained unfairly by the economic operators trading in milk products as a result of a decrease in wholesale prices of milk products.

8. In this context, the following factual circumstances linked to the relationships regulated by the Law that are approved by the material of the constitutional justice case should be mentioned.¹

8.1. The milk sector of Lithuanian economy is one of the biggest and most developed branches of food production. The milk sector – production, processing, and retail sectors together generate about 2 percent of gross domestic product.

8.2. In Lithuania, raw milk is sold by about 25 000 raw milk producers. The possibilities of raw milk producers for negotiating with processors and other milk purchasers are limited, as most raw milk producers are small (according to the data of 2015, 74 percent of all the raw milk producers kept 1–5 cows) compared to processors (97 percent of milk is processed by six milk processing establishments).

8.3. Despite the efforts to encourage cooperation among raw milk producers by various means (legal, financial, consultative), they are not cooperated sufficiently (only 15 percent of milk producers participate in a real cooperation and they provide only 18 percent of all raw milk purchased in Lithuania) and the organisations of raw milk producers described and recognised under Articles 152–154 of the Regulation do not at all exist in Lithuania.

8.4. Milk is purchased from small raw milk producers through milk collection centres. Before the adoption of the Law, in these centres, the purchasers would simply provide the information on the purchase price of raw milk without negotiating with raw milk producers.

8.5. According to the European Commission's data², the average purchase price of raw milk in Lithuania was and is one of the lowest throughout the European Union.

9. The Law was amended and supplemented by the Republic of Lithuania's Law Amending Articles 2, 3, 5, 6, and 13 of the Law on the Prohibition against Unfair Acts of Economic Operators That Purchase and Sell Raw Milk and Trade in Milk Products (No XII-1907) and Supplementing the Law with Article 7¹ (the Register of Legal Acts, 29-12-2015, No 20903), which was adopted by the Seimas on 22 December 2015 and, among other things, amended Articles 3 and 5 of the Law that are impugned in the constitutional justice case at issue.

10. Under Item 3 of Paragraph 2 of Article 3 “The Prohibition against Unfair Acts of Economic Operators” of the Law, which is interpreted in conjunction with Article 3 of the Republic of Lithuania's Law on Payment for Agricultural Production, an economic operator³ is prohibited from performing an unfair act – selling and purchasing raw milk without concluding a written contract for purchasing and selling raw milk. Thus, the laws establish that when economic operators purchase raw milk, they must conclude a written contract.

11. Item 1 of Paragraph 3 of Article 3 of the Law prescribes: “The purchaser of raw milk shall be prevented from committing the following unfair acts: (1) when purchasing raw milk, which meets the quality requirements established by an order of the Minister of Agriculture of the Republic of Lithuania, from the same group of sellers of raw milk and delivering it to the purchaser of raw milk in the same way (raw milk is delivered to the raw milk collection centre, raw milk is taken directly from the farm or raw milk is delivered directly to the raw milk processing establishment), from applying, in the contract for purchasing and selling raw milk, a different purchase price of raw milk, with the exception of cases when the milk is purchased from the sellers of raw milk who sell self-produced milk and belong to milk producer organisations, recognised under the procedure established by an order of the Minister of Agriculture of the Republic of Lithuania; however, in this case, it is prohibited from applying a lower purchase price of raw milk than it would be established according to the groups of sellers of raw milk”.

11.1. Thus, under Item 1 of Paragraph 3 of Article 3 of the Law, a purchaser of raw milk is prohibited from performing this unfair act – applying a different purchase price of raw milk when purchasing raw milk, which meets the established quality requirements, from the sellers of raw milk belonging to the same group that do not belong to the recognised milk producer organisations and when delivering raw milk to the purchaser of raw milk in the same way.

11.2. Under Paragraph 5 of Article 2 (wording of 22 December 2015) of the Law, the sellers of raw milk are divided into ten groups under the volume of raw milk of natural fat content sold (in kilograms) per day: the first group – up to 100 kg inclusive, second – from more than 100 kg to 200 kg inclusive, third – from more than 200

kg to 300 kg inclusive, fourth – from more than 300 kg to 500 kg inclusive, fifth – from more than 500 kg to 1 000 kg inclusive, sixth – from more than 1 000 kg to 2 000 kg inclusive, seventh – from more than 2 000 kg to 4 000 kg inclusive, eighth – from more than 4 000 kg to 10 000 kg inclusive, ninth – from more than 10 000 kg to 20 000 kg inclusive, and tenth – more than 20 000 kg.

11.3. Under Paragraph 7 of Article 2 (wording of 22 December 2015) of the Law, the purchase price of raw milk is the amount of money agreed between the seller of raw milk and the purchaser of raw milk that is paid for the sold raw milk meeting the basic milk composition indicators established by an order of the Minister of Agriculture, exclusive of premiums, supplements, and charges. In this context, it should be mentioned that under the Rules of purchase of milk, as approved by the order (No 146) of 9 May 2001 of the Minister of Agriculture, the indicators of milk composition include the fat content and the protein content in milk as a percentage (Item 4.8); the basic indicators are 3.4 percent of fat content and 3 percent of protein content (Annex 4).

11.4. It also needs to be mentioned that under the Rules of purchase of milk, milk is purchased if the primary quality indicators (milk colour, odour, consistency, temperature, taste, acidity, cleanliness, density, and neutralising and antimicrobial substances) meet the indicators specified in these rules (Items 4.12 and 32, Annex 1); if milk does not meet other milk quality indicators (such as total bacterial count, somatic cell count, antimicrobial substances, and the freezing point of milk), the charges of the amount established in these rules will be applied (Item 4.6, Chapter VII). According to these rules, the raw milk producers may be paid premiums or supplements for the conditions provided for in a contract (Item 15.5), therefore, also for a higher quality of milk.

11.5. Consequently, under the reviewed legal regulation, the purchase price of raw milk paid to a specific seller of raw milk not belonging to the recognised milk producer organisations may depend on the fact to which group of sellers the said seller is attributed according to the volume of the milk sold, as well as on the way raw milk is delivered and the composition and quality of raw milk; the purchaser of raw milk is not prohibited from differentiating the purchase price of raw milk for the sellers of raw milk that belong to the same group, having regard to the composition and quality of the milk supplied (it is allowed to pay relevant premiums and supplements and to apply charges for the raw milk of different composition and quality); however, the list of criteria (factors) influencing the purchase price of raw milk is exhaustive.

12. Item 3 of Paragraph 3 of Article 3 of the Law (wording of 22 March 2015) prescribes: “The purchaser of raw milk shall be prevented from committing the following unfair acts: [...] (3) from unreasonably reducing the purchase price of raw milk;”

13. Article 5 “The requirement to justify the reduction of the purchase price of raw milk” (with the amendment of 22 December 2015) prescribes:

„1. In the case where the purchaser of raw milk reduces the purchase price of raw milk established in the contract for purchasing and selling raw milk, the purchaser of raw milk must justify the reduction of the said price by more than 3 percentage points and submit such a justification to the Market Regulation Agency.

2. Pursuant to the description of the procedure as approved by the order of the Minister of Agriculture of the Republic of Lithuania, the Market Regulation Agency, having, within 5 working days, assessed the justification of the reduction of the purchase price of raw milk submitted by the purchaser of raw milk according to Paragraph 1 of this Article, shall, within 3 working days, adopt a decision on the justification of the reduction of the purchase price of raw milk by more than 3 percentage points.

3. Where the Market Regulation Agency adopts, under the procedure provided for in Paragraph 2 of this article, a decision that the reduction of the purchase price of raw milk by more than 3 percentage points is unjustified, the purchaser of raw milk shall not be allowed to reduce the purchase price of raw milk that is established in the contract for purchasing and selling raw milk.”

14. Thus, Item 3 of Paragraph 3 of Article 3 of the Law consolidates the general prohibition for the purchaser of raw milk to unjustifiably reduce the purchase price of raw milk and Article 5 thereof establishes the duty of the purchaser of raw milk to provide the Market Regulation Agency with the justification of the reduction of the purchase price of raw milk prescribed in the contract for purchasing and selling raw milk by more than 3

percentage points; the said article also consolidates the prohibition to reduce the purchase price of raw milk if such a reduction is established to be unjustifiable.

15. Under Paragraphs 5 and 6 of Article 11 “Economic sanctions” of the Law, fines are imposed on the purchaser of raw milk for the violation of the requirements specified in Items 1 and 3 of Paragraph 3 of Article 3 and Paragraph 1 of Article 5 of this Law. Under Article 10 of the Law, complaints may be filed against the decisions of the Market Regulation Agency under the Law on the Proceedings of Administrative Cases.

16. In 2016, the Market Regulation Agency established that the above-mentioned Items 1 and 3 of Paragraph 3 of Article 3 of the Law had been violated most frequently. Some purchasers of raw milk were applied economic sanctions for the violations they had made. A part of the purchasers of raw milk were not, under Article 5 of the Law, allowed to reduce the purchase price of raw milk by more than 3 percentage points, as such a reduction had been assessed as unjustified.

III

The legal regulation of the European Union and the questions arising in relation to its interpretation

17. Trade in milk and milk products in the European Union is regulated by the Regulation establishing a common organisation of the markets in agricultural products, *inter alia*, milk and milk products (Article 1).

18. As it is specified in the Preamble to the Regulation, it was adopted with reference to the TFEU, in particular to Article 42 and Article 43 (2) thereof.

18.1. Under the first paragraph of Article 42 of the TFEU, the provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

18.2. Article 43 (2) of the TFEU prescribes that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40 (1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

18.3. Article 39 (2) of the TFEU consolidates the following objectives of the common agricultural policy:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.

18.4. Under Article 39 (2) of the TFEU, in working out the common agricultural policy and the special methods for its application, account shall be taken of:

(a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;

(b) the need to effect the appropriate adjustments by degrees;

(c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

19. Special provisions applicable to the milk and milk products sector are consolidated in Articles 148–151 of the Regulation. The provisions important in the constitutional justice case at issue are set out in Article 148 of the Regulation.

19.1. Article 148 “Contractual relations in the milk and milk products sector” of the Regulation prescribes:

“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 paragraphs 1 and 1a 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. [...]

19.2. Thus, Article 148 of the Regulation, *inter alia*, prescribes the requirements for the written contracts between the farmers selling raw milk and the processing establishments purchasing it, as well as other collectors. Under Paragraph 2 of this article, the contract for purchasing raw milk must establish the conditions that are *expressis verbis* specified in the said Paragraph 2, among other things, the purchase price of raw milk that is calculated, among other things, having regard to the market indicators reflecting the changes of market conditions, quantity of the delivered raw milk, as well as to its quality or composition. Under Paragraph 4 of this article, all aspects of contracts for the delivery of raw milk, including those that are not specified *expressis verbis* in Paragraph 2, are freely negotiated between the parties.

19.3. As it is obvious from recital 127 of the Regulation, the milk and milk products sector, which establishes, at the European Union level, the main conditions of written contracts (that must be subject to free negotiation), is excluded from other sectors of agricultural products, in which, with due respect for the principle of subsidiarity, the issue of the use of written contracts was left to the Member States.

19.4. Thus, Article 148 of the Regulation, recital 127 thereof does not, *expressis verbis*, provide for the possibility for the Member States, which have decided to use written contracts in the milk and milk products sector, to establish, in the national law, the restrictions of the right of the parties of the above-mentioned contracts to freely negotiate.

20. On the other hand, certain other provisions of the Regulation, which reflect certain directions of the implementation of common agricultural policy, give rise to the question if there is a possibility to interpret Article 148 (4) of the Regulation also in a way that the freedom of parties to negotiate on the conditions of contracts for delivery of raw milk, *inter alia*, the price of raw milk, is not absolute and may be limited in seeking to increase the power of the farmers of milk sector in negotiating with the purchasers of milk, to prevent unfair commercial practices and in taking account of certain important circumstances such as structural particularities of milk and milk products sector and changes in milk market.

20.1. It should be noted that there are no legal acts of the European Union intended for unfair commercial practices between establishments in the food supply chain. However, as it is obvious from recital 138 of the Regulation, the use of written contracts in the milk and milk products sector is considered to be the measure, among other things, able to prevent certain unfair commercial practice. However, it is not clear whether this means a possibility to establish such national legal regulation, under which the parties to such contracts could freely negotiate insofar as they do not perform certain unfair acts.

20.2. Second, in the context of the constitutional justice case at issue, attention should also be drawn to the fact that one of the directions for the implementation of the European Union's common agricultural policy, as it is obvious from recital 128 of the Regulation, is to increase the power of the farmers in negotiating with the processing establishments and so to strengthen their position in the food supply chain. The way to increase the power of the farmers of milk sector in negotiating with the milk processing establishments provided for in this recital of the Regulation and Article 149 thereof is a possibility to negotiate collectively the conditions of raw milk delivery contracts allowed for the milk producer organisations as an exception to the application of competition rules. However, as the material of this case makes it clear, no raw milk producer organisations exist in Lithuania. The question therefore arises whether, in the light of this circumstance, the legal acts may, at national level, provide other ways to implement the objective to strengthen the negotiating powers of raw milk producers and, among other things, to this end, to establish certain prohibitions against unfair acts of raw milk purchasers.

20.3. In this context, it should be mentioned that the European Union institutions, taking account of the need to strengthen the situation of farmers in the food supply chain, took certain steps to assess how to combat the problem of unfair trading practices in the agri-food chain; however, only preparatory work are taking place in order to clarify the legal regulation that could (or should) be established at the European Union level.⁴

21. In view of the above, it is not clear whether the provision of Article 148 (4) of the Regulation that the parties freely negotiate on the conditions for contracts for delivery of raw milk, *inter alia*, the price of raw milk, could be interpreted as meaning that, while seeking to strengthen the negotiating powers of raw milk producers, prevent from unfair commercial practices, and, taking account of certain structural particularities of the milk and milk products sector of the economy of a Member State, changes in milk market, national law may establish such prohibitions against unfair acts in this sector that would, to a certain extent, limit the freedom of negotiating between the parties to a contract.

22. As mentioned before, in the constitutional justice case at issue, the petitioner impugns, *inter alia*, the compliance of the provisions of Articles 3 and 5 of the Law consolidating certain prohibitions and requirements linked to the establishment of the purchase price of raw milk applicable to the purchasers of raw milk with the Constitution.

22.1. Thus, under Item 1 of Paragraph 3 of Article 3 of the Law, a purchaser of raw milk is prohibited from performing certain unfair act – applying a different purchase price of raw milk when purchasing raw milk, which meets the established quality requirements, from the sellers of raw milk attributed to the same group according of the volume of milk sold that do not belong to the recognised milk producer organisations, and when delivering raw milk to the purchaser of raw milk in the same way. Thus, by means of this legal regulation, the freedom of parties to contracts to negotiate on the conditions of contracts for purchasing and selling raw milk is restricted from the point of view that the purchase price of raw milk may depend only on the fact to which group of sellers the seller is attributed according to the volume of the milk sold, as well as on the way raw milk is delivered and the composition and quality of raw milk; therefore, taking account of any factors, the parties are not allowed to agree on a different purchase price of raw milk.

22.2. Under Item 3 of Paragraph 3 of Article 3 of the Law, the purchaser of raw milk is prevented from committing a certain unfair act – from unreasonably reducing the purchase price of raw milk; under Article 5 of the Law, the reduction of the said price by more than 3 percentage points is possible only if such a reduction is recognised as justified by the Market Regulation Agency. Thus, this legal regulation also restricts the freedom of parties to contracts to negotiate on the purchase price of raw milk.

23. In the light of the above and in seeking to remove the doubts raised concerning the compatibility of Items 1 and 3 of Paragraph 3 of Article 3 and Article 5 of the Law with Article 148 (4) of the Regulation, in the constitutional justice case at issue, the Constitutional Court needs to clarify whether Article 148 (4) of the Regulation may be interpreted as not preventing, in order to strengthen the negotiating power of raw milk processors and prevent unfair commercial practices and taking account of certain structural particularities of the milk and milk products sector of a Member State and the development of milk market, from establishing such a national legal regulation that would restrict freedom of contracting parties in negotiating on the purchase price of raw milk in the following aspects:

- a purchaser of raw milk would be prohibited from applying a different purchase price of raw milk when purchasing raw milk, which meets the established quality requirements, from the sellers of raw milk attributed to the same group according to the volume of milk sold that do not belong to the recognised milk producer organisations, and when delivering raw milk to the purchaser of raw milk in the same way; thus, the parties would not be able, taking account of any other factors, to agree on a different purchase price of raw milk;
- a purchase of raw milk would be prohibited from reducing the purchase price of raw milk; however, it would be possible to reduce this price by more than 3 percentage points only if such a reduction were recognised as justified by the institution authorised by the state.

Conforming to Article 102 of the Constitution of the Republic of Lithuania and Article 267 of the Treaty on the Functioning of the European Union, the Constitutional Court of the Republic of Lithuania adopts the following

decision:

1. To apply to the Court of Justice of the European Union for a preliminary ruling on the following issues:

1.1. Whether Article 148 (4) of the Regulation No 1308/2013 may be interpreted as not preventing, in order to strengthen the negotiating power of raw milk processors and prevent unfair commercial practices and taking account of certain structural particularities of the milk and milk products sector of a Member State and the development of milk market, from establishing such a national legal regulation that would restrict freedom of contracting parties in negotiating on the purchase price of raw milk from the viewpoint that the purchaser of raw milk would not be allowed to pay the sellers of raw milk that are attributed to the same group according to the volume of the milk sold, which do not belong to the recognised organisations of milk producers, a different price for the raw milk of same composition and quality and delivered to the purchaser in the same way; thus, the parties could not, taking account of any other actions, agree on a different purchase price of raw milk?

1.2. Whether Article 148 (4) of the Regulation No 1308/2013 may be interpreted as not preventing, in order to strengthen the negotiating power of raw milk processors and prevent unfair commercial practices and taking account of certain structural particularities of the milk and milk products sector of a Member State and the development of milk market, from establishing such a national legal regulation that would restrict freedom of

contracting parties in negotiating on the purchase price of raw milk from the viewpoint that the purchaser of raw milk would not be allowed to unreasonably reduce the purchase price of raw milk and it would be possible to reduce the said price by more than 3 percentage points only if such a reduction would be recognised as justified by the authorised state institution?

2. To decide the issue of consideration of constitutional justice case no 11/2016 at the judicial hearing of the Constitutional Court of the Republic of Lithuania after the requested preliminary ruling of the Court of Justice of the European Union is received.

Justices of the Constitutional Court: Elvyra Baltutytė

Gintaras Goda

Vytautas Greičius

Danutė Jočienė

Gediminas Mesonis

Vytas Milius

Daiva Petrylaitė

Janina Stripeikienė

Dainius Žalimas

1 The written opinion of Bronius Markauskas, the Minister of Agriculture of the Republic of Lithuania, the statements of the Market Regulation Agency on the implementation of the Law and assessment of the results obtained, and the conclusions of the market research in the milk and milk products sector carried out by the Competition Council, etc.

2 See on the website of the European Commission at https://ec.europa.eu/agriculture/sites/agriculture/files/market-observatory/milk/pdf/eu-raw-milk-prices_en.pdf.

3 Under Paragraph 2 of Article 2 (wording of 22 December 2015) of the Law, an economic operator is a legal person, other organisation or their branch, a farmer or other legal person – seller of raw milk, purchaser of raw milk or processor of raw milk that were established in the Republic of Lithuania, other Member State of the European Union, a state of the European Economic Area or in a third state, and are performing economic and/or commercial activity in the Republic of Lithuania. }

4 On 7 June 2016, the European Parliament adopted the resolution on unfair trading practices in the food supply chain (2015/2065(INI)); on 14 November 2016, the Agricultural Markets Task Force, which was created by Commissioner Phil Hogan, submitted the report on enhancing the position of farmers in the supply chain; on 12 December 2016, the Council of the European Union adopted the conclusions on strengthening farmers' position in the food supply chain and tackling unfair trading practices (15508/16), etc.