Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 12 November 2020[1]

Case C-400/19

European Commission
v

Hungary

(Failure of a Member State to fulfil obligations – Article 34 TFEU – Common organisation of the markets in agricultural products – Regulation (EU) No 1308/2013 – National law prohibiting unfair trading practices applied against suppliers in respect of agricultural and food products – Sale prices of agricultural and food products – Uniform retail profit margin to be applied to identical products)

I. Introduction

1. By its application, the European Commission requests the Court to declare that, by restricting the fixing of sale prices of agricultural and food products, having particular regard to Paragraph 3(2)(u) of the mezőgazdasági és élelmiszeripari termékek vonatkozásában a beszállítókkal szemben alkalmazott tisztességtelen forgalmazói magatartás tilalmáról szóló, 2009. évi XCV. törvény (Law XCV of 2009 prohibiting unfair trading practices applied against suppliers in respect of agricultural and food products)[2] ('Law XCV of 2009'), Hungary has failed to fulfil its obligations under Article 34 TFEU and Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.[3]

2. This application thus raises again the question of the extent to which and under what conditions Member States can utilise the provisions of their national unfair competition or consumer laws to limit pricing mechanisms in order to favour the party or parties which are generally considered to enjoy a less advantageous bargaining position in the food supply chain. These issues were already highlighted in the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962) and, for the purposes of this Opinion, it will be necessary to examine the reasoning and conclusions of that decision in some detail.

3. Before doing so, however, it is first necessary to set out the relevant legislative and Treaty texts.

1 Original language: English.

2 According to the Commission, Law XCV of 2009 entered into force on 1 January 2010.

3 OJ 2013 L 347, p. 671.

II. Legal framework

A. EU law

4. Article 34 TFEU provides:

'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

5. Article 83(5) of Regulation No 1308/2013 provides:

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

B. Hungarian law

6. In accordance with its Paragraph 1, Law XCV of 2009 concerns 'agricultural products and foodstuffs', which are defined in Paragraph 2(2) of that law, by reference to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.[4]

7. Pursuant to its Paragraph 2(1), Law XCV of 2009 relates to (a) undertakings producing, processing or selling without processing agricultural and food products; and (b) undertakings selling those products to final consumers. The latter category includes all retailers, irrespective of their size, and therefore applies to both hypermarkets and small shops selling agricultural and food products.

8. Paragraph 3(2) of Law XCV of 2009 provides:

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

…

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

III. Forms of order sought

9. The Commission claims that the Court should:

– Declare that, by restricting the fixing of sale prices of agricultural and food products, having particular regard to Paragraph 3(2)(u) of Law XCV of 2009, Hungary has failed to fulfil its obligations under Article 34 TFEU and Regulation No 1308/2013; and

– Order Hungary to pay the costs.

4 OJ 2002 L 31, p. 1.

10. Hungary claims that the Court should:

– Dismiss the Commission's action as unfounded; and

– Order the Commission to pay the costs.

IV. The action

A. Arguments of the parties

11. By its application, the Commission advances two complaints. It alleges that by restricting the fixing of sale prices of agricultural and food products pursuant to, in particular, Paragraph 3(2)(u) of Law XCV of 2009, Hungary has failed to fulfil its obligations under first, Regulation No 1308/2013 and second, Article 34 TFEU.

12. As regards its action under Regulation No 1308/2013, the Commission claims that in accordance with Paragraph 3(2)(u) of Law XCV of 2009, the retail selling prices of agricultural and food products from a given country must include the same profit margin as that applied to identical products from elsewhere, irrespective of their country of origin. The provision therefore prohibits retailers from selling, for example, imported products at a price plus a 5% profit margin if, at the same time, they offer identical domestic products at a price plus a 10% margin. Paragraph 3(2)(u) of Law XCV of 2009 applies to all agricultural and food products and the concept of 'identical products' is defined by reference to the composition and organoleptic properties of the product.

13. According to the Commission, Paragraph 3(2)(u) of Law XCV of 2009, which in practice prohibits retailers from selling imported products at a different profit margin from that applied to domestic products, undermines the implementation of Regulation No 1308/2013 as it is incompatible with a basic principle of that regulation, namely, the free determination of the selling prices of agricultural products on the basis of fair competition. The Commission considers that the profit margin is an integral part of the fixing of the retail price.

14. The Commission refers to the judgments of 4 March 2010, *Commission* v *France* (C-197/08, EU:C:2010:111) and *Commission* v *Ireland* (C-221/08, EU:C:2010:113) which it considers are an example of the importance of protecting the freedom of economic operators in the field of fixing prices. That freedom makes it possible for new imported products to penetrate a given national market by means of attractive retail prices.

15. In respect of its action under Article 34 TFEU, the Commission submits that Paragraph 3(2)(u) of Law XCV of 2009 does not refer to the characteristics of agricultural and food products, but solely to their selling arrangements, and must therefore be regarded as a provision relating to sales arrangements within the meaning of the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905). The provision in question fails the second test laid down in that judgment as it grants a de facto advantage to identical national products. Thus, the Commission considers that Paragraph 3(2)(u) of Law XCV of 2009 constitutes a restriction affecting trade between Member States pursuant to Article 34 TFEU, given that it makes it more difficult to market certain goods imported from other Member States as compared with identical national products and thus discourages the retail distribution of such goods. The Commission notes that consumers are naturally more familiar with national products, which have been on the market for longer, and prefer them to newly arrived products. In addition, some consumers feel that they are supporting the national economy by buying local products, and in some Member States there are regular promotional

campaigns to this effect, which take advantage of this sentiment. It is precisely for this reason, among many others, that commercial operators may resort to different commercial practices, one of the most appropriate of which is that of lowering the price of certain imported products so that consumers become more familiar with them more quickly.

16. The Commission considers that the interference in the free pricing policy in question is aimed at protecting certain national economic operators rather than defending the interests of consumers as claimed by Hungary. In order to defend the interests of consumers, it would be sufficient to prohibit sales below cost. In the present case, the State intervention goes beyond a ban on sales below cost and does not appear to bring any benefit to the consumer. According to the Commission, Paragraph 3(2)(u) of Law XCV of 2009 constitutes per se an arbitrary discrimination and a practice contrary to Article 34 TFEU such that different statistical data, which might tend to prove that the contested measure is not discriminatory, is irrelevant. The Commission also considers that the term 'identical products' gives rise to uncertainty and thus to a breach of Article 34 TFEU. In that regard, the Commission notes that certain retailers could, for example, indicate on the product the breed of cows that produced the UHT milk, as some already do for meat products. Due to the national rules in question, these products may not be sold at a higher price since, according to Hungary, the same profit margin should be applied to all UHT milk with a fat content of, for example, 2.8%. This could negatively influence the consumer and affect the free movement of goods.

17. As regards the possible justifications for the national rules in question, the Commission notes that a measure which constitutes a restriction pursuant to Article 34 TFEU may be justified in accordance with Article 36 TFEU or for overriding reasons in the public interest. However, in accordance with the case-law, a provision which is capable of restricting a fundamental freedom guaranteed by the FEU Treaty, such as the free movement of goods, can be properly justified only if it is appropriate for securing the attainment of a legitimate objective and does not go beyond what is necessary in order to attain it. The Commission considers that the national measure in question is neither appropriate nor proportionate.

18. On the question of the appropriateness of the measure, the Commission considers that the fixing of profit margins benefits primarily retailers rather than producers. The Commission considers that the measure is disproportionate and that increased transparency in the market would have achieved the same objective without negatively influencing the freedom to set prices.

19. The Commission does not consider, contrary to Hungary's claim, that the commercial practice which is the object of Paragraph 3(2)(u) of Law XCV of 2009 is an unfair commercial practice as defined by the European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain.[5] In addition, the Commission claims that in its resolution, the European Parliament does not encourage the adoption of measures, such as those at issue in the present case, which jeopardise the functioning of the internal market and hinder trade.

20. The Commission points out, moreover, the fact that Paragraph 3(2)(u) of Law XCV of 2009 interferes significantly with the freedom of distributors to set margins, a freedom which cannot be deemed equivalent to selling below cost. The Commission accepts that it is possible to limit sales below cost in accordance with the case-law of the Court as it does not lead to arbitrary discrimination. By contrast, however, Paragraph 3(2)(u) of Law XCV of 2009 has a discriminatory effect on imported products and thus cannot be justified.

5 2015/2065(INI) 2018/C 086/05.

21. The Commission submits that, contrary to Hungary's claims, Paragraph 3(2)(u) of Law XCV of 2009 does not appear to be conducive to ensuring fair business practices. Indeed, the setting of retail profit margins does not guarantee that suppliers will receive any advantage. On the contrary, the potential benefits accrue to retailers and not to farmers. As regards the principle of proportionality, the Commission considers that there are other less restrictive measures which are compatible with EU law which could achieve the objectives sought.

22. In its reply, the Commission does not accept Hungary's assertion that Paragraph 3(2)(u) of Law XCV of 2009 applies only to basic foodstuffs which cannot be distinguished from one another by composition and taste. According to the Commission, it cannot be excluded that certain 'branded' products may be considered identical in composition and organoleptic properties. The Commission notes that retailers are in competition with each other and thus there is no justification for limiting their ability to set prices by invoking an alleged improvement of competition with respect to the producers of the product. Hungary has failed to demonstrate how limiting the right of retailers to fix their margins benefits producers. The retailer has much stronger bargaining power because of its size and economic strength, and the fixing of retail margins does not affect the wholesale price between the supplier and the retailer. The contested national measure does not offer protection to producers, but contains a disproportionate restriction which, in practice, discriminates against products imported from other Member States.

23. The Commission considers that the restriction in question cannot be justified in accordance with 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.[6] It notes that Directive 2019/633 identifies in a precise manner 16 unfair trading practices which are prohibited. Thus not every situation which is presumed unfair is prohibited. As the contested measure applies in a very general manner to all decisions on the fixing of price by a retailer, the Commission considers that Paragraph 3(2)(u) of Law XCV of 2009 is contrary to the general principles laid down in Regulation No 1308/2013 and the relevant case-law, as it affects a large range of agricultural and food products when it limits the freedom to fix prices in the supply chain. In paragraph 20 of the judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845), the Court stated that 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. The Commission considers that Paragraph 3(2)(u) of Law XCV of 2009 is thus incompatible with that judgment.

24. The Commission submits that the free formation of selling prices should also apply to products such as milk, flour, oil, sugar, etc. Directive 2019/633 emphasises the importance of freedom of negotiation. The Commission rejects Hungary's claim that the effects of the contested measure on the free movement of goods is too uncertain and indirect.

25. Hungary considers that Paragraph 3(2)(u) of Law XCV of 2009, which is the only provision of that law which has been called into question by the Commission, is compatible with Regulation No 1308/2013 and does not constitute a restriction contrary to Article 34 TFEU.

26. Hungary claims that Paragraph 3(2)(u) of Law XCV of 2009, which was adopted seven years ago, seeks to ensure equal competitive conditions for national agricultural and food products and for those products from other Member States. It thus complies with and pursues the objectives of the recently adopted Directive 2019/633, which establishes a minimum level of protection in the European Union against unfair trading practices in the light of the significant imbalances in bargaining power between suppliers and buyers of agricultural and food products. Directive 2019/633 seeks to address unfair practices which cannot be addressed by competition law. The focus of Directive 2019/633 is on the

6 OJ 2019 L 111, p. 59.

dependent position of suppliers vis-à-vis retailers rather than the dominant position of retailers. Directive 2019/633 expressly allows Member States to maintain measures relating to trading practices not covered by that directive, provided that they are compatible with the rules on the functioning of the internal market. Law XCV of 2009 was adopted in order to protect suppliers from the abusive behaviour of large retail outlets such as supermarkets, due to the position of economic vulnerability and dependence of suppliers as compared to those outlets. The difference between the contested measure and Directive 2019/633, is that while the contested measure intervenes formally at the level of retailer and consumer, its effects are produced at the level of the relationship between the supplier and retailer.

27. According to Hungary, despite the fact that Paragraph 3(2)(u) of Law XCV of 2009 restricts to a limited extent the economic freedom of retailers of agricultural products and foodstuffs, it does not impede trade between Member States.

28. Hungary states that Law XCV of 2009 restricts the practices of retailers in order to ensure that the relevant element is essentially the purchase price of products agreed between the supplier and the retailer and that it is not possible to charge other costs or commissions unless they correspond to a real service requested by the supplier. Paragraph 3(2)(u) of Law XCV of 2009 applies only to a limited range of products, namely products which are 'identical in composition and organoleptic properties'. That provision therefore applies solely to basic foodstuffs which are homogeneous and cannot be distinguished from one another by composition and taste or which cannot be considered to be 'branded' products. The products in question are typically, inter alia, milk, flour, oil, fruit, vegetables, poultry and sugar. Moreover, Paragraph 3(2)(u) of Law XCV of 2009 concerns only products that are identical in respect of all their characteristics. Thus, according to Hungary, UHT milk with a fat content of 2.8% cannot, for example, be considered identical to fresh milk or milk with a different fat content. Products that contain different ingredients or have a different taste, such as fruit juice or chocolate, cannot be considered identical. Consumer choice regarding the purchase of products covered by Paragraph 3(2)(u) of Law XCV of 2009 is largely influenced by price such that even a minimal variation in price can influence that choice. It is thus particularly important to have competition based on the merits in relation to such products as they only compete on the basis of price.

29. Hungary considers that the concept of 'identical products' has not given rise to legal uncertainty over the past seven years since the adoption of Law XCV of 2009 and that there is no difficulty interpreting that concept.

30. According to Hungary, in the retail trade, maximising profit is achieved by the effective management of total profit margins. Thus, for example, a supermarket sets the price of 20 to 30 000 different products in such a way that it is profitable *across the range* of products sold. The usual practice in this context is to set low prices and profit margins for certain goods in order to attract the attention of customers and to offset 'lost' revenue by means of an increase in turnover as a result of the sale of other goods to customers. Retailers therefore have a significant impact on the type of products that consumers buy. As a result of this practice, the price of a product for the final consumer, is a reflection, not primarily of the product's competitiveness, but rather of the decision of the retailer to manage its profit margin with regard to its product portfolio as a whole.

31. Hungary emphasises the fact that in accordance with Paragraph 3(2)(u) of Law XCV of 2009, the supplier and retailer are entirely free to negotiate the *purchase price of* the goods. However, the *relationship* between that price and the price of an identical product coming from another Member State cannot be changed by the retailer. If the supplier produces products more efficiently, and consequently sells its products to the retailer at a lower supply price, the consumer price of that product will also be lower than that of identical products manufactured less efficiently and sold at a higher supply price. Contrary to the Commission's claim, the contested measure does not restrict price competition, but rather *price distortion* of certain basic foodstuffs. Moreover, the contested measure

does not restrict the sale of the products concerned at a special promotional price provided that the profit margins applied to the products of all origins are equalised over a six-month period. Introductory prices and promotions are allowed in respect of the sale of the products concerned. Moreover, the restriction in question does not apply where a retailer ceases its activity, changes its profile or liquidates products. In addition, there is no rule prohibiting advertising of the goods.

32. Hungary claims that Paragraph 3(2)(u) of Law XCV of 2009 is compatible with the rules of the internal market. Moreover, while the Commission considers that Paragraph 3(2)(u) of Law XCV of 2009 is contrary to Regulation No 1308/2013, it has not indicated any specific provision of that regulation which has been breached. Hungary states that the contested measure does not fix prices and does not set either a reference price or a minimum price. Therefore the freedom of economic operators to set the purchase price is fully preserved. The contested measure ensures that the competitive advantage will be reflected in the consumer price, thereby enabling all producers to have free access under effective conditions of competition to an open market.[7] In its judgments of 4 March 2010, *Commission* v *France* (C-197/08, EU:C:2010:111) and *Commission* v *Ireland* (C-221/08, EU:C:2010:113), the Court held that the minimum price fixed by a Member State is contrary to EU law precisely in that it impairs competition by preventing some producers or importers from taking advantage of 'lower cost prices' so as to offer more attractive retail prices.[8] However, the contested measure ensures that the price advantage resulting from the greater efficiency of producers or suppliers is reflected in the price of the products for consumers. The measure also guarantees producers the possibility of 'taking advantage of lower cost prices'.[9] One of the objectives of the common agricultural policy is to maintain effective competition in the markets for agricultural products.[10] Thus Paragraph 3(2)(u) of Law XCV of 2009 is not contrary to Regulation No 1308/2013 or to the case-law cited by the Commission.

33. Hungary considers that the Commission has failed to establish its claim that Paragraph 3(2)(u) of Law XCV of 2009 affects, de facto, the marketing of domestic products and those from other Member States differently.[11] The Commission proceeds on the assumption that, on a national market, consumers, by virtue of their habits and preferences, favour national products over products from other Member States and that it is therefore more difficult for imported products to gain access to the market. Hungary considers that while that assumption is generally well founded, it does not apply in respect of foodstuffs of a homogeneous nature, which are identical in terms of taste and composition, where price plays a decisive role. Paragraph 3(2)(u) of Law XCV of 2009 ensures that retailers do not, by fixing their margins, favour national products to the detriment of products from other Member States.

34. According to Hungary, the fundamental error in the Commission's reasoning is that it confuses the economic interests of operators located at different points in the supply chain. The Commission proceeds on the assumption that the retailer represents the interests of the supplier when it states that retailers reduce the price of certain imported products at the expense of their own margin so that consumers become familiar with them more quickly, thereby promoting trade between Member States. Like all other market operators, retailers seek to maximise their own profits. The aim of retailers, when fixing the price at which the products are offered to consumers, is to sell their entire range of products on the most advantageous terms. It is in their interests to apply the greatest possible margin. Retailers give up their own profits only for tactical reasons, in the hope that that loss of profits will benefit from increased sales and sales of other products, thus enabling higher margins to be achieved. Their pricing policy therefore applies to the whole of their product range and an effective means of pursuing that policy is to attract customers with particularly inexpensive products. Contrary to the Commission's

7 Judgment of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 59 and the case-law cited).

8 Judgment of 4 March 2010, *Commission* v *Ireland* (C-221/08, EU:C:2010:113, paragraph 40).

9 Judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 21).

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

11 See, judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905, paragraph 16).

claim, it is not the retailer, but the *supplier* who has an interest in placing its product on a new market. The supplier's interest lies in delivering its product to the retailer at a lower price in order to be competitive on the market of another Member State. The supplier may do so freely and there is nothing to prevent it from doing so in under competitive conditions in a free market.

35. Hungary submits that the effect of the contested measure is that the price reduction charged by the supplier is reflected in the price to the consumer. The reduced costs resulting from the supplier's efficiency are reflected in the price charged by that supplier. The supplier 'has no influence over the price at which the product is offered to the consumer, which is freely determined by the retailer.'[12]

36. The barriers to trade outlined by the Commission are not the result of the contested measure, but rather the consequence of the commercial practice which that measure seeks to address. Paragraph 3(2)(u) of Law XCV of 2009 expressly prohibits discrimination based on the country of origin in the context of price fixing. If a supplier manufactures products efficiently, innovatively and at low cost and therefore sells its products to a retailer at a low supplier price, the price at which those products will be offered to the consumer will also be lower than that of other suppliers' products which are manufactured less efficiently and are therefore sold at a higher price. Homogeneous basic foodstuffs therefore compete on the consumer market on the basis of their cost-effectiveness, irrespective of their Member State of origin. The case-law of the Court does not support the conclusion that legislation of a Member State which makes no distinction on the basis of the origin of the goods, which is not intended to regulate trade in goods with other Member States and whose restrictive effects on the free movement of goods are too uncertain and too indirect, is incompatible with Union law.[13]

37. Hungary therefore considers that in the light of the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905), Paragraph 3(2)(u) of Law XCV of 2009 is a measure relating to selling arrangements which is not caught by Article 34 TFEU.

38. In the event that the Court should consider that Paragraph 3(2)(u) of Law XCV of 2009 falls within the scope of Article 34 TFEU, Hungary considers that the measure may be justified by overriding reasons in the public interest, is appropriate for achieving its objective and is proportionate. The principal objective of Paragraph 3(2)(u) of Law XCV of 2009 is to create a level playing field between suppliers by imposing an additional obligation on retailers, who generally have significant market power, thus ensuring effective competition. The measure is limited to basic homogeneous foodstuffs and simply requires the retailer not to apply a different profit margin to identical products from different Member States. Moreover, the concept of identical product is narrowly defined. In addition, the measure applies equally to imported and domestic products.

39. As regards the Commission's claim relating to market transparency, which is allegedly less restrictive, Hungary submits that transparency is not a measure in itself, but rather an objective. Moreover, the Commission is unable to indicate any less restrictive measure capable of effectively achieving the objective of Paragraph 3(2)(u) of Law XCV of 2009. In addition, the contested measure does not place any additional burden or cost on the retailer. The law does not impose any prior approval, authorisation, subsequent notification or other administrative requirements. As regards penalties, the retailer may undertake to comply with the measure rather than be fined.

40. In its rejoinder, Hungary considers that the Commission has failed to demonstrate how the contested measure affects imported products more than national products. This is particularly the case given that there is no limitation on advertising the products in question, the contested measure does not eliminate entirely the retailer's right to fix the price, and, moreover, it is not discriminatory.

12 See paragraph 51 of Hungary's defence.

13 Judgment of 14 July 1994, *Peralta* (C-379/92, EU:C:1994:296, paragraph 24 and the case-law cited).

41. In the event that the Court does not consider that the contested measure is a selling arrangement in compliance with the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C268/91, EU:C:1993:905) and considers that it is a measure equivalent to a quantitative restriction, Hungary reiterates its claim that the contested measure is both appropriate and proportionate in the light of its objective of general interest to ensure fair commercial dealings and improve the position of producers in the food supply chain. In that regard, Hungary notes that the Commission has not indicated what type of measure would be more proportionate while achieving the same objective. Hungary considers that the restriction of the freedom of retailers improves competition between producers, as retailers cannot eliminate a producer's competitive advantage by applying a higher margin, thus depriving the consumer of the possibility of benefiting from competition in the producers' market. The application of a higher margin to a product is likely to eliminate the hard-fought purchase price reduction in the producers' market and the resulting competitive advantage, with the result that the consumer will also have to pay more for the product. By setting the retail margin, the retailer will also have an incentive, in the case of products for which consumers are guided by price, to choose products solely on the basis of their purchase price. This will increase competition at producer level and consumers will also benefit. Furthermore, retailers retain the possibility of applying price reductions when launching new products and of using marketing tools based on a transitional price reduction, provided that the price margins applied to the products are equalised over a six-month period.

42. Finally, Hungary considers that branded products are not homogeneous products.

B. Analysis

1. Preliminary remarks

43. It is established case-law that, in proceedings for failure to fulfil obligations, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose.[14] The question of whether a Member State has failed to fulfil its obligations must accordingly be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion,[15] namely, in the case at hand, on 9 March 2018.

44. In the present action, the Commission claims that Hungarian legislation, in particular Paragraph 3(2)(u) of Law XCV of 2009, restricts or limits the fixing of sale prices of certain agricultural and food products at retail level to the detriment of imported products. The Commission claims that Hungary has thus failed to fulfil its obligations under Regulation No 1308/2013[16] and Article 34 TFEU. The basic contention of the Commission is that Paragraph 3(2)(u) of Law XCV of

14 Judgment of 19 May 2011, *Commission* v *Malta* (C-376/09, EU:C:2011:320, paragraph 32 and the case-law cited).

15 Judgment of 18 October 2018, *Commission* v *United Kingdom* (C-669/16, EU:C:2018:844, paragraph 40 and the case-law cited).

16 Regulation No 1308/2013 establishes a common organisation of the markets for all agricultural products listed in Annex I to the EU and FEU Treaties, including milk and milk products. See Article 1(2)(p) of Regulation No 1308/2013. The legal basis of that regulation is in particular the first subparagraph of Article 42 and Article 43(2) TFEU. Article 38(1) TFEU provides that the Union shall define and implement a common agriculture and fisheries policy. That provision also provides that 'the internal market shall extend to agriculture, fisheries and trade in agricultural products. "Agricultural products" means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term "agricultural", shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector'. The specific rules on those policies are laid down in Articles 39 to 44 TFEU. Thus, save as otherwise provided in Articles 39 to 44 TFEU, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products. See Article 38(2) TFEU. The products subject to the provisions of Articles 39 to 44 TFEU are listed in Annex I to the EU and FEU Treaties. In the present action, the Commission has not alleged that Hungary breached Articles 39 to 44 TFEU.

2009, by limiting retailers' freedom to fix profit margins and thus, in turn, their freedom to fix attractive retail prices, hinders the entry of new products from another Member State on the national market. In that regard, the Commission considers that profit margins form an integral part of the retail price.

45. Despite the fact that the national rules in question affect the retail price of the relevant products rather than their wholesale price, Hungary claims that those rules, in a similar manner to Directive 2019/633,[17] are directed at combating certain unfair practices in relation to the relevant products by buyers/retailers vis-à-vis suppliers/producers – the party considered to be in a position of economic vulnerability and dependence. Hungary considers that the rules are not contrary to Regulation No 1308/2013 or Article 34 TFEU and that they are in any event justified by overriding reasons in the public interest. It submits that the contested measure represents a rational method of achieving this objective and is proportionate.

46. In that regard, it must be noted that the rules at issue do not fix the sale prices for agricultural and food products between the producer/supplier and the buyer/retailer, nor do they specify minimum or maximum sale prices in relation to those products at any trading level, including the retail level. Moreover, the contested rules are not specifically directed at inherently anticompetitive practices such as below cost selling or the exclusion of competitors who are not members of certain trade or producers' organisations or other similar anticompetitive measures. It is important to note, therefore, that the producers/suppliers and buyers/retailers of the relevant products may freely negotiate between themselves the prices of the relevant food products.

47. Rather, while it is admittedly not evident from the wording of Paragraph 3(2)(u) of Law XCV of 2009 itself, it is not disputed that the effect of the rules in question is that the retail selling prices of the relevant products must, in principle, include the same profit margin irrespective of their country of origin.

48. Paragraph 3(2)(u) of Law XCV of 2009 therefore prohibits retailers from selling, for example, imported products at a price plus a 5% profit margin if, at the same time, they offer identical domestic products at a price plus a 10% margin. The converse is also true, so that there is no doubt but that the legislation, at first view,[18] applies without distinction to all relevant food products, irrespective of their provenance.

49. While the present action concerns two complaints in respect of Regulation No 1308/2013 and of Article 34 TFEU, as will be seen, there is, however, considerable overlap between these complaints.

2. The first complaint alleging infringement of Regulation No 1308/2013

(a) Complaint relating to Regulation No 1308/2013 as a whole

50. The Commission complains that Paragraph 3(2)(u) of Law XCV of 2009, in particular, undermines Regulation No 1308/2013 as those national rules on unfair trading practices impede the free formation of prices. I would note that in its action the Commission does not point to any specific provision(s) of Regulation No 1308/2013 as such, but rather to that regulation as a whole. This is undoubtedly due to the broad manner in which Law XCV of 2009 appears to be drafted.

17 It must be noted that the Commission has not claimed in the present action that Hungary failed to fulfil its obligations under Directive 2019/633. Indeed, as is clear from Article 13(1) of Directive 2019/633, which requires Member States to transpose the directive by 1 May 2021 and apply those transposing measures by 1 November 2021, and from Article 14 of that directive which provides that it shall enter into force on 30 April 2019 (thus after the reasoned opinion of 9 March 2018) that directive is not applicable *rationae temporis*.

18 *De jure*.

51. The Commission has claimed – and Hungary has not denied – that in accordance with Paragraph 1 of Law XCV of 2009, that law relates to 'agricultural and food products', as defined in Article 2(2) of that law which in turn refers to Regulation No 178/2002. In that regard, Article 2 of Regulation No 178/2002 contains a definition of 'food' and provides that for the purposes of that regulation, 'food' (or 'foodstuff') 'means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans'. Given the scope of Regulation No 1308/2013 and the agricultural products covered by that regulation as outlined in Article 1 thereof, there would therefore appear to be considerable overlap between the agricultural products subject to Regulation No 1308/2013 and the agricultural products and foodstuffs subject to Law XCV of 2009. The scope of Paragraph 3(2)(u) of Law XCV of 2009 itself is, however, clearly limited by the requirement that the products be identical in composition and organoleptic properties.

52. Despite the fact that the Commission's complaint is based on Regulation No 1308/2013 in its entirety and might therefore be regarded as somewhat broad and imprecise in scope, one cannot fault it on that ground alone given the broad scope of Law XCV of 2009 and, to a lesser extent, of Paragraph 3(2)(u) of that law.

53. Moreover, while the Commission has not pointed to any specific provision of Regulation No 1308/2013 that either permits the fixing of the retail selling prices of the relevant products, at national or Union level, or provisions that prohibit Member States adopting national measures fixing such prices,[19] it must be recalled that it is settled case-law that 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.[20]

54. A national law which materially inhibited the free fixing of competitive prices for agricultural products would, therefore, contravene a key requirement of Regulation No 1308/2013 unless it was objectively justified. As the Court explained in paragraph 86 of the judgment of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429), the objectives of the common organisation of the market envisaged by that regulation are not compromised by national measures which do not as such 'affect the fixing of prices' but which seek rather 'to safeguard the proper working of the machinery for setting prices in order to achieve price levels which serve the interests of both producers and consumers'.

55. The converse, of course, is also true: the common organisation of the market may indeed be compromised by national measures which affect, in an unjustified manner, the fixing of prices for such agricultural products.

56. To my mind, therefore, the critical question is whether Paragraph 3(2)(u) of Law XCV of 2009 affects in an unjustified manner the fixing of prices or, alternatively, whether it simply safeguards the proper functioning of the mechanisms for setting prices.

19 See by analogy, judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 17).

20 Judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraph 37 and the case-law cited). In paragraphs 57 and 59 of the judgment of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429), the Court stated that the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy and the common organisation of the relevant markets and that common organisations of the market are based on the concept of an open market to which every producer has free access under effective conditions of competition. The Court thus found in paragraph 67 of that judgment 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.

(b) Absence of exhaustive harmonisation in the sector relating to the combating of unfair commercial practices in the agricultural and food supply chain – Finding of the Court in the judgment of 13 November 2019, Lietuvos Respublikos Seimo narių grupė *(C-2/18, EU:C:2019:962)*

57. 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. [21]

58. It is settled case-law that, 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. [22]

59. 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 also likely to have an effect on the functioning of the common market in the sector concerned. [23]

60. The Commission has not claimed in its action that the European Union has exhaustively exercised its competence in the area covered by Law XCV of 2009, namely, unfair trading practices applied against suppliers in respect of agricultural and food products.

61. Indeed, the Court highlighted in paragraph 52 of the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962), that the adoption of Directive 2019/633, which pursuant to its Article 14, 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. Therefore at the time when the reasoned opinion was adopted by the Commission in the present case, the power of a Member State to adopt rules to combat unfair commercial practices in the agricultural and food supply chain was not pre-empted by, inter alia, Regulation No 1308/2013.

62. In addition, in paragraphs 49 and 50 of its judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962), the Court confirmed, in substance, that – despite references to certain unfair practices – Regulation No 1308/2013 does *not* regulate exhaustively unfair trading practices in respect of the milk and milk products sector which was the subject of that case.

21 Judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraph 28). In paragraphs 26 and 27 of the judgment of 19 September 2013, *Panellinios Sindesmos Viomikhanion Metapoiisis Kapnou* (C-373/11, EU:C:2013:567), the Court said that the possibility for Member States to exercise their competence to the extent that the European Union has not exercised its competence has been the case particularly since the reform of the common agricultural policy, which entails further decentralisation of competences in order to take greater account of the particular circumstances of each Member State or region and of the market situation of the various products and producers concerned.

22 Judgments of 26 May 2005, *Kuipers* (C-283/03, EU:C:2005:314, paragraph 37), and of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 19).

23 Judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraph 30 and the case-law cited). In paragraphs 26 to 28 of the judgment of *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845), the Court held that a Member State could, in principle, rely on the objective of the protection of human life and health in order to justify a measure which undermines the system of free formation of prices in conditions of effective competition on which Regulation No 1308/2013 is founded, provided that the measure is appropriate for attaining the objective pursued, and does not go beyond what is necessary to attain that objective.

Moreover, in paragraphs 53 and 72 of that judgment, the Court held, in effect, that Member States have a residual competence to adopt measures which are designed to combat unfair commercial practices which have the effect of restricting the process of free negotiation of prices and on the functioning of the internal market in the sector concerned. [24]

63. It must be noted that the Member States' residual competence to adopt measures to combat unfair commercial practices in respect of agricultural and food products is not, however, unfettered. Thus in paragraphs 56 and 73 of the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962), the Court stated that the national rules in question must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary to achieve that objective. [25]

(c) The national rules must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary to achieve that objective

64. The national rules in question in the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962) prohibited 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 on the basis of the daily quantity of raw milk sold, which is of identical composition and quality and delivered via the same method. These rules had the effect of ensuring that the buyer offers an identical basic price [26] to all producers who are in a comparable situation based on an objective criterion relating to the daily quantity of milk sold. [27]

65. It is plain that the national rules in question in that case greatly reduced the ability of buyers and producers to negotiate freely the purchase price of raw milk. Despite this clear limitation of one of the fundamental principles underlying Regulation No 1308/2013, the Court considered that the rules at issue appeared appropriate for preventing the risk that the party considered to be the weaker contracting party might otherwise be compelled to accept unjustified price reductions. The Court thus held in paragraph 60 of its judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962) that viewed from this perspective, the national legislation could be justified as a means of combating potential unfair commercial practices in that it prevented price discrimination as between suppliers depending on whether they were members of a particular recognised milk producers' organisation or not. [28]

24 The finding of the Court may be contrasted to the approach of Advocate General Bobek in his Opinion in *Lietuvos Respublikos Seimas* (C-2/18, EU:C:2019:180). In his Opinion, Advocate General Bobek considered that Article 148 of Regulation No 1308/2013 had already covered the matter of protection against unfair trade practices in the raw milk sector and that Member States were, in effect, pre-empted from enacting legislation pursuing the same (legitimate) objectives. Advocate General Bobek considered in point 86 that the 'EU legislature made a clear value choice: taking into account the same objectives and arriving at regulating the same situation at the exact same stage of the production chain. For these reasons, the conflict between EU law rules and the national ones in this case is simply not a mere marginal instance of two partially overlapping regimes, in which any further examination of proportionality could even be discussed. Instead, it is a fundamental functional clash between two ways of regulating exactly the same issue, reflecting different value choices between the same objectives'. While I find myself in respectful agreement with the views expressed by Advocate General Bobek, the Court clearly disagreed. In these circumstances, I propose to treat the decision of the Court as having settled the matter so far as the scope of Regulation No 1308/2013 is concerned.

25 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 judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraph 57).

26 See paragraph 41 of the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962) which states that while the 'basic price is fixed for all producers in the same group that is formed according to the daily quantity of raw milk sold, … the final price payable will be calculated according to any surcharges, premiums, deductions or delivery arrangements freely and individually negotiated at the relevant stage'.

27 See paragraph 59 of the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962).

28 This matter of fact was ultimately a matter for the referring court in that case to determine. One might further add that the national legislation was capable of having pro-competitive effects in that it allowed certain suppliers access to the market on the same terms as other suppliers who happened to be members of a recognised milk producers' organisation. In that sense, the legislation sought to counteract the potentially exclusionary effects which non-membership would have and the de facto market power which might then otherwise accrue to members of that organisation.

66. In addition, the Court considered that the national rules, in principle, did not go beyond what was necessary to achieve the objectives pursued given, inter alia, that the purchase price paid to a given raw milk producer may depend on a number of factors, namely, 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. [29]

(d) Application of case-law to the case at hand

67. It would appear from the file before the Court – and the Commission has not contended otherwise – that Paragraph 3(2)(u) of Law XCV of 2009 does not interfere in the free negotiation of the price of the relevant products between their producer/supplier and the retailer/buyer.

68. Rather, that national provision entails that the margin charged at retail on that price is, in principle, the same irrespective of the origin of the products. Paragraph 3(2)(u) of Law XCV of 2009 therefore ensures – as claimed by Hungary – that the price charged to consumers reflects essentially the purchase price of products agreed between the supplier and the retailer, including, of course, the retailer's margin.

69. While the national provision does not interfere with the establishment of prices at the level of the supplier/retailer, it precludes the sale by a retailer of certain products 'identical in composition and organoleptic properties' at a lower margin depending on the country of origin [30] and the recoupment of that price reduction over a range of other similar agricultural products and foodstuffs.

70. In that regard, it must be stressed that any limitation on the freedom to fix retail margins to be applied to products is ultimately a limitation on the freedom to fix the retail price of those products.

71. Given, however, that the Court concluded in paragraph 62 of its judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962) that the Lithuanian legislation which had the effect of ensuring that buyers offer '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' [31] appeared appropriate for combating potential unfair practices and thus appeared not to contravene Regulation No 1308/2013, then if Paragraph 3(2)(u) of Law XCV of 2009 had the same effect, it too could be said to be compatible with the requirements of the regulation, provided that it did not go beyond what is necessary to achieve the stated objectives.

72. But does Paragraph 3(2)(u) of Law XCV of 2009 have this effect? There are, to my mind, subtle differences between the present case and the circumstances of the Lithuanian legislation at issue in the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962). To start with, the position of those Lithuanian milk producers who did not belong to a recognised milk producers' organisation was evidently weaker than that of the producers in question in the present proceedings. In addition, that weak position and the potential for anticompetitive market exclusionary behaviour on the part of the milk processors was obviously well documented.

73. It is also true that Paragraph 3(2)(u) of Law XCV of 2009 is considerably broader in scope than its Lithuanian counterpart relating to the milk sector at issue in the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962), given that the Hungarian legislation in question applies to a wider range of agricultural products.

29 Judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraph 67). See also paragraphs 63 to 69 of that judgment.

30 It must be noted that Paragraph 3(2)(u) of Law XCV of 2009 makes specific reference to the *origin* of the products in question. Given that the first part of the present action by the Commission relating to Regulation No 1308/2013 is drafted in that cross-border context, I will examine Hungary's alleged failure to comply with Regulation No 1308/2013 by its enactment of Paragraph 3(2)(u) of Law XCV of 2009 in that context.

31 See paragraph 59 of the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962).

74. The critical difference, however, is that the Lithuanian legislation ensured that milk producers who did not belong to a recognised milk producers' organisation were 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, while other producers, even though they may have been of the same size, benefited from higher prices resulting from more balanced negotiations, whereas the Hungarian legislation prohibits the application of different margins – and thus by extension a form of price discrimination – *based on the origin of the products*.

75. In the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962) the Court was accordingly prepared to uphold the Lithuanian legislation as a means of countering market power and strengthening the position of the weaker party. That legislation was to that extent broadly pro-competitive in both its purpose and effects, specifically by protecting the route to market of producers who were not members of a recognised milk producers' organisation.

76. That particular rationale does not, however, apply in the present case because the legislation, on the basis of its wording, is aimed essentially at preventing price discrimination based on the provenance of the products rather than enhancing the bargaining position of the producer/supplier. Specifically, it has not been established that Paragraph 3(2)(u) of Law XCV of 2009 serves to protect the competitive nature of the market for agricultural products.

77. At the oral hearing on 3 September 2020, the representative of the Hungarian Government confirmed that the objective of Paragraph 3(2)(u) of Law XCV of 2009 was to protect the primary producers of the products in question, namely, farmers. If that is indeed so, then one feels obliged to observe that Paragraph 3(2)(u) of Law XCV of 2009 does not seem well adapted and thus appropriate for this purpose. It is, after all, clearly the retailer's margin – as distinct from the producer's margin – which is expressly protected by the terms of Paragraph 3(2)(u) of Law XCV of 2009.

78. Nor is the practical operation of Paragraph 3(2)(u) of Law XCV of 2009 free from difficulty. At the oral hearing, two particular difficulties were highlighted.

79. First, while Paragraph 3(2)(u) of Law XCV of 2009 that the prices of given agricultural products should be the same or at least similar, no allowance seems to be made for the contemporary reality of the modern marketplace by which certain commercial entities secure a premium price – often through clever presentation of the product and advertising strategies – by actually branding certain types of consumer staples. This is so even if the branded product is to all intents and purposes 'identical in [its] composition and organoleptic properties' with the non-branded product.[32]

80. Second, the representatives of the Hungarian Government stressed that the margin rule is applied over a six-month period. They maintained, therefore, that a retailer could engage in a series of short-term promotional price reductions in respect of certain products, provided that the margin remained more or less the same when averaged out over the six-month period.

81. In my view, it is clear that a restriction on the retailers' capacity to vary the margin in respect of different products is likely to have a significant effect on the free marketing of goods. One could readily envisage circumstances in which, for example, a consumer staple is sold at a small premium in Hungary as compared with the prices secured in neighbouring Member States for that same product. If a producer in one of those Member States wanted to break into the Hungarian market, that producer

32 In that regard, the representatives of the Hungarian Government stated that branded products have different organoleptic properties to unbranded products and are thus considered different products for the purposes of Paragraph 3(2)(u) of Law XCV of 2009. In that regard, those representatives indicated that branded products are experienced differently by the consumer than unbranded products and that the packaging of a branded product is thus an organoleptic property. In my view, this explanation indicates clearly just how vague the scope of Paragraph 3(2)(u) of Law XCV of 2009 actually is.

might naturally wish the retailer to accept a lower margin so that overall sales of the new product could be boosted. Indeed in certain circumstances it might even be economically advantageous for the Hungarian retailer to accept a lower margin for this new product if this resulted in greater consumer demand for – and, by extension, sales of – that new product, particularly in the long term.

82. In expressing this view, I have not overlooked the fact that Paragraph 3(2)(u) of Law XCV of 2009 is neutral in its wording and applies *de jure* without distinction to both domestic and imported products alike. Yet it would be nugatory to deny that pricing mechanisms represent probably the most effective method whereby a producer from another Member State can break into a domestic market. Any material constraint on the capacity of retailers to determine different consumer prices for different products depending on the provenance of the products in question inevitably raises serious internal market concerns.

83. These concerns are not assuaged by the vagueness of Paragraph 3(2)(u) of Law XCV of 2009. The right to engage in promotional selling is not expressly provided for in that provision and producers from other Member States, in particular, wishing to break into the Hungarian market may not be aware of what appears to be something in the nature of a concessionary practice on the part of the Hungarian authorities so far as short-term promotional selling is concerned. In the nature of things, this inevitably is likely to impact more heavily on producers from other Member States as compared with domestic producers who are more likely to be familiar with the manner in which the law operates in practice.[33] In any event, a producer from another Member State in particular wishing to break into that market may need a much longer pricing strategy than one which is dependent simply on short-term promotional pricing methods which merely last for a few days or weeks.

84. In this regard, the judgment of the Court of 4 March 2010 in *Commission* v *Ireland* (C-221/08, EU:C:2010:113) is instructive. That case concerned Irish tobacco legislation which imposed minimum prices in respect of the sale of cigarettes. This was a public health measure designed to ensure that young people in particular did not acquire an addictive habit which would be deleterious to their health by being able to purchase cigarettes cheaply.

85. In paragraph 40 of the judgment of 4 March 2010 in *Commission* v *Ireland* (C-221/08, EU:C:2010:113), the Court held that legislation imposing minimum prices for certain consumer products (in this instance, cigarettes) was 'capable of undermining competition by preventing some of those producers or importers from taking advantage of lower cost prices so as to offer more attractive retail selling prices'. The Court went on to hold in paragraph 45 of that judgment that such a system of minimum prices was unlawful in that it impaired 'the competitive advantage which could result for some producers and importers of tobacco products from lower cost prices'.

86. It is clear that the Court was troubled by the fact that a minimum pricing obligation imposed by national legislation in respect of consumer products such as cigarettes struck at the very essence of a competitive market and had exclusionary effects.

33 I would note here the comments of Advocate General Kokott in her Opinion in *Commission* v *Ireland* (C-456/08, EU:C:2009:679) relating to provisions of a domestic law which allowed a national court to exercise its discretion to dismiss public procurement proceedings on the ground that they had not been brought 'promptly' even though the application had otherwise been brought within the time period fixed by law. In point 61 of her Opinion, Advocate General Kokott concluded that this discretionary system compromised the principle of legal certainty which underlined the public procurement directives, saying: 'If the position in national law derives from the interplay of statutory provisions and "judge-made" law, that must not take place at the expense of the clarity and precision of the provisions and rules concerned. That applies all the more where a directive is intended to confer rights on the individual and an unclear or complex legal position with respect to limitation periods could lead to the loss of rights – in the present case the loss of the right to review of decisions taken by contracting authorities. *Foreign tenderers and candidates in particular could be deterred from seeking public contracts in Ireland by a complex and non-transparent legal situation*.' (Emphasis added.) While the context of these remarks was, of course, very different to that of the present proceedings, it might yet be considered that these remarks of Advocate General Kokott have a resonance so far as the likely impact of the interpretation of Paragraph 3(2)(u) of Law XCV of 2009 is concerned.

87. It is, I think, difficult not to share these concerns in respect of the national legislation at issue in the present case even if the judgment of 4 March 2010 in *Commission* v *Ireland* (C-221/08, EU:C:2010:113) was delivered in the specific context of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco [34] and, moreover, the curtailment of price competition is not as severe as that manifested in the case giving rise to that judgment. [35]

88. The general principle regarding the anticompetitive effects of minimum pricing provisions is, I think, nonetheless applicable by analogy to the present case. Specifically, it is hard to avoid the conclusion that Paragraph 3(2)(u) of Law XCV of 2009 is not only anticompetitive in that it prevents the free formation of selling prices on the basis of fair competition, but it also discriminates, de facto, against new entrants to the market for food and agricultural products in Hungary for all the abovementioned reasons.

89. In that regard, it must be recalled that the retailer's margin is a fundamental element of the price of a product for consumers and may – depending on the level of that margin – be a vital factor determining consumer choice. [36]

90. It follows, therefore, that by preventing price discrimination based on the provenance of the products in question, Paragraph 3(2)(u) of Law XCV of 2009 may have the effect of inhibiting producers in other Member States from gaining a foothold in the Hungarian domestic market, as retailers of imported products are prevented from engaging in price competition in respect of their own margin for these products at the expense of domestic products. In some instances at least, it is fair to assume that these imported products could acquire market share only by engaging in price competition with identical domestic products. Nor can it be said that Paragraph 3(2)(u) of Law XCV of 2009 has the pro-competitive effects identified by the Court in paragraph 69 of the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962) by ensuring that particular producers do not suffer price discrimination by virtue of their weaker bargaining position due to non-membership of a recognised milk producers' organisation. [37]

91. It is thus clear that Paragraph 3(2)(u) of Law XCV of 2009 has the effect of potentially excluding price competition in a material way which affects the capacity of producers in other Member States to ensure that their products gain access to the Hungarian market. It follows, therefore, that Paragraph 3(2)(u) of Law XCV of 2009 undermines and unduly impedes the proper functioning of the common organisation of the agricultural market in respect of the products in question.

92. It follows that Paragraph 3(2)(u) of Law XCV of 2009, by suppressing price competition in the manner just described, is contrary to a key principle underpinning Regulation No 1308/2013 and the way in which this regulation, as well as its predecessors, [38] has been consistently interpreted by this Court in cases such the judgment of 26 May 2005, *Kuipers* (C-283/03, EU:C:2005:314).

34 OJ 1995 L 291, p. 40.

35 It is clear from paragraphs 43 to 45 of the judgment of 4 March 2010 in *Commission* v *Ireland* (C-221/08, EU:C:2010:113) that the effect of the Irish legislation was to impose on producers and importers active on the Irish market a minimum retail selling price for cigarettes equal to 97% of the weighted average price on that market for each category of cigarettes. Thus, that system effectively eliminated price differences between competing products and caused the prices to converge around the price of the most expensive product.

36 In that regard, a retailer's margin could vary widely, for example, from 5% to 100% to perhaps even 200% of the producer's price.

37 No similar actual or potential abuse of the competitive process by retailers has been identified in the present case as justification for Paragraph 3(2)(u) of Law XCV of 2009. Quite the contrary: legislation which has the general effect of preventing retailers from reducing their margins in the case of agricultural products simply stifles the ordinary competitive process in respect of the market for those products. It is not in itself an abuse for a retailer to engage in price competition by reference to the provenance of the goods in question. It would, of course, be different if Paragraph 3(2)(u) of Law XCV of 2009 had sought to prevent a retailer from exploiting its market power by, for example, engaging in price discrimination at the expense of a producer who was not a member of a recognised producers' organisation. However, Paragraph 3(2)(u) of Law XCV of 2009 sweeps far, far more broadly than this to the point whereby a key aspect of the pricing mechanism necessary for the functioning of a competitive market for such products is essentially de-activated and suppressed.

38 For instance, Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176), as amended by Council Regulation (EC) No 1538/95 of 29 June 1995 (OJ 1995 L 148, p. 17).

93. I therefore consider that the Court should declare that, by restricting the fixing of sale prices of agricultural and food products, having particular regard to Paragraph 3(2)(u) of Law XCV of 2009, Hungary has failed to fulfil its obligations under Regulation No 1308/2013.

3. The second complaint alleging infringement of Article 34 TFEU

94. The free movement of goods is a fundamental principle of the FEU Treaty which is expressed in the prohibition, set out in Article 34 TFEU, of quantitative restrictions on imports between Member States and all measures having equivalent effect. In accordance with settled case-law, the prohibition of measures having an effect equivalent to a quantitative restriction, laid down in Article 34 TFEU, applies to all legislation of the Member States that is capable of hindering, directly or indirectly, actually or potentially, trade between Member States.[39] This prohibition was first articulated by the Court in its judgment of 11 July 1974, *Dassonville* (8/74, EU:C:1974:82) ('the *Dassonville* judgment').

95. The broad scope of the prohibition laid down in the *Dassonville* judgment was tempered in relation to selling arrangements in a number of cases following the Court's judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905).

96. Since the judgment of the 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91 EU:C:1993:905), the Court has consistently held that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[40]

97. Provided that those conditions are fulfilled, the application of national selling arrangements to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 34 TFEU.

98. It must be noted that the Commission considers that Paragraph 3(2)(u) of Law XCV of 2009 constitutes a selling arrangement within the meaning of the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905). One can only agree with that assessment.[41]

99. Moreover, the Commission does not claim that Paragraph 3(2)(u) of Law XCV of 2009 hinders *de jure* access of the products in question from other Member States to the Hungarian market. The Commission nonetheless considers that that provision fails the second test laid down in the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905) as it grants a de facto advantage to identical national products.

39 Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:776, paragraphs 20 and 22 and the case-law cited).

40 Judgment of 12 November 2015, *Visnapuu* (C-198/14, EU:C:2015:751, paragraph 103 and the case-law cited). The Court has pointed out that the reason why legislation imposing certain selling arrangements falls outside the scope of Article 34 TFEU is that it is not such as to prevent the access of imported products to the market of that Member State or to impede it any more than it impedes the access of domestic products. Judgment of 18 September 2003, *Morellato* (C-416/00, EU:C:2003:475, paragraph 31).

41 See by analogy, judgment of 11 August 1995, *Belgapom* (C-63/94, EU:C:1995:270, paragraph 13) in which the Court held that national legislation prohibiting sales which yield only a very low profit margin was a selling arrangement. The Court noted in paragraph 14 of that judgment that the provision in question which was 'applicable, without distinction as to products, to all traders in the relevant sector does not affect the marketing of products from other Member States differently than the marketing of domestic products'. It is clear that that judgment was directed at what was essentially sales below cost. For my part, however, I think that Paragraph 3(2)(u) of Law XCV of 2009 is far more than simply a measure directed at such sales given that it strikes at a core feature of the competitive process for agricultural products namely, the free formation of selling prices.

100. The principles laid down in the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905) – much relied on by the Hungarian Government in the present case – have also been applied by the Court in other infringement proceedings.

101. Thus, for example, in its judgment of 29 June 1995, *Commission* v *Greece* (C-391/92, EU:C:1995:199), the Court considered that a Greek law which confined the sale of processed milk for infants to pharmacies did not infringe what is now Article 34 TFEU. The Court found that the law merely affected selling arrangements for products and applied without distinction to domestic and imported products alike. The Court went on to hold in paragraph 18 of that judgment, that the situation would be different only 'if it was apparent that the legislation at issue protected domestic products which were similar to processed milk for infants from other Member States or which were in competition with milk of that type'.

102. For my part, I consider that the present case is different from that at issue in the case giving rise to the judgment of 29 June 1995, *Commission* v *Greece* (C-391/92, EU:C:1995:199) for all the reasons I have already mentioned in relation to the infringement of Regulation No 1308/2013.

103. In my view, Paragraph 3(2)(u) of Law XCV of 2009 inhibits the entry of new agricultural products from another Member State to the Hungarian market by suppressing price competition at the retail level. As I previously indicated, this curtailment of the competitive process is likely to bear more heavily on the producers of imported products, since it is only by effective price competition (including promotional prices) that such producers can generally hope to gain a foothold in the Hungarian market at the expense of traditional (and better-known) national agricultural products familiar to the average Hungarian consumer. The uncertainties in the application of Paragraph 3(2)(u) of Law XCV of 2009 in relation to the products which are covered by its application and the possibility to carry out short-term promotional selling, to which I have already alluded, only adds to these difficulties.

104. Even if the Court should find that Paragraph 3(2)(u) of Law XCV of 2009 infringes Article 34 TFEU, it would also be necessary to consider whether this infringement could be justified by reference to Article 36 TFEU or for overriding reasons in the public interest. In the present case, Hungary seeks to justify Paragraph 3(2)(u) of Law XCV of 2009 by claiming that its object is to combat unfair selling practices by retailers to the detriment of producers.

105. For my part, I do not accept that Paragraph 3(2)(u) of Law XCV of 2009 can be justified on this basis. First, unlike the situation that prevailed in the case giving rise to the judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962), Hungary has failed to produce evidence of unfair competitive practices by retailers in respect of the wide range of products covered by Paragraph 3(2)(u) of Law XCV of 2009. Second, in any event, Hungary has failed to show in a coherent manner how the fixing of retailers' margins in fact protects the allegedly weaker party to sales negotiations, namely, the producer, particularly as that provision does not inhibit the retailer's freedom to negotiate prices, commissions, rebates, etc. with producers.

106. I would stress that it is not an abuse in itself for a retailer to engage in price competition by reference to the provenance of the goods in question.

107. In those circumstances, I am of the view that by its enactment of Paragraph 3(2)(u) of Law XCV of 2009 Hungary has failed to comply with its obligations under Article 34 TFEU and it cannot be justified by reference to any alleged overriding reasons in the public interest.

4. The costs

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

V. Conclusion

109. In light of the considerations set out above, I consider that the Court should hold that by its enactment of Paragraph 3(2)(u) of the mezőgazdasági és élelmiszeripari termékek vonatkozásában a beszállítókkal szemben alkalmazott tisztességtelen forgalmazói magatartás tilalmáról szóló, 2009. évi XCV. Törvény (Law XCV of 2009 prohibiting unfair trading practices applied against suppliers in respect of agricultural and food products), Hungary has failed to comply with its obligations under Article 34 TFEU, together with its obligations under Regulation (EU) No 1308/2013 of the European Parliament and the Council of 17 December 2013 regarding the common organisation of the market for agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.

110. Since the Commission has applied for costs to be awarded against Hungary and Hungary has essentially been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission.