Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 16 March 2016[1]

Case C-134/15

Lidl GmbH & Co. KG
v
Freistaat Sachsen

(Request for a preliminary ruling from the Sächsisches Oberverwaltungsgericht (Higher Administrative Court of Saxony, Germany))

(Commission Regulation (EC) No 543/2008 — Marketing standards for poultry meat — Validity of Article 5(4)(b) — Fresh pre-packaged poultrymeat — Obligation to indicate the total price and the price per weight unit on the pre-packaging or on a label attached thereto at the retail stage — Articles 15(1) and 16 of the Charter of Fundamental Rights — Freedom to pursue a freely chosen occupation — Freedom to conduct a business — Proportionality — Article 40(2) TFEU — Non-discrimination)

1. The present preliminary request concerns the validity of Article 5(4)(b) of Commission Regulation (EC) No 543/2008,[2] which establishes a labelling obligation for fresh poultrymeat. That provision requires that at retail level, fresh poultrymeat must bear an indication of the total price and price per weight unit either on the pre-packaging or on a label attached to the pre-packaging ('the labelling obligation').

2. The referring court has asked the Court of Justice whether the labelling obligation complies with Article 15(1) and Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter'). Furthermore, since the labelling obligation is only imposed on fresh poultrymeat, but not other kinds of meat, the Court is also invited to ascertain whether Article 5(4)(b) of Regulation No 543/2008 is compatible with the non-discrimination principle enshrined in Article 40(2) TFEU.

1 — Original language: English.

2 — Regulation of 16 June 2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for poultry meat (OJ 2008 L 157, p. 46).

I – Legal framework

A – *European Union law*

3. Article 121(e)(iv) of Council Regulation (EC) No 1234/2007[3] states that, as regards the marketing of poultrymeat, the Commission is entitled to establish detailed rules including 'rules concerning further indications to be shown on accompanying commercial documents, the labelling, presentation and advertising of poultrymeat intended for the final consumer and the name under which the product is sold within the meaning of point (1) of Article 3(1) of Directive 2000/13/EC'.

4. Regulation No 543/2008, based on Article 121(e) and on Article 4 of Regulation No 1234/2007, lays down detailed rules for the application of Regulation No 1234/2007 as regards the marketing standards for poultrymeat.

5. Recital 10 of Regulation No 543/2008 states that: '[i]t is necessary, in order that the consumer be provided with sufficient, unequivocal and objective information concerning such products offered for sale, and to secure the free movement of such products throughout the Community, to ensure that poultrymeat marketing standards take into account as far as is practicable the provisions of Council Directive 76/211/EEC of 20 January 1976 on the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain pre-packaged product'.

6. Article 5(2) of Regulation No 543/2008 provides that 'in addition to complying with national legislation adopted in accordance with Directive 2000/13/EC, the labelling, presentation and advertising of poultrymeat intended for the final consumer shall comply with the additional requirements set out in paragraphs 3 and 4 of this Article'.

7. Article 5(4)(b) of Regulation No 543/2008, which incorporates the content of Article 5(3)(b) of Council Regulation (EEC) No 1906/90,[4] provides that: 'in the case of pre-packaged poultrymeat, the following particulars shall also appear on the pre-packaging or on a label attached thereto: … in the case of fresh poultrymeat, the total price and the price per weight unit at the retail stage.'[5]

8. Directive 2000/13, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs did not contain any provision regarding labelling obligations concerning price.

3 — Regulation of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1). That regulation has been repealed by 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 (OJ 2013 L 347, p. 671). However, the provision upon which Regulation No 543/2008 is based, Article 121(e)(iv) of Regulation No 1234/2007, is among the provisions which continue to apply according to Article 230(1)(c) of Regulation No 1308/2013. Pursuant to Article 230(2) of Regulation No 1308/2013, references to Regulation No 1234/2007 shall be construed as references to Regulation No 1308/2013 and to Regulation (EU) No 1306/2013 and be read in accordance with the correlation table set out in Annex XIV to Regulation No 1308/2013.

4 — Regulation of 26 June 1990 on certain marketing standards for poultry (OJ 1990 L 173, p. 1) repealed by Regulation 1234/2007.

5 — According to Article 2(c) of Regulation No 543/2008, 'pre-packaged poultrymeat' means poultrymeat presented in accordance with the conditions laid down in Article 1(3)(b) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 (OJ 2000 L 109, p. 29). According to Article 1(3)(b) of Directive 2000/13, 'pre-packaged foodstuff' means 'any single item for presentation as such to the ultimate consumer and to mass caterers, consisting of a foodstuff and the packaging into which it was put before being offered for sale, whether such packaging encloses the foodstuff completely or only partially, but in any case in such a way that the contents cannot be altered without opening or changing the packaging'. Directive 2000/13 has been repealed by Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers (OJ 2011 L 304, p. 18). Article 2(2)(e) of Regulation No 1169/2011, however, retains the previous definition and adds that the concept of prepacked food 'does not cover foods packed on the sales premises at the consumer's request or prepacked for direct sale'.

9. According to Article 3(1) of Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers,[6] '[t]he selling price and the unit price shall be indicated for all products referred to in Article 1, the indication of the unit price being subject to the provisions of Article 5. The unit price need not be indicated if it is identical to the sales price.'

II – Facts, procedure and the questions referred

10. Lidl GmbH & Co. KG (the applicant) is a retail operator with food discount stores throughout Germany. In some of its branches in the region of Lamperswalde, the applicant offers for sale, among other items, pre-packaged fresh poultrymeat. The price of fresh poultrymeat is not directly marked on the label attached to the product itself. Instead, the price labels are affixed to the shelves.

11. Having noted that price labelling practice during a number of inspections, the former Sächsiche Landesanstalt für Landwirtschaft (Agriculture Authority for the Land of Saxony, now, the Sächsische Landesamt für Umwelt, Landwirtschaft und Geologie – Environment, Agriculture and Geology Authority for the Land of Saxony), took the view that that practice infringed Article 5(3)(b) of Regulation No 1906/90, applicable at the time of the inspections, which corresponds to the current Article 5(4)(b) of Regulation No 543/2008.

12. In 2007, the applicant brought an action seeking a declaration that its method of price labelling pre-packaged fresh poultrymeat is compatible with the labelling obligation provided for by Article 5(3)(b) of Regulation No 1906/90, and subsequently, by Article 5(4)(b) of Regulation No 543/2008. The applicant claimed that Article 5(4)(b) of Regulation No 543/2008 was invalid because it contravened Article 6(1) TEU read in conjunction with Article 15(1) of the Charter. In its view, the labelling obligation constitutes a disproportionate interference with the freedom to pursue an occupation. The Verwaltungsgericht Dresden (Administrative Court, Dresden) dismissed the action by judgment in 2010.

13. The applicant continues its action on appeal before the referring court, the Sächsisches Oberverwaltungsgericht (Higher Administrative Court of Saxony). In its order for reference, the referring court calls into question the validity of Article 5(4)(b) of Regulation No 543/2008 on two grounds.

14. First, the referring court is uncertain whether the interference resulting from the labelling obligation is justified with regard to Article 15(1) and Article 16 of the Charter. It considers that the labelling obligation does not affect the actual substance of the freedoms and rights at issue; that it genuinely meets the objective of strengthening consumer protection, a general interest recognised by the Union; and that it appears to be appropriate and necessary for the purpose. However, the referring court expresses doubts as to whether an appropriate balancing of the interests at stake has been carried out.

15. Second, the referring court questions the validity of the labelling obligation for poultrymeat in light of the non-discrimination principle contained in Article 40(2) TFEU. The order for reference highlights that, in relation to other pre-packaged meat such as beef, veal, pig meat, sheep meat and goat meat, for which Regulation No 1308/2013 also lays down rules establishing common market organisation, no labelling obligation of that kind exists. Therefore, according to the referring court, the labelling obligation imposed on fresh poultrymeat results in unequal treatment because comparable situations are treated differently. The referring court has doubts, in particular, as to whether such unequal treatment is objectively justified on the basis of the general interest of consumer protection.

6 — Directive of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 80, p. 27).

16. In those circumstances, the Sächsisches Oberverwaltungsgericht (Higher Administrative Court of Saxony) has stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 5(4)(b) of Regulation (EC) No 543/2008 compatible with the first subparagraph of Article 6(1) TEU, in conjunction with Articles 15(1) and 16 of the Charter?

(2) Is Article 5(4)(b) of Regulation (EC) No 543/2008 compatible with the second subparagraph of Article 40(2) TFEU?'

17. Written observations were submitted by Lidl GmbH & Co. KG, the Freistaat Sachsen (Free State of Saxony, the respondent in the main proceedings) and by the Commission, all of whom presented oral arguments at the hearing on 13 January 2016.

III – Assessment of the questions referred

A – *First question: the compatibility of the labelling obligation with Article 15(1) and Article 16 of the Charter*

18. In order to propose an answer to the first preliminary question, I will first identify the relevant provision of the Charter against which the validity of Article 5(4)(b) of Regulation No 543/2008 should be assessed (section 1). Next, I will carry out the assessment of compatibility of the labelling obligation with that specific provision of the Charter (section 2), examining whether this limitation is provided for by law and respects the essence of that right (subsection (a)), and whether it complies with the principle of proportionality (subsection (b)).

1. The applicable provision: Article 15(1) or Article 16 of the Charter?

19. The referring court considers that the validity of the labelling obligation should be examined in light of both Article 15(1) and Article 16 of the Charter. It states that the applicant is affected by the labelling obligation with regard to its freedom to pursue an occupation and its freedom to pursue an economic activity. In the same vein, the applicant also considers that the labelling obligation constitutes a restriction on the freedoms and rights guaranteed by Articles 15(1) and 16 of the Charter. The Free State of Saxony has also referred to both provisions in its observations. Conversely, the Commission considers that only Article 16 of the Charter is relevant for the present case.

20. As is clear from the case-law of the Court, the rights and freedoms enshrined in Article 15(1) and Article 16 of the Charter are closely connected. This is readily evident from the case-law pre-dating the entry into force of the Treaty of Lisbon. At that time, the Court used different formulations to refer, in their quality as general principles of law, to the freedom to freely choose and practice one's trade or profession; the freedom to pursue an occupation; the right to carry on one's trade or business; or the freedom to pursue an economic activity.[7] The Court acknowledged that those concepts overlap, stating that the freedom to conduct a business 'coincides with freedom to pursue an occupation'.[8]

7 — See, inter alia, for the different formulations, judgments in *Nold* v *Commission* (4/73, EU:C:1974:51, paragraph 14); *Hauer* (44/79, EU:C:1979:290, paragraph 32); *Eridania* (230/78, EU:C:1979:216, paragraph 21); *Biovilac* v *EEC* (59/83, EU:C:1984:380, paragraph 21); *Keller* (234/85, EU:C:1986:377, paragraph 8); *Finsider* v *Commission* (63/84 and 147/84, EU:C:1985:358, paragraph 24); *Rau Lebensmittelwerke and Others* (133/85 to 136/85, EU:C:1987:244, paragraph 19); *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 15); *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* (C-143/88 and C-92/89, EU:C:1991:65, paragraph 76); *Kühn* (C-177/90, EU:C:1992:2, paragraph 16); *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraph 81) and *Bosphorus* (C-84/95, EU:C:1996:312, paragraph 22).

8 — Judgment in *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497, paragraph 51).

21. That overlap remains evident in the case-law after the entry into force of the Treaty of Lisbon. Article 15(1) and Article 16 of the Charter have often been invoked and interpreted together, along with Article 17 of the Charter (right to property).[9] All of these provisions can be said to protect individuals' economic interests.

22. However, the fact that the Charter today contains two separate provisions suggests that there ought to be some differentiation between the 'right to engage in work and to pursue a freely chosen or accepted occupation' — Article 15(1) —, and the 'freedom to conduct a business' — Article 16.

23. On a structural level, the differentiation between the two provisions is not without consequence. As the Commission and the Free State of Saxony have submitted, Article 16 of the Charter allows for a broader margin of appreciation when it comes to regulation that might interfere with the freedom to conduct a business. This can be seen from the wording of that provision, which unlike other freedoms under Title II of the Charter, refers to *Union* law and *national* laws and practices. Furthermore, the Court has stated that 'the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest'.[10]

24. This relatively broad margin of appreciation given to States when regulating economic activities is also reflected in the case-law of the European Court of Human Rights. When interpreting Article 1 of Protocol 1 to the European Convention on Human Rights, the ECtHR has recognised that States have a broad margin of appreciation 'to control the use of property in accordance with the general interest …'.[11]

25. There is thus no doubt that in terms of permissible limitations, Article 16 of the Charter allows for a greater degree of State interference than Article 15(1). Despite the fact that there is a clear differentiation regarding potential limitations that may be imposed on each respective freedom, this does not shed that much light on the *initial* definition of the scope of the right itself. Both articles protect the realm of individual autonomy in the closely related professional and business fields. Both are intrinsically linked to the performance of an economic activity. There are thus no clear-cut criteria that can be composed, in the abstract, to distinguish between the scope of the two articles, for example, based on the legal or natural character of the persons concerned or on the independent or dependent nature of the economic activities at issue.[12]

26. Even in the absence of any precise criteria delineating the scope of Article 15(1) and Article 16 of the Charter, at least some approximate guidelines may be discerned. On the one hand, Article 15(1) focuses on the element of choice and personal autonomy, which are closely linked to personality rights and their development. The reference to 'work' emphasises a more relevant, although not exclusive, impact on natural persons and employment relationships.[13] On the other hand, the freedom to conduct a business under Article 16 bears a closer connection to entrepreneurial activity, with

9 — See, for example, judgments in *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 44 et seq.); *Interseroh Scrap and Metals Trading* (C-1/11, EU:C:2012:194, paragraph 43); and *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 57 et seq.).

10 — Judgments in *Sky Österreich* (C-283/11, EU:C:2013:28, paragraphs 46) and *Council* v *Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraph 123).

11 — See judgments of 23 September 1982, *Sporrong and Lönnroth* Series A no. 52, para. 61; 24 October 1986, *AGOSI v. the United Kingdom*, Series A no. 108, p. 18, para. 52; 25 October 1989, *Allan Jacobsson v. Sweden* (No. 1) App. No. 10842/84 A163, para. 55; and 20 August 2007, *J.A. Pye (Oxford) LTD and J.A. Pye (Oxford) Land LTD v. the United Kingdom*, Application no. 44302/02 2007-III, para 55. See also the decision of the European Commission of Human Rights in *Pinnacle Meat Processors Company and Others v. the United Kingdom*, Application no. 33298/96, Dec. 21 October 1998.

12 — Indeed, as Advocate General Wahl has stated in his Opinion in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:168, point 69), undertakings enjoy the right enshrined in Article 15 of the Charter.

13 — See in this regard the Opinion of Advocate General Wahl in *Schaible* (C-101/12, EU:C:2013:334, point 24).

stronger links to the right to property.[14] Thus, the material scope of Article 16 of the Charter, as progressively defined by the case-law of the Court, is more centred on the economic aspect of entrepreneurial activity. It covers the performance of economic or commercial activities, including the freedom of contract, free competition, the freedom to choose whom to do business with and the freedom to determine the price of a service.[15] In addition, the freedom to conduct a business also includes the right to freely use available resources of an economic, financial and technical nature.[16]

27. In a nutshell, Article 15(1) of the Charter is more likely to be applicable if the situation at hand concerns natural persons and issues such as access to work and choice of occupation. Conversely, Article 16 of the Charter is more relevant for legal persons and the way an already established business, or an already chosen occupation, is being carried out and regulated.[17]

28. However, approximate guidelines delineating the respective parameters of Article 15(1) and Article 16 do not exclude ongoing overlaps or potential joint consideration of Articles 15 and 16 of the Charter in an appropriate case. Examples of when joint consideration might be appropriate are rules restricting access to an occupation through licensing or authorisation requirements, or when highly burdensome requirements are imposed on businesses.

29. In the present case, Lidl GmbH & Co. KG claims that the requirements relating to the labelling of its merchandise interfere with the manner in which it desires to carry out its commercial activities. The labelling obligation in no way limits the right of the applicant to choose or pursue a freely chosen occupation. It merely relates to the way in which an undertaking can conduct (an already chosen) line of business.

30. On the application of the general guidelines outlined above, I am therefore of the opinion that the case ought to be properly assessed under Article 16 of the Charter.

2. The compatibility of the labelling obligation with Article 16 of the Charter

31. As the Commission and the Free State of Saxony correctly point out, the freedom to conduct a business is not absolute. It must be viewed in relation to its social function.[18] Article 52(1) of the Charter permits limitations on the exercise of the rights and freedoms recognised by the Charter if they are provided for by law, they respect the essence of the fundamental right or freedom in issue, and if, subject to the principle of proportionality, they are 'necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.[19]

32. I will now examine in turn whether the labelling obligation complies with those requirements.

a) The permissible limitations on the right to conduct a business

33. As the applicant has admitted in its written observations, there is no doubt that the labelling obligation *is provided for by law*.

14 — See, for example, judgment in *Hauer* (44/79, EU:C:1979:290, paragraph 32). However, as Advocate General Cruz Villalón has stated in his Opinion in *Alemo-Herron and Others* (C-426/11, EU:C:2013:82, point 51), despite this close link, the fundamental right to property and the freedom to conduct a business protect different legal situations.

15 — See, for example, judgments in *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 42 et seq.); *Alemo-Herron and Others* (C-426/11, EU:C:2013:521, paragraph 32 et seq.); and *Schaible* (C-101/12, EU:C:2013:661, paragraph 25).

16 — Judgment in *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 49 and 50).

17 — See the approach adopted by judgments in *Scarlet Extended* (C-70/10, EU:C:2011:771); *McDonagh* (C-12/11, EU:C:2013:43); *Sky Österreich* (C-283/11, EU:C:2013:28); *Schaible* (C-101/12, EU:C:2013:661); or *Neptune Distribution* (C-157/14, EU:C:2015:823).

18 — See, for example, judgments in *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 45) and *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54).

19 — See, for example, judgment in *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 65).

34. Furthermore, the Court has already held that whereas Union rules on labelling place certain restrictions, within a clearly defined sphere, on the business activities of the traders concerned, 'they in no way impinge on the actual substance of the freedom to pursue that activity'.[20] The situation in the present case is no different. Therefore, I agree with the Commission and the Free State of Saxony that the labelling obligation does not affect the *essence* of the freedom to conduct a business.

b) Proportionality

35. At this point, it remains to be ascertained whether the labelling obligation complies with the principle of proportionality.

i) General considerations

36. The Court has established that 'the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference'.[21]

37. This means that the strictness of the Court's judicial review, and in particular the intrusiveness of the proportionality review, may differ from case to case. Two factors in particular are relevant to determine the approach to be taken in the present case: the substantive area of EU law concerned and the nature of the rights in question.

38. With regard to the area concerned, the Court has consistently accepted that, in the field of agriculture, the EU legislature enjoys a broad discretion, corresponding to the political responsibilities given to it by Articles 40 TFEU to 43 TFEU.[22] As a consequence, the review by the Court limits itself to verifying whether the legislature has not *manifestly* exceeded the limits of this broad discretion.[23]

39. The broad discretion enjoyed by the Commission is also confirmed in the present case by the nature of the right at issue. As the Court has stated, the freedom to conduct a business 'may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest'.[24]

40. In general, proportionality is the examination of the match between stated aim(s) and chosen mean(s). In order to comply with the principle of proportionality, the measures adopted should be *appropriate* to attain the legitimate objectives pursued; they shall not exceed what is *necessary* to attain them (where there are several regulatory alternatives, recourse must be had to the least onerous); and the disadvantages caused must not be disproportionate to the aims pursued (*internal balancing*, or *proportionality stricto sensu*).[25]

41. The three-stage proportionality analysis is, to a considerable extent, internally flexible. It can be carried out with varying degrees of strictness, thus varying the amount of deference given to the legislator. At the same time, however, proportionality ought to include all the three stages. The fact that a measure has been adopted in an area within which the Commission enjoys broad discretion, as

20 — Judgments in *Keller* (234/85, EU:C:1986:377, paragraph 9). See also judgments in *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraphs 57 and 58) and *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraph 71).

21 — Judgment in *Digital Rights Ireland* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 47).

22 — See, for example, judgments in *Fédesa and Others* (C-331/88, EU:C:1990:391, paragraph 14); *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 22); or *Spain* v *Council* (C-310/04, EU:C:2006:521, paragraph 96 et seq.).

23 — See, inter alia, judgments in *Schaible* (C-101/12, EU:C:2013:661, paragraph 48) and *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 80).

24 — See, inter alia, *Schaible* (C-101/12, EU:C:2013:661, paragraph 28).

25 — See, inter alia judgments in *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81); *Agrana Zucker* (C-309/10, EU:C:2011:531, paragraph 42); *Schaible* (C-101/12, EU:C:2013:661, paragraph 29) ; or *Léger* (C-528/13, EU:C:2015:288, paragraph 58).

is the case with the field of agriculture, does not entail, in my view, that the review of proportionality by the Court should be constrained to the level of appropriateness. It rather requires a greater degree of deference *within* the same test. The test then limits itself to detecting *manifest defects*.[26] But it involves due examination of each of the three individual stages.

42. Thus, subscribing fully to a line of argument already lucidly explored by other Advocates General,[27] the 'manifestly inappropriate' standard stretches along all three stages of the proportionality analysis. As Advocate General Kokott has recently put it,[28] in such cases, judicial review is limited to ascertaining whether the measure is not *manifestly* inappropriate for attaining the objectives pursued; whether it does not go *manifestly* beyond what is necessary to attain them; or whether it does not entail *manifestly* disproportionate disadvantages with regard to such objectives.

43. In addition, there are two broader constitutional arguments that support the need for a more searching review of measures of EU institutions, implying a full, three stage proportionality review. First, the Treaty of Lisbon elevated the Charter of Fundamental Rights to the level of binding primary law. By doing so it brought fundamental rights review of EU acts to the fore.

44. Second, in the absence of external review,[29] the mandate of reviewing the compatibility of the acts of EU institutions with fundamental rights falls exclusively to the Court of Justice. In discharging that mandate, the high level of protection aimed at by the Charter entails the necessity of carrying out a full and efficient internal review of EU law and of the acts of EU institutions.

45. In the light of the foregoing, I now turn to considering whether the labelling obligation complies with the three-pronged proportionality principle.

ii) Proportionality applied in the present case

46. The Commission and the Free State of Saxony maintain that the labelling obligation is appropriate and proportionate with regard to the legitimate objective of consumer protection.

47. The protection of consumers is, indeed, an objective of general interest recognised by the Union, particularly in Article 114(3) TFEU, Article 169 TFEU and Article 38 of the Charter. However, it is not, as is the case with a number of other objectives and values, an absolute one. The need to strike a proper balance between the protection of consumers and other values, including the freedom to conduct a business, has often been acknowledged by the Court.[30]

26 — See, to that effect, the Opinion of Advocate General Tizzano in *ABNA and Others* (C-453/03, EU:C:2005:202, point 57).

27 — See, inter alia, Opinions of Advocate General Kokott in *S.P.C.M. and Others* (C-558/07, EU:C:2009:142, point 74 et seq.) and *Association Kokopelli* (C-59/11, EU:C:2012:28, point 61), and of Advocate General Wahl in *Schaible* (C-101/12, EU:C:2013:334, point 40).

28 — Opinions of Advocate General Kokott in *Poland* v *Parliament and Council* (C-358/14, EU:C:2015:848, point 89); *Pillbox 38* (C-477/14, EU:C:2015:854 point 58); and *Philip Morris Brands and Others* (C-547/14, EU:C:2015:853, point 150). In this sense, see also Opinion of Advocate General Trstenjak in *Chabo* (C-213/09, EU:C:2010:372, point 80 et seq.).

29 — See, in this regard, Opinion 2/13 (EU:C:2014:2454).

30 — See, for example judgments in *McDonagh* (C-12/11, EU:C:2013:43, paragraph 63) and *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraph 74).

48. The Commission has referred in its written observations to recital 10 of Regulation No 543/2008. That recital provides for the need to ensure that poultrymeat marketing standards take into account 'as far as is practicable' the provisions of Council Directive 76/211/EEC, [31] with the objective of providing consumers 'with sufficient, unequivocal and objective information concerning such products offered for sale ...'. Therefore, I agree that, even if not directly connected to the labelling obligation at issue in the present case, this and other recitals indicate that the objective of providing better information to consumers is explicitly recognised by Regulation No 543/2008. [32]

49. The applicant submits, however, that the labelling obligation does not in practice further the objective of consumer protection. It makes spontaneous price adjustments more difficult, therefore restricting the possibility for price competition within a short timeframe, which might not be, ultimately, in the best interest of consumers.

50. Although the applicant's arguments may be relevant in the assessment of the compliance of the labelling obligation with the non-discrimination principle, there can be little doubt that providing information on prices through labelling furthers the objective of consumer protection. The labelling obligation requires an indication of the price per weight unit and of the total price on the pre-packaging or on a label attached thereto. It therefore increases the information available to consumers by giving an accurate and clear indication of price, enabling them to make informed choices. From this point of view, the labelling obligation is certainly not manifestly inappropriate to attain the legitimate objective of providing better information to consumers.

51. With regard to the element of necessity, as is readily apparent from the Court's case-law, labelling is in general considered one of the least intrusive forms of regulatory intervention. [33]

52. The applicant submits, however, that the practice of affixing price tags to the shelves constitutes a less onerous regulatory option suitable to attain the objective of consumer protection. According to the applicant, the general obligation arising from Article 3(1) of Directive 98/6, which requires an indication of the selling price and the unit price (without specifying where), already fulfils the objective of providing sufficient information to consumers.

53. In my view, even if the applicant's practice could be seen as being a suitable way of providing information on price, it is not *as* effective as the labelling obligation. A range of situations might be envisaged in which the indication of the price per weight unit and the total price on a label directly attached to the pre-packaging offers a more efficient way of informing the customer.

54. First, the labelling obligation ensures the continuous availability of the price information during the whole purchasing process. It allows for price comparison once the item has been removed from the shelf. It also protects consumers in the case of misplacement of merchandise.

55. Second, the indication of the total price and the price per weight unit is even more relevant when it concerns pre-packages of non-standardised weight. In this context the labelling obligation certainly contributes to the objective of consumer protection. It guarantees the accuracy of price information and ensures that the consumer can make an informed choice.

56. Admittedly, where packages of non-standardised weights are concerned, compliance with the provisions of Directive 98/6 already requires an indication of the total price and the price per unit weight on the pre-packaging.

31 — Directive of 20 January 1976 on the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain pre-packaged products (OJ 1976 L 46, p. 1).

32 — See, in particular, recitals 6, 11 and 12.

33 — See, for example, in the field of free movement of goods, judgment in *Rau Lebensmittelwerke* (261/81, EU:C:1982:382, paragraph 17).

57. Nonetheless, as already stated above, the Commission enjoys broad discretion in this field. Bearing this fact in mind, I am of the view that the Commission did not manifestly go beyond what was necessary to attain the objective of enhancing consumer protection.

58. Finally, it has to be ascertained whether the labelling obligation does not impose manifestly disproportionate disadvantages on the operators subject to it.

59. The applicant emphasises the financial and organisational burdens that the labelling obligation entails and submits that an appropriate balance of the competing interests has not been struck.

60. However, as is apparent from the explanations given to the Court in oral submissions by the Free State of Saxony, the labelling obligation does not in practice entail significant supplementary burdens for producers in terms of time or costs. The scope and detail of information appearing on a label can be amended in a flexible way on the computer at the moment of production without material additional costs.

61. Moreover, the additional costs of potential re-labelling in the retail store in the event of later price adjustments or promotional campaigns are moderate. First, as the Commission and the Free State of Saxony submitted at the hearing, the quantities of merchandise so affected by such actions are relatively low. Second, re-labelling in the case of price modifications would certainly give rise to some additional work to be carried out on the part of retailers. However, as the Free State of Saxony pointed out at the hearing, a sticker affixed to the original label would comply with the requirements of the labelling obligation. That cannot be said to entail disproportionate costs with regard to the objective of informing the consumer of the change of price.

62. For these reasons, I think that the labelling obligation does not impose manifestly disproportionate burdens with regard to the interests of the applicant and is not disproportionate to achieving the aim of consumer protection. Consequently, it does not entail an impermissible limitation on the freedom to conduct a business under Article 16 of the Charter.

63. In light of the foregoing, I propose to the Court that it answers the first question as follows: consideration of the question referred has disclosed no factor such as to affect the validity of Article 5(4)(b) of Regulation No 543/2008 in light of Article 16 of the Charter.

B – *Second question: the compatibility of the labelling obligation with Article 40(2) TFEU*

64. As consistently held by the Court, Article 40(2) TFEU embodies the general principle of non-discrimination in the field of agriculture.[34] It is applicable to economic operators which are subject to a common market organisation.[35] This provision constitutes a specific expression of the general principle of non-discrimination, which requires that comparable situations are not treated differently and that different situations are not treated alike unless such treatment is objectively justified.[36]

65. It ought to be stressed at the outset that the answer to the first preliminary question does not prejudge the analysis of the compatibility of the labelling obligation with the principle of non-discrimination. Assessing the compatibility of the labelling obligation with the freedom to conduct a business, enshrined in Article 16 of the Charter, is a '*vertical*' type of review: the stated aim

34 — See inter alia, judgment in *Agrargenossenschaft Neuzelle* (C-545/11, EU:C:2013:169, paragraph 41 and the case-law cited).

35 — See, to this effect, judgment in *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraph 68).

36 — See, inter alia, judgments in *Ruckdeschel and Others* (117/76 and 16/77, EU:C:1977:160, paragraph 10); *Moulins et huileries de Pont-à-Mousson and Providence agricole de la Champagne* (124/76 and 20/77, EU:C:1977:161, paragraph 22); *Niemann* (C-14/01, EU:C:2003:128, paragraph 51); or *Franz Egenberger* (C-313/04, EU:C:2006:454, paragraph 33 and the case-law cited).

of consumer protection is examined against the means of the labelling obligation, but only with regard to the product in question, that is, fresh poultrymeat. Such review is carried out, to a great extent, in isolation from other products and sectors. By contrast, the non-discrimination principle under Article 40(2) TFEU commands a different type of review, which is '*horizontal*' by its nature: does the labelling obligation, applicable only and exclusively to fresh poultrymeat, amount to a different treatment of comparable situations? If yes, can such treatment be objectively justified?

1. Comparability

66. The preliminary issue is comparability: what producers, consumers, and through them, products, can be said to be in the same situation for the purposes of Article 40(2) TFEU? There are differing views.

67. On the one hand, the referring court and the applicant have embraced a broad view of comparability. They suggest that Article 5(4)(b) of Regulation No 543/2008 leads to a difference in treatment with regard to other types of meat not affected by the same obligation, such as pork, beef, lamb or goat. They suggest that all of these types of fresh meat are, for the purpose of labelling, comparable.

68. On the other hand, the Commission takes a narrower view of comparability and submits that fresh poultrymeat is not in the same situation as other meat products. The main argument the Commission advances for maintaining this proposition is historical: it relies on a detailed *exposé* on the evolution of the different regulatory frameworks to which the different meat sectors have been subjected. The Commission submits that the EU legislator has been less interventionist in the sector of poultrymeat compared to other meat sectors. Among the few measures adopted by the Union to support the poultrymeat sector are marketing standards such as the labelling obligation. The Commission affirms that this obligation, by protecting consumers, encourages sales and therefore, furthers the objective of improving the revenues of farmers.

69. I see a number of problems with the Commission's suggestions. Above all, the question of comparability is in its nature an *objective* assessment. It examines whether, in relation to a given quality (that is, *tertium comparationis*, which may be a value, aim, action etc.), the elements of comparison (persons, products, etc.) demonstrate more similarities or more differences. Certainly, when carrying out such an assessment, past *subjective* regulatory choices are relevant, in particular in defining *tertium comparationis*.[37] However, they are not necessarily conclusive.

37 — Indeed, comparability 'must in particular be determined and assessed in the light of the subject matter and purpose of the Community act which makes the distinction in question' (see judgment in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 26 and the case-law cited). For the particularities of the application of the non-discrimination principle between different sectors in the area of the common agricultural policy, see: R. Barents, 'The Significance of the Non-Discrimination Principle for the Common Agricultural Policy: Between Competition and Intervention', *Mélanges H. G. Schermers*, Vol. 2, Martinus Nijhoff Publishers 1994, p. 527, in particular p. 538.

70. Nonetheless, the rather complex questions of comparability across different agricultural sectors need not be addressed here for a simple reason: even if one were to accept the arguments of the Commission as to the non-comparability of meat products belonging to different sectors, the fact remains that Article 5(4)(b) of Regulation No 543/2008 only subjects one product to the labelling obligation, namely, fresh poultrymeat. As the applicant points out, other poultrymeat products to which Regulation No 543/2008 is also applicable, such as frozen or quick-frozen poultrymeat,[38] are not subject to the labelling obligation.[39]

71. Thus, even if one embraces the narrow vision of comparability advanced by the Commission limited to just poultrymeat, there is still a difference in treatment *within* the poultrymeat sector alone.

2. Objective justification

72. The difference in treatment having already been established, I shall now examine whether this difference in treatment can be objectively justified.

73. The Commission has invoked its discretion with regard to the attainment of the objectives of the common agricultural policy. Indeed, as already noted above in point 38 of this Opinion, the Court has consistently recognised the broad degree of discretion enjoyed by the EU institutions in matters concerning agriculture. As a consequence, when examining alleged violations of the non-discrimination principle in the field of agriculture, the Court limits its review to the verification that the measure at issue is not vitiated by any manifest error or misuse of powers, and that the institution concerned has not manifestly exceeded the limits of its discretionary power.[40]

74. That being said, a difference in treatment in this field, in order not to be discriminatory, still has to find justification in *objective reasons* which are not *manifestly inappropriate*.[41] It is particularly the task of the institution having authored the measure at issue to demonstrate that such objective criteria exist and to provide the Court with the appropriate information to assess those criteria.[42]

75. In spite of the repeated questions posed to the Commission at the hearing, the fact is that there remains a distinct lack of clarity as to the objective reasons that could justify the introduction of a labelling obligation limited only to fresh poultrymeat, but not applicable to other kinds of poultrymeat. Two potential objective reasons were put forward by the Commission: first, consumer protection as such and, second, enhanced consumer protection as an intermediate aim to the furtherance of the objective of increasing farmers' income.

76. I find it difficult to accept these arguments as valid justifications for the unequal treatment at issue.

77. Although a labelling obligation can be considered to be *per se* appropriate to achieve a high degree of consumer information, no objective reasons have been adduced to explain why this obligation should be applied only to fresh poultrymeat and not also to the other types of poultrymeat covered by the regulation at issue.

38 — According to point III(2) of Part B of Annex XIV to Regulation No 1234/2007, poultrymeat and poultrymeat preparations can be marketed in three conditions: fresh, frozen or quick-frozen. This provision is now contained in point III of Part V of Annex VII to Regulation No 1308/2013.

39 — In addition, it has to be noted that Council Regulation (EC) No 1047/2009 of 19 October 2009 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets as regards the marketing standards for poultrymeat (OJ 2009 L 290, p. 1) has extended the scope of the marketing standards for poultrymeat to include 'poultrymeat preparations' and 'poultrymeat products'.

40 — See, inter alia, judgments in *Agrargenossenschaft Neuzelle* (C-545/11, EU:C:2013:169, paragraph 43) and *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 80).

41 — E.g. judgments in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 58) and *Agrargenossenschaft Neuzelle* (C-545/11, EU:C:2013:169, paragraph 44 et seq.).

42 — See, to that effect, for example, judgments in *Schaible* (C-101/12, EU:C:2013:661, paragraph 78) and *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 48 and the case-law cited.)

78. In general, in the case of fresh products, perishability may hypothetically justify certain differences regarding the information to be included on labels affixed to the pre-packaging of meat products.[43] However, no specific characteristics have been relied on in order to justify different labelling requirements with regard to *price* indications.[44] On the contrary: at the hearing, the applicant and the Free State of Saxony confirmed that the alleged specific characteristics of fresh poultrymeat concerning conservation, transport, slaughtering, cutting, marketing, and size of poultrymeat do not have any impact on the production of packages of standardised weights. In any case, those specific characteristics, if any, would not only be specific to fresh poultrymeat but also to other types of poultrymeat not subjected to the labelling obligation.

79. Further, the Commission has stated that Article 3(1) of Directive 98/6 reduces the differences between the legal regimes applicable to poultrymeat and other types of meat, since that provision entails, particularly as regards products of non-standardised weights, the obligation to indicate the price on the pre-packaging. The Commission states that the fact that such a general regime exists does not mean that the level of protection in the sector of poultrymeat should be reduced. In this line of argument, the Free State of Saxony also claims that the application of the non-discrimination principle should not lead to lowest level of protection, referring by analogy to the case-law of the Court in the field of animal and public health requirements.[45]

80. In my view, those arguments also fail to provide a valid justification for differential treatment.

81. First, the argument of the Commission that the difference in treatment is 'reduced' by the general obligation provided for in Article 3(1) of Directive 98/6 is not pertinent. For a start, it in no way justifies the 'remaining' differential treatment and it certainly fails to justify the difference in treatment *per se*.

82. Second, the present case ought to be distinguished from *ABNA and Others*, relied on by the Free State of Saxony. In *ABNA and Others*, the Court examined the compatibility of a requirement under Directive 2002/2/EC with the non-discrimination principle,[46] namely that manufacturers of animal feedingstuffs were subjected to an information regime not imposed on foodstuffs intended for human consumption. In this context, the Court stated that the fact that equally restrictive measures may also be justified in other, still not-regulated, areas did not constitute a sufficient reason for establishing that the measures at issue were not lawful on the ground of their discriminatory character. The Court held that '[i]f that were not so, this would have the effect of bringing the level of public health protection down to that of the existing legislation which provides the least protection'.[47]

83. The situation in the present case clearly differs from the situation in *ABNA and Others*. First, that case did not concern differential treatment of products covered by a common market organisation in the field of the common agricultural policy. Rather, Directive 2002/2 was based on Article 152(4)(b) TEC (now, Article 168(4)(b) TFEU) — a legal basis related to the adoption of measures for ensuring a high level of human health protection. In contrast to *ABNA and Others*, the labelling obligation at issue in the present case establishes a difference in treatment regarding agricultural products that belong to the same sector, namely, the poultrymeat sector, as defined by Regulation No 1234/2007

43 — For example, as provided for in Regulation No 1169/2011, cited in note 5.

44 — Therefore, the present case is different from the situations in cases like, for example, *Niemann* (C-14/01, EU:C:2003:128, paragraph 51 et seq.) or *Association Kokopelli* (C-59/11, EU:C:2012:447, paragraph 73).

45 — Judgment in *ABNA and Others* (C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 65).

46 — Directive of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/537/EEC (OJ 2002 L 63, p. 23).

47 — Judgment in *ABNA and Others* (C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 65).

and implementing Regulation No 543/2008. Second, as the Advocate General pointed out in that case, the more stringent rules for animal feedingstuffs could find objective justification in the closer link between the animal feedingstuffs sector and the spongiform encephalopathy and the dioxin crisis, with which the adoption of Directive 2002/2 was connected. [48]

84. The second strand of potential justification put forward by the Commission relates to the objective of consumer protection, this time around however not as an aim in itself, but as a transitive value to the final goal of improving farmers' income. The argument unfolds as follows: by providing additional information to consumers, the price information on the packaging enhances consumers' trust in the product. Enhanced consumer trust brings about increased sales, thereby eventually increasing the income of farmers.

85. This argument fails to convince. It would be common sense to assume that the applicant and other retailers are also interested in encouraging these very sales. However, as the applicant points out at quite some length, additional costs linked to the labelling obligation are liable to impose higher burdens on retailers when making price adjustments and taking promotional actions for fresh poultrymeat, thereby discouraging sales of that very product. It is therefore difficult to see how additional labelling obligations would contribute to increased sales in this regard.

86. However, leaving speculations about social reality and consumer perceptions aside, the Commission still failed to produce any objective justification that would explain why, even if one were to embrace the assumption that the labelling obligation contributes to improving the income of farmers, such a measure should be limited only to fresh poultrymeat and not applicable to other types of poultrymeat.

87. Thus, in my view, neither the first nor the second reason advanced by the Commission can provide an objective justification for different labelling requirements in the poultrymeat sector.

88. Finally, the Commission invokes the case-law of the Court which states that the lawfulness of an EU measure is to be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. [49] At the oral hearing, the Commission suggested that if being called upon to adopt similar rules today, they would have been perhaps different. Thus, part of the discretion enjoyed by the Commission was claimed to also include a historical dimension: the Commission ought to be allowed to carry out changes gradually. Within such a context, it should not be the role of the Court to step in and start invalidating such provisions.

89. A two-fold reply might be offered to this argument: a concrete, case-specific one and a broader, constitutional one. On the concrete level of the present case, it suffices to point out that the labelling obligation, originally provided for by Article 5(3)(b) of Regulation No 1906/90, [50] was re-enacted by the implementing regulation at issue, adopted in the year 2008. Thus, in a way, the legislator could be seen as making the same regulatory choice in 2008 again. There are no elements before this Court allowing for a determination that technical or any other objective reasons present at that time would be such as to justify the difference in treatment at issue in the present case.

90. On the more general level, the broad discretion enjoyed by the Union institutions in certain areas cannot be understood, in my view, as being a temporally unlimited 'blank cheque', whereby past regulatory choices concerning market organisation ought to be perceived as permanent and sufficient justification for their ongoing application to considerably changed market and social contexts. Put

48 — Opinion of Advocate General Tizzano in *ABNA and Others* (C-453/03, EU:C:2005:202, point 138).

49 — See, for example, judgment in *Agrana Zucker* (C-309/10, EU:C:2011:531, paragraph 45 and the case-law cited).

50 — It must be noted that the Proposal of the Commission for a Council Regulation (EEC) on certain marketing standards for poultrymeat (COM (89)580 final, of 23 November 1989), contemplated the labelling obligation in its Article 5(3) for 'pre-packaged poultrymeat' in general. The only specific obligations concerning the labelling of fresh poultrymeat concerned the limit date of consumption.

metaphorically, a legislator, much like a forester, must regularly take care of the state of the legislative forest. He must not only keep planting new trees, but also, at regular intervals, thin the forest and cut out the deadwood. Failing to do so, he cannot be surprised that somebody else might be obliged to step in.

91. For all those reasons, even if acknowledging the broad margin of appreciation enjoyed by the Commission and applying a light touch review, I am bound to conclude that the Commission failed to provide any objective criteria capable of justifying the difference in treatment as far as labelling requirements are concerned between the various types of poultrymeat.

92. Therefore, I am of the view that the Court should give the following response to the second question referred: Article 5(4)(b) of Regulation No 543/2008 is invalid, inasmuch as it introduces discrimination amongst different types of poultrymeat in violation of Article 40(2) TFEU.

IV – Conclusion

93. In the light of the foregoing considerations, I propose to the Court that it answers the questions referred to it by the Sächsisches Oberverwaltungsgericht (Higher Administrative Court of Saxony) as follows:

(1) Consideration of the first question referred has disclosed no factor such as to affect the validity of Article 5(4)(b) of Commission Regulation (EC) No 543/2008 of 16 June 2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for poultry meat, in the light of Article 16 of the Charter of Fundamental Rights of the European Union.

(2) Article 5(4)(b) of Regulation No 543/2008 is invalid, inasmuch as it introduces discrimination amongst different types of poultrymeat in violation of Article 40(2) TFEU.